

**DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY**

UNITED STATES)	GOVERNMENT RESPONSE
)	TO DEFENSE MOTION FOR
v.)	APPROPRIATE RELIEF:
)	ILLEGAL PRETRIAL
1ST LT TRAVIS C. BAKER)	PUNISHMENT
Delta 4 Detachment 2 (SpOC))	
Buckley SFB, Colorado)	5 May 2023

MOTION RESPONSE

The United States, by and through counsel, hereby responds to the Defense motion to order administrative credit for illegal pretrial punishment.

SUMMARY

The Accused is charged with two specifications of violating UCMJ Article 113, Drunken Operation of a Vehicle, two specifications of violating UCMJ Article 107, False Official Statement, and two specifications of violating UCMJ Article 133, Conduct Unbecoming an Officer and a Gentleman. All charged misconduct took place on 14 and 18 October 2022.¹

Defense Counsel requests this Court award the Accused confinement credit from 21 October 2022 until the issuing of a sentence in this case due to alleged illegal pretrial punishment.² Defense Counsel's motion should be denied because the Accused was not subject to pretrial punishment. The Government respectfully requests denial.

BURDEN

As the moving party, the Defense bears the burden for this motion. RCM 905(c)(2). The burden of proof on any factual issue the resolution of which is necessary to resolve this motion is a preponderance of the evidence. RCM 905(c)(1).

FACTS

1. For the purpose of this response the Government agrees with the facts proffered in paragraph 1 and 2.

¹ See Attachment 1.

² See Attachment 2.

2. For the purpose of this response the Government agrees with the facts proffered in paragraph 3 with the addition of the fact that the 3 November 2023 Amendment to Pretrial Restraint Order implicitly lifted the order requiring the Accused to remain on Buckley Space Force Base.

3. For the purpose of this response the Government agrees with the facts proffered in paragraphs 4 through 6.

4. The Government disagrees with the facts proffered in paragraph 7 as Defense has offered these facts without substantiation (i.e., additional transportation costs or home address of Accused). In fact, the Government understands that the Accused's spouse has driven the Accused to work on some occasions. (Anticipated Testimony of [REDACTED]). Further, neither the Accused nor any of his defense counsel have complained or requested relief from any of the pretrial restraint orders until this motion on 1 May 2023, despite a paragraph in each order instructing the Accused on how to do so ("If you feel you need relief from this order at any time or if you have questions regarding its provisions, call the First Sergeant").³ Lastly, the Government was available to litigate this trial on 20 February 2023.⁴ The Accused could have chosen to proceed on that date with another defense counsel if these conditions are as onerous as Defense makes them out to be.

5. For the purpose of this response the Government agrees with the facts proffered in paragraph 8 with the clarification that the Accused made a request to his Commander that his Security Clearance be withdrawn, rendering him unable to perform the tasks for which he is trained to perform. (Expected testimony of [REDACTED].) The Government anticipates witness testimony at the motions hearing attesting to the inability of the Accused to reliably perform any task.

6. On the morning of 25 April 2023, the Accused was arrested again under the suspicion of being drunk on duty.

7. Between 24 October 2022 and 26 October 2022, the Accused was purchasing and consuming mouthwash at lodging while under pretrial restraint. (Expected testimony of [REDACTED].)

LAW

8. Pretrial punishment is forbidden in accordance with Article 13, UCMJ, 10 U.S.C. sec. 813, which states that:

"No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence..."

³ See Attachments 3-5.

⁴ See Attachment 6.

9. Article 13 protects the Fifth Amendment's basic guarantee that the Government will not take life, liberty, or property without due process of law. *United States v. Adcock*, 65 M.J. 18, 19 (C.A.A.F. 2007).

10. The Court of Military Appeals adopted a two-prong test to determine whether a violation of Article 13 has occurred. *United States v. James*, 28 M.J. 214 (C.M.A. 1989) (adopting the standard enunciated in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)). The Court should first decide whether the particular conditions were imposed with the intent to punish. *Bell*, 441 U.S. at 539. If the answer is "yes," the conditions are punishment, and the Court should consider a sentence credit. If the answer is "no," the Court should inquire as to whether the purposes purportedly served by the conditions are reasonably related to a legitimate governmental objective. *Bell*, 441 U.S. at 539.

11. With regard to pretrial punishment absent pretrial confinement, the courts apply a two-part test. *United States v. Washington*, 42 M.J. 547, 562 (A.F. Ct. Crim. App. 1997). First, courts ask whether the actions of which the accused complains were done with the intent to punish him. *Id.* Second, if there is no punitive intent, the court asks whether the actions complained of further a legitimate nonpunitive governmental objective. *Id.* With regard to the second part, the court specifically looks at the reasonableness of the conduct designed to secure the purported nonpunitive government objective. *United States v. Cruz*, 25 M.J. 326, 331 (CMA 1987). In Conditions which are "arbitrary or purposeless," will allow a permissible inference of a punitive purpose. *United States v. King*, 61 M.J. 225, 228 (C.A.A.F. 2005) (quoting *United States v. James*, 28 M.J. 214, 216 (C.M.A.1989)).

12. A trial judge may grant credit for any illegal pretrial punishment in violation of Article 13, UCMJ. See *United States v. Combs*, 47 M.J. 330 (C.A.A.F. 1997); *Cruz*, 25 M.J. at 331.

13. RCM 304(a) states, "Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement." RCM 304(a)(1) specifies that conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. RCM 304(a)(2) defines restriction in lieu of arrest as, "the restraint of a person by oral or written orders directing the person to remain within a specified limits".

