UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
WALKER, EWING,[1] and PARKER
Appellate Military Judges

UNITED STATES, Appellee
v.
Sergeant SHAQUILLE D. CRAIG
United States Army, Appellant

ARMY 20200069

Headquarters, Fort Stewart
Mark A. Bridges, Military Judge
Colonel Michael D. Mierau, Jr., Staff Judge Advocate

For Appellant: Colonel Michael C. Friess, JA; Major Jodie L. Grimm, JA; Captain David D. Hamstra, JA (on brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Pamela L. Jones, JA; Captain Thomas J. Darmofal, JA (on brief).

3 November 2022

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

WALKER, Senior Judge:

While pending investigation and trial for the premeditated murder of two soldiers, appellant was placed in pre-trial confinement. Appellant spent a portion of his time in pre-trial confinement at U.S. Naval Consolidated Brig in Charleston, South Carolina in which he was placed in maximum custody status and subject to restrictions akin to solitary confinement for at least twelve months of his almost twenty-two months at that facility. Appellant asserts that the restrictive conditions of confinement at the Naval Brig violated Article 13, Uniform Code of Military

---

[1] Judge Ewing decided this case on active duty.

Justice, 10 U.S.C. § 813 [UCMJ]. We find that appellant's confinement conditions, while restrictive, did not violate Article 13, UCMJ.

Appellant also asserts that the portion of his sentence of confinement for life without the possibility of parole for having pleaded guilty to two specifications of premeditated murder, two specifications of obstructing justice, and one specification of violating a lawful order is inappropriately severe.[2] Upon careful consideration of the record as a whole, we agree and provide relief in our decretal paragraph.

BACKGROUND

A. Appellant's Criminal Conduct

Appellant's crimes stemmed from a failing marriage with his estranged wife. In October 2016, while both stationed at Fort Stewart, Georgia, appellant and his wife separated and ceased sharing a residence. Appellant's wife took primary physical custody of their two-year-old daughter, which was difficult for appellant as he and his daughter were inseparable while living as a family. Despite appellant's repeated requests to spend time with his daughter, his wife often left their daughter with babysitters and family while she frequented parties and clubs.

Soon after their separation, appellant's wife engaged in romantic relationships with at least two other men resulting in appellant's crimes. In January 2017, while moving furniture into his wife's new residence, appellant discovered his wife's phone records and noticed frequent phone calls from a certain phone number. Upon confronting his wife about her communication with this one number, appellant's wife disclosed the person's identity. Shortly thereafter, appellant's wife and the male with whom she had been communicating received threatening text messages and phone calls from an unidentified phone number. Appellant's wife had her vehicle vandalized and small personal items stolen. She reported these events to local law enforcement and Fort Stewart Criminal Investigation Command (CID). During its investigation of these incidents, Fort Stewart CID questioned appellant. As a result of this investigation, appellant's command cancelled his orders to Korea and issued a military protective order that appellant was not to have any contact with his wife. However, appellant coordinated with his wife regarding bills and custody issues through one of his friends, who later became the co-accused in appellant's crimes. Appellant went so far as to have his friend relay a false story to appellant's

---

[2] We have also given full and fair consideration of the other assignment of error pertaining to dilatory post-trial processing and the matters appellant personally submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). None of these issues warrant discussion or relief.

wife about appellant having attempted suicide in an attempt to garner sympathy and rekindle their marriage, but to no avail. A few weeks later, appellant's wife openly resumed a romantic relationship with a married male soldier, PV2 MJ, with whom she previously had a brief relationship. Not long after, appellant was part of a group text in which another soldier joked about appellant's wife's extra-marital affairs.

Appellant eventually decided he was going to confront PV2 MJ about his relationship with appellant's wife. On 4 March 2017, appellant's wife and PV2 MJ attended a party at another soldier's apartment. Appellant was hanging out at an adjacent apartment in the same building and asked a friend to go to the party, check on his wife, and report back as to wife's actions. In the early morning hours of 5 March 2017, appellant drove by his wife's apartment and observed PV2 MJ's vehicle in the parking lot of his wife's apartment building thereby confirming that PV2 MJ accompanied appellant's wife home from the party. Later that morning, appellant exchanged vehicles with another friend and drove to a hotel parking lot near his wife's apartment building, waited, and then followed PV2 MJ when he left the wife's apartment. Realizing he was being followed, PV2 MJ drove to SPC MB's apartment where the party had occurred the previous night. During the drive, appellant texted PV2 MJ from a fake number stating, "Did she let you smash?"[3] Once at the apartment, both PV2 MJ and SPC MB called and texted appellant's fake number in an attempt to identify appellant but he did not respond. Appellant decided not to confront PV2 MJ alone for fear that he might get jumped so he drove to a nearby library parking lot and called a friend to meet him there. When appellant's friend arrived at the library parking lot, appellant jumped into his friend's vehicle. Appellant's friend noticed a handgun tucked into the waistband of his pants. In addition, appellant was concealing another handgun in the pocket of a jacket he was carrying.

Appellant enlisted his friend's assistance to verify who was in the apartment where PV2 MJ was located. Appellant directed his friend to drive to the parking lot of the apartment building where PV2 MJ was located. Once there, appellant informed his friend that he had seen his wife with another man the night prior and the man was in an apartment in the building where they had parked. Appellant appeared serious and angry and placed a handgun in his lap and told his friend these men "gotta go."[4] At appellant's direction, the friend went to SPC MB's apartment under the guise of leaving a laptop at the apartment the night prior in order to

---

[3] Smash is a slang term for sexual intercourse.

