IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	**FINAL BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Crim. App. Dkt. No. 19961044
Sergeant **WILLIAM J. KREUTZER, JR.** United States Army, Appellant	)	USCA Dkt. No. 11-0231/AR

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IN THE UNITED STATES COURT OF APPEALS
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U N I T E D S T A T E S Appellee, v. Sergeant **WILLIAM J. KREUTZER, JR.** United States Army, Appellant,	**FINAL BRIEF ON BEHALF OF APPELLANT** Crim. Appellant. Dkt. No. 19961044 USCA Dkt. No. 11-0231/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issue Granted

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION SEEKING ARTICLE 13 SENTENCE CREDIT FOR THE GOVERNMENT'S 278-DAY DELAY IN TRANSFERRING HIM FROM DEATH ROW AFTER THE COURT OF CRIMINAL APPEALS SET ASIDE THE DEATH SENTENCE AND AFFIRMED ONLY THOSE NON-CAPITAL CHARGES TO WHICH APPELLANT PLEADED GUILTY.

Introduction

On April 9, 2004, thirty days after the expiration of the government's right to accept, seek reconsideration, or appeal the Army Court's March 11, 2004 decision setting aside Sergeant William J. Kreutzer's [hereinafter Appellant] death sentence, Appellant should have been removed from death row and placed back into pretrial confinement. Despite this clear requirement and Appellant's multiple requests to be removed from

death row, Appellant's confinement status remain unchanged. The government never provided a lawful rationalization for keeping Appellant on death row 278 days longer than he should have been. The military judge and Army Court's failure to grant Appellant any relief under Article 13, UCMJ for this violation was error.

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (2008) [hereinafter UCMJ]; 10 U.S.C. § 866 (2008). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ; 10 U.S.C. § 867(a)(3) (2008).

Statement of the Case

On January 30, March 12 and 26, May 9, June 6 and 10-12 1996, Appellant was tried at Fort Bragg, North Carolina before a panel consisting of officer and enlisted members, sitting as a general court-martial. Pursuant to his pleas, Appellant was convicted of violating a lawful general order and larceny of military property, in violation of Articles 92 and 121, UCMJ; 10 U.S.C. §§ 892 and 921. Contrary to his pleas, Appellant was convicted of attempted premeditated murder (eighteen specifications) and premeditated murder, in violation of Articles 80 and 118(1), UCMJ; 10 U.S.C. §§ 880 and 918(1) (1994). The convening authority approved the adjudged sentence

of a reduction to the grade of Private E-1, total forfeitures of all pay and allowances, a dishonorable discharge, and death.

On March 11, 2004, the Army Court set aside Appellant's sentence and affirmed only those charges to which Appellant pled guilty. *United States v. Kreutzer*, 59 M.J. 773 (Army.Ct. Crim. App. 2004.) On May 10, 2004, the government filed a Motion for Reconsideration and Suggestion for En Banc Reconsideration. On June 10, 2004, the Army Court denied the government's Motion for Reconsideration and Suggestion for En Banc Reconsideration. The government appealed to this Court, which affirmed the Army Court's decision on August 16, 2006. This Court denied the government's petition for reconsideration on September 7, 2005. *United States v. Kreutzer*, 62 M.J. 211 (C.A.A.F. 2005). On September 14, 2005, this Court denied the government's motion to stay the mandate.

On March 24, 2009, Appellant was re-tried at Fort Bragg, North Carolina before a military judge sitting as a general court-martial. Pursuant to his pleas, Appellant was found guilty of one specification of premeditated murder and one specification of attempted murder, in violation of Articles 80 and 118(1),UCMJ; 10 U.S.C. §§ 880 and 918(1) (1994). Contrary to his pleas, Appellant was found guilty of sixteen specifications of aggravated assault and one specification of assault likely to produce death or grievous bodily harm, in

violation of Article 128, UCMJ; 10 U.S.C. § 828 (1994). The convening authority approved the adjudged sentence of reduction to the grade of E-1, total forfeitures of all pay and allowances, a dishonorable discharge, and confinement for life. Appellant was credited with 4,897 days of *Allen* Credit against his sentence.

On November 5, 2010, the Army Court affirmed the findings and sentence in Appellant's case. (JA 1-3). Judge Gifford dissented in part, finding that the government lacked a legal basis to continue holding Appellant on death row at the United States Disciplinary Barracks after the Army Court's March 11, 2004 decision. Judge Gifford concluded her dissenting opinion by stating that Appellant should receive appropriate sentence credit pursuant to Article 13, UCMJ and R.C.M. 305(k). *Id.* at 3.

On January 4, 2011, Appellant petitioned this Court for review. This Court initially granted Appellant's Petition for Grant of Review [hereinafter Petition] on March 31, 2011. On further consideration of Appellant's Petition, this Court rescinded its March 30, 2011 order and granted the modified issue on April 4, 2011.