14. RCM 304(c) states, "No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that: (1) An offense triable by court-martial has been committed; (2) The person to be restrained committed it; and (3) The restraint ordered is required by the circumstances." The Discussion section instructs that the decision on whether to impose pretrial restraint, and the type of pretrial restraint to be imposed should be made on a case-by-case basis and several factors should be considered. Some of those factor are: the nature and circumstances of the offenses; the weight of the evidence; the confinees character and mental condition; the likelihood the confinee can and will commit further serious criminal misconduct if allowed to remain at liberty.

ARGUMENT

The Accused's Pretrial Restraint was Ordered for the Safety of the Community, Not with Intent to Punish, And Should Therefore Not Be Considered Punishment

15. The Defense's request to award confinement credit to the Accused for the days from 21 October 2022 through the issuing of a sentence should be denied. The pretrial restraint placed on the Accused was necessary under the circumstances to protect both the community and the Accused. The Accused had been arrested twice within 4 days for DUI, an offense that endangers not only the accused but also the community. One of the factors to be considered when determining pretrial restrains is the likelihood of further criminal misconduct. Given the two DUI occurred in such a short period of time, there was an increased likelihood of further criminal misconduct, specifically DUI. Here, there was (1) probable cause that an offense triable by court-martial (violation of UCMJ, Article 113) had been committed; (2) that the Accused, the person to be under restraint, committed the violation; (3) the restraint was required under the circumstances, as the accused drove intoxicated in violation of Article 113, on two occasions within 4 days of each other. The restraint was required to protect the Accused, and the community. Therefore, the conditions of restraint were not punitive under UCMJ, Article 13, and no confinement credit should be granted.

16. There is no indication that the pretrial restraints placed on the Accused were done so with the intent to punish. As stated by [REDACTED] in the Pretrial Restraint Order⁵, the restraints placed on the Accused were not punishment ("...you will not be subject to punishment or penalty for the offenses which are the basis for your restraint. You will not be required to undergo punitive duty hours or training, perform punitive labor, or wear a special uniform."). Defense has offered no evidence to rebut this intent. As acknowledged by Defense, the Accused was given numerous opportunities for mental health and addiction treatment. While the Accused was ordered to remain within Buckley Space Force base (in addition with the order to refrain from consuming alcohol), he was found to be purchasing and consuming mouthwash.⁶ This further indicates the necessity of the pretrial restraints and illustrates the restrains were not punitive.

17. Additionally, he was not placed into pretrial restraint after the first DUI on 14 October, which also would have been justified. Instead, it was not until after two DUIs within days of each other that command determined to implement the restraint. Moreover, the fact that the pretrial restraints were amended as necessary to allow for such treatment further illustrates that these restraints were not intended to punish the Accused, but rather were intended to help him get better. As such, prong one of the two-prong test set out in *Bell*, is not met and sentence credit should not be considered. *Bell*, 441 U.S. at 539.

18. Despite the pretrial restraints prohibiting the Accused from possessing or consuming alcohol, on 25 April 2023, he was found to be Drunk on Duty in violation of Article 112, UCMJ.⁷ The continued misconduct by the Accused further indicates the necessity of the pretrial restraints and illustrates the nonpunitive purpose for the continued restraints.

⁵ See Attachments 3-5.

⁶ See Attachment 7-8

⁷ See Attachment 9.

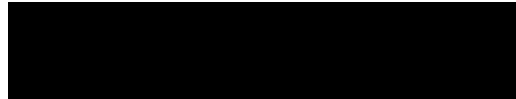
19. Defense's motion therefore fails the first prong of the *Bell* test. Even if you do find that the pretrial restraint was ordered with the intent to punish, however, the orders serve a legitimate nonpunitive government objective and are neither arbitrary nor purposeless. The restraints placed on the Accused were directly related to the UCMJ violations for which he had been arrested. The two-part test established in *United States v. Washington*, directs courts to ask 1) whether the actions taken against the accused were done with the intent to punish, and 2) if there is no punitive intent, was there a legitimate nonpunitive government objective. Here, the restraints placed on the Accused were prohibitions on driving and possessing and consuming alcohol. When taken under the circumstances, these restraints serve a legitimate nonpunitive purpose of keeping the Accused, as well as the community safe.

RELIEF REQUESTED

20. For the foregoing reasons, the Government respectfully requests that the Defense request to award confinement credit for the days from 21 October 2022 through the issuing of a sentence be denied.

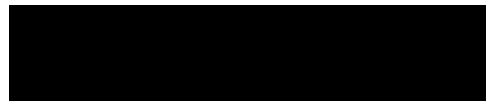
21. As the defense has requested a hearing under Article 39(a), UCMJ, the United States respectfully requests the same to present argument and evidence.

Respectfully Submitted,



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Assistant Trial Counsel

I certify that I uploaded a true copy of the above on the e-filing site and notified the Military Judge and Defense Counsel 8 May 2023.



PAIGE A. TERPSTRA, 1st Lt, USAF
Assistant Trial Counsel

9 Attachments:

1. *U.S. v Baker* Charge Sheet dated 19 January 2022 (3 pages)
2. Defense Motion for Appropriate Relief for Illegal Pretrial Punishment, dated 1 May 2023 (5 pages)
3. Pretrial Restraint Order, dated 21 October 2022 (2 pages)
4. Pretrial Restraint Order, dated 3 November 2022 (2 pages)
5. Pretrial Restraint Order, dated 9 December 2022 (2 pages)
6. CDO Docketing Memo, dated 25 January 2023 (1 page)

7. Lodging Information for Lt Baker, dated 24 October 2022 (1 page)
8. Lodging Sales Breakdown, dated 24 October 2022 (6 pages)
9. Letter of Reprimand, dated 26 April 2022 (3 pages)