[4] As a child, appellant had suffered abuse at the hands of his mother's boyfriends and did not want his daughter to experience the same and thus, wanted his wife to end relationships with other men.

confirm how many people were in the apartment. Appellant's friend returned to the truck and confirmed that only PV2 MJ and SPC MB were inside the apartment. Appellant headed to the apartment, alone, but stopped in the breezeway of the building and called his friend. During this seven-minute telephone call, appellant expressed, "I just can't stop thinking about what happened last night." A few minutes later, appellant called his friend again and told him "[y]o, you can leave. Go down the road and come back." Appellant's friend complied.

Appellant decided he was going to confront PV2 MJ about sleeping with his wife and knocked on the apartment door. PV2 MJ answered the door holding a kitchen knife with the blade pointed below appellant's waist. When confronted, PV2 MJ denied being with appellant's wife the previous night stating "nah, I wasn't with the bitch." PV2 MJ's referring to appellant's wife as a "bitch" angered appellant, and he decided he was going to kill PV2 MJ. Appellant pulled the handgun from his jacket pocket and shot PV2 MJ in the face penetrating his skull and shot him a second time hitting him in the neck, resulting in his death. SPC MB, who was down the hall, emerged from the kitchen. Startled, appellant shot SPC MB hitting him in the face. SPC MB attempted to escape through the back door of the apartment but was unable to open the door and retreated back to his bedroom. When SPC MB emerged from the bedroom, appellant shot him a second time hitting him in the face and striking his right jugular vein and cervical spinal cord, resulting in his death.[5] Appellant then grabbed the knife PV2 MJ had been holding and stabbed PV2 MJ twice in the neck, and left the knife embedded in his neck. Appellant collected his shell casings, locked the apartment door, and went to link up with his friend.

Appellant located his friend in a nearby library parking lot and then made efforts to conceal the murders. Appellant gave his friend the second gun he brought with him and they drove to his friend's apartment to store it there. The two of them then drove to the apartment of the friend whose car appellant had borrowed where appellant then changed his clothing. While there, appellant admitted that he had killed PV2 MJ and SPC MB and told everyone "this stays between us." Appellant, and his friend who assisted him in the murders, drove to a wooded area where appellant burned the clothing he wore during the murders and disposed of the murder weapon in the woods.

[5] Appellant explained during his guilty plea proceedings that he had the ability to retreat after initially shooting SPC MB but decided to kill him so as to not leave any witnesses.

B. Appellant's Pre-trial Confinement

Appellant was arrested by civilian authorities on 9 March 2017, four days after he committed the murders, and remained in pre-trial confinement until his trial in February 2020.

Appellant remained in a civilian confinement facility even after the military preferred charges against him on 15 August 2017.[6] During the 263 days that appellant was held by civilian authorities, he was placed in general population with other pre-trial inmates. Appellant was transferred to the U.S. Naval Consolidated Brig in Charleston, South Carolina in November 2017. The Naval Brig is a medium security confinement facility authorized to hold inmates with a sentence of up to ten years of confinement.

After appellant's in-processing at the Naval Brig, he was placed in a maximum custody status and housed in the special quarters area for the entirety of his time at the facility. Special quarters was the maximum security area of the facility which facilitated direct supervision of the inmates housed in that area and possessed high security measures in the recreation yard. Confinement officials determined the security classification of each pre-trial inmate based primarily upon the seriousness of the alleged offenses and the potential length of the sentence, if convicted. Given that the appellant was pending pre-meditated murder charges and a referral to a court-martial empowered to impose the death penalty, he was classified as maximum custody and placed in special quarters. Other pre-trial confinees facing similar offenses and length of a potential sentence would have also been classified as maximum custody.

Soon after his arrival, and periodically thereafter, appellant requested that brig officials downgrade his custody status. Brig officials conducted a weekly review of the accused's confinement status in accordance with standard operating procedures.[7] The review was conducted by the Classification and Assignment Board (CAB), consisting of the prisoner management director, clinical department personnel, medical department personnel, the chaplain, and the civilian

---

[6] Appellant's commander ordered that he be held in pre-trial confinement the same day that he preferred charges against appellant on 15 August 2017.

[7] The facility adheres to the standards outlined by the American Correctional Association (ACA). The ACA standards require that an inmate's status is reviewed weekly for the first sixty days and then monthly thereafter. The Naval Brig at Charleston, however, conducted weekly reviews of appellant's status for the entirety of his time at the facility.

administrator of the facility. The CAB considered many factors in reviewing appellant's custody status, including input from the guard staff. In fact, on at least one occasion, brig guards who supervised appellant advocated on his behalf to have his status downgraded. The CAB also considered appellant's own concerns about the impact of the restrictive confinement on his mental health. Solely due to the severity of appellant's charged offenses of premeditated murder and length of his potential sentence, his status would not, and did not, change. However, appellant's privileges could, and did, change as a result of these reviews based upon appellant's good behavior while in confinement.

Appellant experienced restrictions similar to solitary confinement for at least the first year of his time at the Naval Brig in Charleston. Appellant remained alone in his cell for twenty-two hours a day with little to no interaction with other inmates. He was only allowed to watch television through a slot in the door of his prison cell and was not allowed to work or attend religious services. However, appellant was allowed visits from the facility chaplain, if requested. During the two hours appellant spent outside of his cell each day, he was allowed to shower and spend time in the outdoor recreation area where he could play basketball alone and talk with other maximum custody inmates through a fence. Any time appellant was moved within the facility he was handcuffed, shackled to a waist belt with an attached leash for leading him through the facility, and accompanied by two escorts. When appellant was transported outside of the facility, to include meetings with his attorneys, he was required to wear a taser vest capable of shocking him with several thousand volts of electricity.