Statement of the Facts

On September 21, 2004, Appellant filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus with

the Army Court, requesting an order releasing him from death row at the United States Disciplinary Barracks [hereinafter USDB]. The Army Court denied Appellant's Writ based on its having been divested of jurisdiction when this Court took jurisdiction of Appellant's case. *United States v. Kreutzer*, Misc. 20040953 (Army.Ct. Crim. App. September 24, 2004). Appellant subsequently filed his Writ with this Court on October 6, 2004. *United States v. Kreutzer*, Misc. No. 05-004/AR (C.A.A.F. October 6, 2004). This Court granted Appellant's Writ, ordering he be released from death row on January 5, 2005. *United States v. Kreutzer*, Misc. No. 05-8002/AR (C.A.A.F. January 5, 2005). This Court based its decision granting Appellant's Writ on Paragraph 12-6b, Army Regulation [hereinafter AR] 190-47, The Army Corrections System (April 5, 2004))(prohibiting the commingling of prisoners under sentence of death with "other than death sentence prisoners.") (JA 85-97, Encl. 1.)

On September 29, 2008, Appellant filed a Motion for Appropriate Relief with the military judge prior to his second court-martial, seeking remedies for multiple violations of Article 13, Uniform Code of Military Justice; [hereinafter UCMJ], 10 U.S.C. § 813, and Rule for Courts-Martial [hereinafter R.C.M.] 305(h), (i), and (k). (JA 85-97; JA 195-200; JA 209-245; JA 567; JA 576-580.) In addition to seeking *Allen* credit, Appellant sought relief for the government's improperly holding

him on death row in violation of Article 13, UCMJ (JA 576-580), and for improperly confining him on death row in violation of R.C.M. 305(h) and (i) (JA 85-97; JA 195-200.)

In denying Appellant relief for the government's Article 13 violation, the military judge found:

> (1) The command did not act in bad faith in failing to remove the accused from death row;
>
> (2) The command complied with CAAF's order that the accused be removed from death row and placed into appropriate custody;
>
> (3) The government's actions concerning the accused's removal from death row did not violate Article 13 and warrants no relief;
>
> (4) R.C.M. 305 was not violated, so no relief is warranted under R.C.M. 305(k); and,
>
> (5) There [was] no evidence before the court from which it [could] reasonably infer that the accused's command intended in any way to punish the accused in violation of Article 13.[1]

(JA 77-80.)

Death Row Status After March 11, 2004 Army Court Decision

Appellant remained on death row from the date of the Army Court's March 11, 2004 decision setting aside his death sentence until January 13, 2005. (JA 30; JA 209-245, Encl. 1). On June

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[1] The military judge also found that: (1) the government conducted timely and appropriate reviews of the accused's confinement status prior to the original trial and after the appellate court decisions in this case; and, (2) there was no evidence before the court which warranted any relief under R.C.M. 305(k). (JA 77-78; JA 80.)

22, 2004, The Judge Advocate General of the Army [hereinafter TJAG] ordered Appellant released from post-trial confinement. (JA 195-200, Encl. 1.) On July 13, 2004, the Clerk of the Army Court sent a memorandum to the Commandant reflecting TJAG's rescission of his June 22, 2004 order. (JA 195-200, Encl. 2.) In the July 13, 2004 rescinding memorandum, TJAG ordered the Commandant to conduct a review under Rule for Courts-Martial [hereinafter R.C.M.] 305 to "determine if there is a basis for Sergeant Kreutzer's continued confinement." *Id.* Despite the queries, the government did not release Appellant from post-trial confinement between the June 22, 2004 order and the July 13, 2004 rescinding order. There is also no evidence in the record the government held a pretrial confinement order in compliance with R.C.M. 305(h) and (i) after receiving TJAG's July 13, 2004 memorandum.

Appellant requested to be transferred from death row on multiple occasions. He made his first request to the Commandant of the USDB on July 6, 2004. (JA 44; JA 209-245, Encl. 15.) Appellant also directed his request for a transfer from death row to: (1) mental health at the USDB on July 22, 2004; and (2) the Commandant of the USDB once more on July 25, 2004. *Id.* On July 27, 2004, the Commandant notified Appellant of his intent to conduct a review under R.C.M. 305(h) to "determine whether

continued confinement at the USDB is warranted for you." (JA 209-245, Encl. 15.)

In August, 2004, the Commandant of the USDB purportedly held a pretrial confinement review. (JA 44; JA 85-97.) He determined at that time that Appellant: (1) committed an offense triable by a court-martial, and (2) that pretrial confinement was necessary because, if Appellant did not remain confined, he would not appear at any re-hearing on further proceedings and would engage in serious criminal misconduct. (JA 45.) Despite completing his purported pretrial confinement review, the Commandant did not afford Appellant an opportunity to physically attend the review, nor did a military magistrate conduct a review of the Commandant's pretrial confinement decision, as is required by R.C.M. 305(i). (JA 44-45; JA 195-200, Encl. 3.) Moreover, in conducting the purported review, the USDB Commandant did not consider taking Appellant off of death row. (JA 45; JA 209-245, Encl. 16.)