After approximately a year of being under restrictive confinement at Naval Brig Charleston, appellant earned some privileges. Appellant was allowed to watch television in the common area (dayroom) of the special quarters area for approximately six hours per day, where he could associate with the other special quarters' confinees. While in the common area, appellant had access to books, was allowed to play board games, use a treadmill, and write letters.

In January 2019, the convening authority denied appellant's defense counsel's request to either release appellant from pre-trial confinement or advocate for his maximum custody classification to be downgraded. In late 2019, appellant was transferred to the Army's Joint Regional Correctional Facility (JRCF) at Fort Leavenworth, Kansas. Within a week of arriving at this facility, the JRCF leadership determined that "maximum custody status [was] not necessary at this time." Appellant was, therefore, placed on a lesser custody status allowing him to interact with other pretrial confinees in general population, spend time in the dayroom watching television, and go to the chow hall for meals. Appellant remained on this lesser custody status at the JRCF until his trial in February 2020. During his entire time in pre-trial confinement, at various confinement facilities, appellant had no disciplinary issues.

C. Appellant's Appointed Military Defense Counsel

On 14 June 2018, approximately fourteen months after the murders, the convening authority referred appellant's charges of premeditated murder, obstruction of justice, and violation of a lawful order to a general court-martial empowered to adjudge the death penalty.

During multiple motions hearings over the course of the next eighteen months while appellant's case was pending trial, all three of his assigned military defense counsel informed the military judge in public filings that they did not believe they were qualified to represent appellant due to the legal complexity and unique challenges of defending a capital case. While all three of the military defense counsel possessed some litigation experience, none of the three had tried a homicide case—much less a capital case—at a contested trial.[8] Both the convening authority and the military judge denied the defense's repeated requests for the appointment of Mr. KP, a retired Army Judge Advocate with much more experience in both capital cases and homicides, as an expert consultant to assist appellant's defense team in navigating the complexities of defending a capital case. Furthermore, in December 2019 while appellant's case was still pending trial, appellant's military defense counsel were informed they would be required to change duty assignments in the coming months thereby requiring the defense counsel to balance representing appellant in a capital murder case with a new duty position.

Following the repeated denials of the appointment of learned counsel or even learned counsel as an expert consultant and shortly before his capital murder trial was to begin, appellant agreed to plead guilty to all charges including two specifications of premediated murder. In offering to plead guilty, appellant requested that his maximum sentence to confinement be limited to life with the possibility of parole. The convening authority denied appellant's request and counter-offered with an agreement to remove the possibility of a death sentence thereby allowing the military judge to sentence appellant to either life with the possibility of parole or life without the possibility of parole. Appellant ultimately agreed to plead guilty in exchange for not having to face the possibility of a death sentence if convicted at a contested trial.

[8] Each of the three military defense counsel filed a memorandum to the Motion for Learned Counsel summarizing their respective litigation experience. None of the defense counsel had litigated more than twelve contested trials by the time they were detailed to represent appellant in a capital murder case.

D. Presentencing Hearing

In February 2020, a military judge sitting as a general court-martial, convicted appellant, pursuant to his pleas, of two specifications of premeditated murder, two specifications of obstructing justice, and one specification of violating a lawful order in violation of Articles 118, 134, and 92, UCMJ. After the completion of appellant's guilty plea proceedings, each of the parties presented evidence for the judge's consideration in determining appellant's sentence.

During appellant's presentencing proceedings, the government presented the testimony and written statements of several family members of the two soldiers appellant murdered. The government's evidence presented information about the lives of each victim and the impact their death had on those closest to them. Private MJ's wife testified about the fact that she was six months pregnant when her husband was murdered, the emotional impact his death has had on her, and the difficulty she has had in now raising two children alone. She also described how in the immediate aftermath of her husband's murder their son, who was now five years old, would wait by the door for his father and ask when he was coming home because she did not know how to explain his father's death to him in a way that he could understand. Private MJ's mother testified that her son was a good child and that she was proud of him when he joined the Army. She also testified that she continued to call his phone even after his death just to hear his voice and that she missed his smile, laughter, and jokes. Private MJ's father provided a victim statement describing the severe emotional and physical impact his son's death had on him and his daily replaying in his mind of the moment he learned of his son's murder. In particular, he explained the trauma of viewing his son's body at the morgue was akin to a "horror movie."

The government also presented evidence about the impact of the second victim's death on friends and family. Specialist MB's mother testified that despite raising her son as a single parent in a rough neighborhood, he stayed out of trouble, helped with his siblings, and decided to follow in his grandmother's footsteps and join the Army. She further described the significant emotional impact her son's death has had on her and his siblings, the physical impact his death has had on her, and how she visits his grave weekly. Ms. AW provided an unsworn written statement outlining SPC MB's impact on her life in keeping her focused, motivated, and driven to be a better person. She described how lost and discouraged she felt without SPC MB in her life and that her life felt dark before she knew him and he brought light and energy to her life but that her life was dark once again without him.

Appellant's trial defense counsel presented a significant amount of evidence in both mitigation and extenuation for the military judge's consideration on an appropriate sentence. First, appellant presented thirteen video statements from

appellant's wife, mother, father, sister, aunt, uncle, cousins, and friends. Common themes from these videos were appellant's overall good nature, his sense of humor, willingness to help others, that he was a good kid despite his surroundings living in Selma, Alabama, and his being a good father to his daughter. Each of these witnesses stated they would continue to support appellant and assist him in any way. Appellant's wife provided a video recorded statement in which she explained that she married appellant because of his good heart, dependability, kindness, and being family oriented. She also explained how much appellant's daughter meant to him and having time with his family was the most important thing to him.

Appellant also presented thirty-seven character letters from cousins, aunts, uncles, middle school and high school friends and teachers, and at least five non-commissioned officers whom he worked with in the Army. An additional twelve individuals including his mother, paternal grandmother who raised him, former Army colleagues, friends, and high school principal testified on appellant's behalf concerning his character, childhood, and military service. Family and friends described appellant as: always willing to lend a hand and help others; someone who encouraged and motivated friends to stay out of trouble, finish school, and make a future for themselves outside of the drugs and violence where they lived in Selma, Alabama; a role model and good influence on those around him; a patient and attentive father to his daughter; someone who never got into trouble at school; compassionate, respectful, kind, and peaceful; a caregiver who took care of his physically disabled grandfather; and, disciplined and focused on a better life. The military witnesses who had served with appellant during his almost five years in the Army prior to his offenses described him as a soldier who was: dedicated to duty and a hard worker; a positive influence on, and a mentor to, many other soldiers; always willing to take out personal time to assist other soldiers in getting promoted; level-headed and a voice of reason; always possessing a positive attitude; and, highly regarded by both peers and superiors alike.

Appellant's mother and paternal grandmother provided testimony pertaining to appellant's difficult childhood. Appellant's mother described appellant as a happy child who did well in school despite his father's excessive drinking and appellant witnessing his father's physical abuse of his mother. At the age of ten, appellant's parents divorced and he moved to another location in Virginia with his mother. After witnessing a boyfriend physically abusing his mother, appellant requested to go to live with his father in Selma, Alabama. Upon moving to Selma, appellant did not see his mother again until his high school graduation. Due to his father's continued drinking, appellant moved in with his paternal grandmother in Selma where he remained until he joined the Army.

Defense counsel also presented a neuro-psychological evaluation of appellant, three life chronologies documenting appellant's life in detail, and a social geography report. The forensic neuropsychological evaluation determined that appellant was of

average intelligence which was consistent with intellectual testing performed during his childhood. The conclusion of the report was that appellant presented a neuropsychological profile that did not indicate any area of significant concern and appeared to be consistent with the typical neurocognitive functioning expected for his age and level of education. The social geography report provided a comprehensive view of the three main "geographic pillars" of family/home, education, and community that determine a "[child's] safety and security and launch them into adulthood with appropriate levels of self-esteem, knowledge, empathy and good judgment." The report provided details about appellant's turbulent childhood which included an alcoholic father, neglectful mother, divorce, domestic violence, physical abuse, poverty, neighborhood gangs, drugs, and violence both in his neighborhood and at school. The report concluded that the three pillars of support – home, school, and community – did not offer the requisite support for appellant. The report noted, however, that

> [Appellant] managed to navigate his way through his parents' break-up, the loss of his childhood home, the absence of his father during some crucial pre-adolescent years, then the absence of his mother during his teenage years. He survived inferior schools and the constant threat of bullies. He resisted the easy lure of drugs and gangs. He steered clear of guns and violence, despite seeing both up close not only his community but also in his own home. [He] maintained a positive, easy-going personality and, according to many people, was, always quick to make others smile and feel better. He did not join gangs, get kicked out of school, or flunk out. Instead, he persevered, participated in sports and Kappa League, attended church with his extended family, made his own money by cutting hair, and planned for his future by signing up for the military even before he'd graduated high school.

Appellant's defense counsel further presented the testimony of an expert in forensic psychology who conducted a violence risk assessment of appellant which is done by examining predictive factors for future violence. The expert assessed appellant's risk for violence both in prison and risk of violence if paroled. The expert reviewed case materials about appellant's crimes, interviewed appellant, reviewed appellant's confinement records, and examined scientific literature about potential future violence of convicted criminals while serving time in prison and upon parole or release from confinement. The expert testified that during appellant's three years in pre-trial confinement he had been a model prisoner which was unusual because typically younger inmates exhibit problematic behavior within the first three years of confinement as they are adapting to prison life. Appellant's confinement records noted that he was pleasant, calm, cooperative, passive,

respectful and well-liked by the staff. The expert testified that, in his opinion, appellant was likely to make a non-violent adjustment to confinement based upon model behavior in confinement up to that point, his age of twenty-six, a lack of mental health issues, having taken responsibility for his crimes, lack of gang affiliation, two years of college education, and lack of a prior criminal history. The expert also testified that the age at the time an individual is paroled is the most predictive factor in parole adjustment and that age progressively reduced the probability of recidivism no matter the category of crime. Generally, he stated, those released from prison for murder have a lower re-arrest and reconviction rates than others. The expert opined that appellant is at low risk for recidivism and that positive predictive factors for appellant were his lack of criminal history, some college education, lack of substance abuse, taking responsibility for his crime, being a model prisoner, and extended social network outside of prison.

Lastly, appellant provided an unsworn statement during the pre-sentencing proceedings in which he described formative events in his childhood and his marriage leading up to the murders. Appellant explained the confusion he felt when his parents divorced when he was just ten years old. He described the violent neighborhood his mother moved him and his sister to in Petersburg, Virginia and the trauma he experienced at the hands of his mother's boyfriends. Appellant described a time when he had to grab a knife to protect his mother from her abusive boyfriend, which resulted in the boyfriend holding a gun to his head while he threatened to kill both him and his mother and chastised appellant for intervening. Despite this incident, appellant's mother remained with the boyfriend and began spending more time away from the home and neglecting appellant resulting in his being alone much of the time at only age eleven. After another incident in which appellant attempted to intervene in a domestic violence situation involving his mother, appellant decided he wanted to live with his father. Thus, at the age of fourteen appellant moved to live with his father in Selma, Alabama. Appellant only lived with his father for a few months due to his father's drinking and keeping appellant awake at night when he was trying to rest for school. At that point, appellant explained, he went to live with his paternal grandmother in Selma. Appellant described the violence in the neighborhood he lived in and that he stayed out of trouble by staying busy with school, playing football, helping his grandmother, caring for physically disabled family members, and the Kappa League leadership group he joined.

Appellant went on to explain that he entered the military right after high school and was sent to Korea for his first assignment. While in Korea, appellant described how he began dating his wife, who then became pregnant, and they married upon getting stationed back in the United States. Appellant explained that when he turned twenty-one, he legally purchased a firearm in order to protect himself, having been in many situations growing up where he felt helpless, and just wanted to be able to protect his family if needed. From December 2013 until late 2015, appellant and his wife were stationed apart from each other. Appellant

explained the impact of being away from his wife and daughter and that he drove from Fort Stewart, Georgia to Fort Polk, Louisiana as often as he could to visit his wife and daughter. A few months after his wife arrived at Fort Stewart, appellant described the marital difficulties that resulted due to his wife's desires to spend time away from home partying and socializing with friends. He also explained he went to the apartment the day of the murders to confront PV2 MJ because he felt "betrayed, and sad and just disrespected" and he "really wanted to know, like, what was going on." Appellant concluded his unsworn statement by making a statement to the families of his victims. Appellant apologized for the pain he had caused the victims' families, took full ownership of his actions, and explained that he cannot forgive himself for damage he had caused. He described the shame he felt for being the cause of children having to grow up without their father, including his own daughter, and that he prayed every night for the victims and their families.

The military judge sentenced appellant to a dishonorable discharge, confinement for life without the possibility of parole, and to be reduced to the grade of E-1. The military judge credited appellant with 1,071 days of pre-trial confinement credit and 100 days of Rule for Courts-Martial [R.C.M.] 305(k) credit.[9] The convening authority approved the sentence.

LAW AND DISCUSSION

A. Appellant's Pre-trial Confinement Did Not Violate Article 13, UCMJ

Appellant asserts that his pre-trial confinement conditions at the Naval Brig were unduly harsh and violated Article 13, UCMJ. Specifically, appellant asserts three violations: (1) the Naval Brig violated Article 13, UCMJ, by classifying appellant in a maximum custody status without considering all of the facts and circumstances; (2) as a maximum custody confinee in the Navy Brig, appellant faced conditions that were more rigorous than required; and, (3) the command failed to

[9] The military judge, upon motion by trial defense counsel, awarded appellant 100 days of confinement credit for the command's violation of a local regulatory requirement to visit a pre-trial confinee at least once every two weeks. From November 2017, when appellant was placed in military pre-trial confinement, until August 2019, appellant's command only visited him twice, both times were in relation to the preferral and referral of charges. In awarding credit, the judge noted, "In short, the command utterly failed to comply with the regulatory requirement for regular visits to the accused. They apparently could not even be bothered to pick up the telephone to call him. The command failed to take care of their Soldier and ensure that his welfare and his needs were being met. They failed the accused."

regularly contact or visit appellant, as required by the unit's regulation.[10] We disagree and find that appellant is not entitled to relief.

Whether an appellant is entitled to credit for an Article 13, UCMJ, violation is reviewed de novo. *United States v. Guardado*, 79 M.J. 301, 303 (C.A.A.F. 2020) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)). Reviewing whether an appellant is entitled to such credit is a mixed question of law and fact. *Id.* We will only overturn a military judge's findings of fact if they are clearly erroneous. *Id.* Appellant bears the burden of proof in establishing an Article 13, UCMJ, violation. *Id.*

Article 13, UCMJ, prohibits: (1) penalty or punishment of an accused prior to trial other than pre-trial confinement upon the charges pending against him; and, (2) pre-trial confinement conditions that are "more rigorous than the circumstances require[d] to ensure his presence . . . ." UCMJ art. 13. The Court of Appeals for the Armed Forces (CAAF) has recognized that, "[c]onditions that are sufficiently egregious may give rise to a permissive inference that an accused is being punished, or the conditions may be so excessive as to constitute punishment." *United States v. King*, 61 M.J. 225, 227-28 (C.A.A.F. 2005). If there is an absence of a showing of an intent to punish, then this court is required to evaluate whether "a particular restriction or condition, which may on its face appear to be punishment, is instead but an incident of a legitimate non-punitive governmental objective." *Guardado*, 79 M.J. at 303 (cleaned up).

This court "will scrutinize closely any claim that maximum custody was imposed solely because of the charges rather than as a result of a reasonable evaluation of all the facts and circumstances of [the] case" and if the "maximum custody was arbitrary and unnecessary to ensure an accused's presence for trial, or unrelated to the security needs of the institution, [this court] will consider appropriate credit or other relief to remedy this type of violation of Article 13, UCMJ." *United States v. Crawford*, 62 M.J. 411, 416 (C.A.A.F. 2006). Meaningful relief, if available, is required for violations of Article 13, UCMJ. *United States v. Zarbatany*, 70 M.J. 169, 170 (C.A.A.F. 2011). "However, relief is not warranted or required where it would be disproportionate to the harm suffered or the nature of the offense." *Id.*

---

[10] At trial, defense counsel asserted that the command's failure to visit appellant and check on his welfare while in pre-trial confinement was a violation of both R.C.M. 305 and Article 13, UCMJ. The military judge awarded appellant confinement credit under R.C.M. 305(k) but not Article 13, UCMJ.

There is no evidence to support a finding that confinement facility officials intended to punish appellant by classifying him as a maximum custody status. Rather, the military judge's findings of fact support a conclusion that there was no intent to punish appellant. Given the severity of appellant's charged offenses and potential lengthy sentence, appellant was identified as a potential threat for violence and a flight risk and thereby classified as maximum custody. Given that the Naval Brig was a "medium security" facility, special quarters was the only area of the facility in which the accused could be securely housed based upon his classification. Thus, appellant's classification was not unreasonable nor arbitrary. The restrictions placed on appellant in special quarters were for the safety of the confinement personnel and the same type of restrictions would be placed on any pre-trial confinee housed in special quarters. While the weekly reviews of appellant's confinement status did not result in any change to his maximum custody status, they did result in appellant being granted additional privileges based upon his good behavior. After approximately a year, appellant was allowed to access the day room for up to six hours a day where he could watch television, write letters, play games, use a treadmill, and socialize with other special quarters' confinees. As the military judge aptly pointed out, the relaxation of appellant's restrictions due to his good behavior further supports the conclusion that there was no intent to punish appellant.

We also do not find appellant's confinement conditions were so excessive as to amount to punishment or conditions more rigorous than necessary to ensure the accused's presence for trial. Appellant asserts that confinement officials failed to consider all the facts and circumstances in his continued classification as maximum custody, thereby justifying Article 13 credit. However, the record demonstrates that confinement officials considered many factors in determining appellant's custody status. The weekly reviews considered such factors such as the severity of appellant's charged offenses, the length of appellant's potential sentence, input from guard staff, appellant's behavior, and appellant's own mental health concerns in determining appellant's status. Admittedly, confinement officials based appellant's maximum custody status primarily upon the severity of his charged offenses and potential length of his sentence but did so in the context of the fact that the facility was just a "medium security" facility. A confinement official testified that special quarters is the maximum security area of the facility which facilitates direct supervision of the inmates housed in that area and the only area that possesses high security measures in the recreation yard. Thus, the record demonstrates that appellant's confinement status was "'reasonably related to a legitimate governmental objective.'" *King*, 61 M.J. at 227 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

Like many courts, we are reluctant to second-guess confinement officials in their determinations related to security matters. *See King*, 61 M.J. at 228 (citing *United States v. McCarthy*, 47 M.J. 162, 167-68 (C.A.A.F. 1997)). "Prison administrators . . . should be accorded wide-ranging deference in the adoption and

execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Crawford*, 62 M.J. at 416 (cleaned up). We decline to second-guess the security determinations of confinement officials under the circumstances of this case given the security level of the facility in the context of the severity of appellant's charges and the potential length of appellant's sentence. Thus, we do not find that appellant's continued classification as maximum custody was so egregious as to give rise to any inference of an intent to punish. While appellant was afforded a lesser security classification when moved to another military facility, we do not find that indicative of an intent to punish appellant at the Naval Brig. The restrictive security measures the Naval Brig imposed on appellant appear reasonable in light of his custody status and the limited security status of the facility. The extra security measures required for movement within the brig and outside the brig, to include a taser vest, are recognized security measures when moving confinees. The methods appear to have a legitimate purpose of securing appellant when moved out of special quarters and the brig in light of the severity of appellant's charged offenses and his facing a potential death sentence. Additionally, there is no indication that appellant was denied food, shelter, health care, hygiene, or even religious services, if requested, during his time at the Naval Brig. Therefore, while appellant's classification resulted in conditions of confinement for his first year at the Naval Brig that were quite restrictive, we do not find them so excessive as to rise to the level of punishment.

B. Appropriateness of Appellant's Sentence

Appellant asserts that his sentence is inappropriately severe in that it neither fits the circumstances in the record nor the offender. We agree and provide relief in our decretal paragraph.

All service Courts of Criminal Appeals (CCAs), pursuant to Article 66, UCMJ, review sentence appropriateness de novo. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018) (cleaned up).

Sentence appropriateness is a statutory obligation of all service CCAs in which the court "may affirm only such . . . [a] sentence or such part or amount of the sentence, as [the court] finds correct in law and fact and determines, on the basis of the entire record, should be approved." UCMJ art. 66(c). In exercising this broad power of plenary review, our superior court has described the CCAs as having a "*carte blanche* to do justice." *Kelly*, 77 M.J. at 406 (cleaned up). Thus, this court "has discretion to approve only that part of a sentence that it finds 'should be approved,' even if the sentence is 'correct' as a matter of law." *Id.* (quoting *United States v. Nerad*, 69 M.J. 138, 142 (C.A.A.F. 2010)). In determining whether a sentence "should be approved," the standard is "not legality alone, but legality limited by appropriateness." *Nerad*, 69 M.J. at 142 (quoting *United States v. Atkins*,

8 U.S.C.M.A. 77, 79, 23 C.M.R. 301, 303 (1957)). This court's review of sentence appropriateness must include an "individualized consideration of the particular [appellant] on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (cleaned up).

Appellant asserts that his sentence is inappropriately severe for three reasons: (1) the government's conduct in this case was fundamentally unfair;[11] (2) the documented systemic racial bias in the criminal justice system;[12] and, (3) the

---

[11] Appellant asserts that: (1) the government engaged in dilatory processing of defense expert requests which interfered with effective assistance of experts and appellant's right to a speedy trial because defense was then forced to seek continuances; (2) the government denied appellant learned counsel or a learned counsel consultant who was experienced in capital cases yet the government availed itself of a highly qualified expert who was a seasoned prosecutor; and, (3) the military moved appellant's defense counsel to another position at another duty station prior to the resolution of his case creating the appearance of governmental interference with the right to an adequate defense.

[12] Appellant referenced a 2012 U.S. Sentencing Commission Report providing data that between 11 December 2007 and 30 September 2009 African-American males in the federal civilian criminal system received sentences that were 19.5% longer than those imposed on Caucasian males convicted of similar crimes. U.S. SENTENCING COMM'N, *BOOKER* REPORT: PART E: DEMOGRAPHIC DIFFERENCES IN SENTENCING 1-2 (2012), *available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf#page=1. Appellant also referenced reports showing racial minorities constituted 43% of the U.S. Army's active duty population in fiscal year 2016 but constituted 75% of the U.S. military's death row population. U.S. ARMY, ARMY DEMOGRAPHICS FY16 ARMY PROFILE, *available at* https://www.armyg1.army.mil/hr/docs /demographics/ FY16_Army_Profile.pdf; DEATH PENALTY INFORMATION CENTER, DESCRIPTION OF CASES FOR THOSE SENTENCED TO DEATH IN U.S. MILITARY, *available at* https://deathpenaltyinfo.org/state-and-federal-info/military/descriptions-of-cases-for-those-sentenced-to-death-in-u-s-military. Additionally, a report from 2009 showed that although African Americans make up only 12% of the general population they accounted for 56.4% of the state and federal life without parole population. ASHLEY NELLIS AND RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 12-13 (The Sentencing Project, 2009), *available at* https://www.sentencingproject.org/wp-content/uploads/2016/01/No-Exit-The-Expanding-Use-of-Life-Sentences-in-America.pdf.

extensive mitigation evidence in the record. When this court reviews sentence appropriateness, "we review many factors to include: the sentence severity; the *entire record of trial*; appellant's character and military service; and the nature, seriousness, facts, and circumstances of the criminal course of conduct." *United States v. Martinez*, 76 M.J. 837, 841-42 (Army Ct. Crim. App. 2017) (emphasis added). Stated another way, we are required to consider *all* matters contained in the record of trial in reviewing the appropriateness of appellant's sentence. *Id.*

First, we consider the nature, seriousness, and facts and circumstances of appellant's crimes in determining the appropriateness of appellant's sentence. Appellant is an African-American who was twenty-four years old at the time of his offenses. He pled guilty to violating a military protection order prohibiting contact with his wife, the pre-meditated murder of two young soldiers, and obstruction of justice for destroying evidence and advising others not to say anything about his murders. Appellant was distraught by the deterioration of his marriage and his inability to spend time with his daughter. By all accounts, appellant's daughter was the center of his world and he was a very attentive father who only wanted the best for his child. Appellant's desire to save his marriage and reconcile with his wife led him to begin tracking males with whom his wife was spending time and taking efforts to derail those relationships. Appellant, along with a friend whose assistance he enlisted, essentially stalked PV2 MJ so appellant could confront him about the nature of his relationship his wife. Taking two handguns with him, appellant followed PV2 MJ to an apartment and confronted him about being with appellant's wife the previous night. Angered by PV2 MJ referring to his wife as a "bitch," appellant pulled out a gun and shot PV2 MJ and killed him. When SPC MB stepped out of a room of the apartment, appellant made the decision to kill him as well so as not to leave any witnesses. In an effort to conceal his crimes, appellant policed up his shell casings and later disposed of the handgun and burned the clothing he was wearing. Appellant's actions left behind grieving parents, a widow, and two children, one of which never had the chance to meet his father as he was still in his mother's womb. Based upon the terms of appellant's plea agreement and the offenses to which he pled guilty, he was facing a sentence to confinement of either life with the possibility of parole or life without the possibility of parole. The military judge sentenced appellant to the maximum sentence of life without the possibility of parole.

In considering the entirety of the record, we also consider the appellant's challenge of defending himself against a capital murder case without the benefit of learned counsel. We recognize that appellant's defense counsel requested learned counsel from both the convening authority and the military judge on multiple occasions, all of which were denied. While appellant's request for even learned counsel to serve as an *expert consultant* was denied, the government availed itself of a "high qualified expert" who had litigated several capital cases as a civilian prosecutor before being hired by the Army to serve as a government prosecution

consultant. Following these denials and shortly before his capital murder trial was to begin, appellant agreed to plead guilty to all charges. In exchange, the government agreed only to not seek death, leaving appellant's adjudged sentence of life without parole as a possibility.

In light of the fact that the last military execution was over 60 years ago, one could question what exactly the defense team accomplished in this plea agreement. The impending capital murder trial—something none of appellant's attorneys felt qualified to conduct—no doubt loomed large. As both the Supreme Court and the CAAF have said, "'[d]eath is different.'" *United States v. Akbar*, 74 M.J. 364, 399 (C.A.A.F. 2015) (quoting *Ring v. Arizona*, 536 U.S. 584, 606 (2002)). A recent change to Article 27, UCMJ, recognizes this, and provides that "[t]o the greatest extent practicable, in any capital case, at least one defense counsel shall . . . be learned in the law applicable to such cases." UCMJ art. 27, 10 U.S.C. § 827 (2018).[13] This change to Article 27 brings the military justice system mostly into step with long-standing requirements for capital defense counsel in the federal system and, more broadly, the American Bar Association's (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. *See Akbar*, 74 M.J. at 399 (discussing the federal requirements under 18 U.S.C. § 3005 and the ABA guidelines). While the military judge correctly noted that this change to Article 27 came too late to apply at appellant's trial as a technical matter, the "death is different" concern is no less valid. On the day appellant entered into his plea agreement, his case was a capital case. When the government makes the considered decision to seek death, it must be willing to properly resource capital defense teams. We recognize that this was not done in this case, and this failure permeated appellant's case through the pretrial litigation and his ultimate plea. We are mindful that appellant does not assert that his plea was uninformed or involuntary due to the lack of assistance of learned counsel and that there is no evidence in the record to suggest otherwise. We merely consider the fact that the litigation related to appellant's defense team's qualifications is part of the "entire record,", that we must consider in evaluating a sentence. *Kelly*, 77 M.J. at 406 (quoting UCMJ art. 66(a)). This is true even if—as here—we do not reach the question of whether appellant's defense team rendered constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

---

[13] The updated Article 27 only requires appointment of learned counsel "to the greatest extent practicable," while federal law mandates the appointment of such counsel in the federal criminal system. *See* 18 U.S.C. § 3005 ("the court before which the defendant is to be tried, or a judge thereof, *shall* promptly . . . assign 2 such counsel, *of whom at least 1 shall be learned in the law applicable to capital cases* . . . .") (emphasis added).

We also consider appellant's character and military service. Appellant presented over 45 videos and written statements from cousins, aunts, uncles, middle and high school friends and teachers, and non-commissioned officers whom he worked with in the Army. Individuals close to appellant, whether family or military colleagues, described appellant as a caring and positive person who was dedicated to his family and always willing to help others. Family and friends noted that appellant was: always willing to lend a hand and help others; someone who encouraged and motivated friends to stay out of trouble, finish school, and make a future for themselves outside of the drugs and violence where they lived in Selma, Alabama; a role model and good influence on those around him; a patient and attentive father to his daughter; someone who never got into trouble at school; compassionate, respectful, kind, and peaceful. The military witnesses who had served with appellant during his almost five years in the Army described him as a soldier who was: dedicated to duty and a hard worker; a positive influence on, and a mentor to, many other soldiers; level-headed and a voice of reason; and, highly regarded by both peers and superiors alike.

Appellant's defense counsel presented a significant amount of additional mitigation evidence regarding appellant's difficult childhood along with a violence risk assessment of appellant. Family member testimony and a social geography report provided significant details and insight in appellant's life before joining the military. Appellant survived a challenging childhood in which he navigated his parents' divorce, an alcoholic father, neglectful mother, domestic violence, physical abuse, having his mother's boyfriend hold a gun to his head, poverty, neighborhood violence, inferior schools, and the constant threat of bullies. Despite these challenges appellant resisted the lure of gangs, drugs, and violence and maintained a positive, easy-going personality and focused on making a better life for himself.

A forensic psychology expert provided testimony about appellant's risk for future violence both while in confinement and if paroled. The expert testified that, in his opinion, appellant was likely to make a non-violent adjustment to confinement based upon model behavior in confinement up to that point, his age of twenty-six, a lack of mental health issues, having taken responsibility for his crimes, lack of gang affiliation, two years of college education, and lack of a prior criminal history. The expert also testified that the age at the time an individual is paroled is the most predictive factor in parole adjustment and age progressively reduced the probability of recidivism no matter the category of crime. Generally, he stated, those released from prison for murder have a lower re-arrest and reconviction rates than others. The expert opined that appellant is at low risk for recidivism and that positive predictive factors for appellant were his lack of criminal history, some college education, lack of substance abuse, taking responsibility for his crime, being a model prisoner, and extended social network outside of prison.

Lastly, we consider appellant's statement during the presentencing proceedings. Importantly, appellant expressed genuine remorse for his actions and the pain and suffering that resulted. After discussing some of the formative events in appellant's childhood, he concluded his unsworn statement by making a statement to the families of his victims. Most significantly, appellant apologized to the victims' families, took full ownership of his actions, and expressed his inability to forgive himself for damage he had caused. The genuine shame and guilt appellant expressed for having forever altered the lives of the surviving children, friends, and family members spoke of his acceptance of responsibility, remorse, and rehabilitative potential.

This court has a great deal of discretion in determining whether a particular sentence is appropriate and we take that solemn responsibility seriously and recognize we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). We have carefully and thoughtfully considered all relevant factors in determining whether appellant's sentence is appropriate. We have given individualized consideration to appellant, the severity of his sentence, the nature and seriousness of the offenses, appellant's record of service, and all other matters contained in the record of trial, including the conditions of appellant's pre-trial confinement while in the Naval Brig from November 2017 until August 2019 and the lack of learned counsel leading up to appellant's plea. In light of the record as a whole and all of the foregoing factors discussed herein, we conclude that appellant's sentence to confinement for life without the possibility of parole is inappropriate in that it neither fits the circumstances in the record nor the offender.

CONCLUSION

Upon consideration of the entire record, the findings of guilty are AFFIRMED. We AFFIRM only so much of the sentence as provides for a dishonorable discharge, confinement for life with the possibility of parole, and reduction to the grade of E-1.

Judge EWING and Judge PARKER concur.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court