Appellant was notified of the results of the Commandant's review on August 25, 2004, only after Appellant had once again inquired about his death row status. Appellant continued to be treated as a death row inmate following the Commandant's purported review. (JA 209-245, Encl. 15.)

On September 13, 2005, the Acting TJAG ordered the USDB Commandant to release Sergeant Kreutzer, once again, from post-

trial confinement. (JA 85-97, Encl. 5.) Appellant remained in post-trial confinement. On January 13, 2005, nine days after this Court's January 5, 2005 order, Appellant was transferred from death row and placed into a Special Housing Unit on Protective Custody status where he was classified as a Medium Custody inmate. (JA 209-245, Encl. 1) Appellant's status as a Medium Custody inmate would change, without explanation, to that of a Maximum Custody Inmate when being transferred to the Camp LeJeune Brig on January 9, 2006.

During the hearing on Appellant's motion for sentence credit, the government argued that Appellant was still in post-trial status pending resolution of its specified issue to this Court. The government claimed that "no mandate releasing [appellant] from prison or releasing him from death row" was issued by the Army Court. (JA 45.)

Issue Granted

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION SEEKING ARTICLE 13 SENTENCE CREDIT FOR THE GOVERNMENT'S 278[2]-DAY DELAY IN TRANSFERRING HIM FROM DEATH ROW AFTER THE COURT OF CRIMINAL APPEALS SET ASIDE THE DEATH SENTENCE AND AFFIRMED ONLY THOSE NON-CAPITAL CHARGES TO WHICH APPELLANT PLEADED GUILTY.

A. LAW

Pursuant to Article 13, UCMJ:

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

As its language indicates, Article 13 prohibits two separate types of activities: (1) the intentional imposition of punishment on an accused prior to trial (i.e., illegal pretrial punishment); and, (2) pretrial conditions that are more rigorous than necessary to ensure the accused's presence at trial (i.e.,

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[2] While Appellant's reference to 278 days in his 2011 Supplement to Petition for Grant of Review formed the basis of the modified issue now before this Court, the minimum number of correct days to be credited Appellant should be 280 days. The figure of 280 days is based off of an April 9, 2004 (not April 11, 2004) start date (i.e., thirty days after March 11, 2005 was April 9, 2004 - not April 11, 2004.)

illegal pretrial confinement).

The protections afforded under Article 13 extend not just to pretrial confinees, but to Service Members "held for trial." *United States v. Combs*, 47 M.J. 330, 333 (C.A.A.F. 1997) (awarding pretrial credit to a Soldier whose command unlawfully punished him while he was awaiting re-trial by executing the rank reduction the Court had set aside from his first court-martial.)

Standard of Review

In reviewing a claim of illegal pretrial confinement, appellate courts will "defer to the findings of fact by the military judge where those findings are not clearly erroneous." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005) Whether the facts amount to a violation of Article 13, UCMJ is a matter of law this Court reviews *de novo*. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002); *see also United States v. Smith*, 53 M.J. 168, 170 (C.A.A.F. 2000); *see also United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997). Whether an individual is entitled to relief for an Article 13 violation is a mixed question of fact and law. *McCarthy*, 47 M.J. at 165.

Where an appellant can establish a violation of Article 13, the remedy must be effective. *United States v. Suzuki*, 14 M.J. 491, 493 (C.M.A. 1983)(citing *United States v. Larner*, 1 M.J.

371 (C.M.A. 1976)). In cases involving pretrial confinement that is illegal "for several reasons and the military judge concludes the circumstances require a more appropriate remedy, a one-for-one day credit limit is not mandated." *Id.*, at 493.

Pursuant to Article 66(e):

> The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the convening authority to take action in accordance with the decision of the Court of Criminal Appeals.

This Court has interpreted Article 66(e), UCMJ to mean that:

> [i]f the Judge Advocate General immediately decides not to pursue a case any further, there must be immediate notice to the convening authority of the opinion of the Court of Criminal Appeals and immediate direction to release an accused or conduct a hearing under RCM 305, Manual . . . on pretrial confinement.

United States v. Miller, 47 M.J. 352, 361 (C.A.A.F. 1997)(citing *United States v. Turner*, 47 M.J. 348 (C.A.A.F. 1997)

If not inclined to immediately accept a Court of Criminal Appeals' [hereinafter CCA's] decision setting aside a court-martial's findings and/or sentence, a TJAG has thirty days to accept a Court of Criminal Appeals' [hereinafter CCA] opinion or

pursue it further, either by seeking reconsideration or certifying the case to this Court. *Miller*, 47 M.J. at 361-62. (Article 66(e) contains a "formulation which implies . . . that the 30 days that Congress gave the Judge Advocate General to decide whether to certify a case is a reasonable period of time to withhold this release instruction.") During this thirty-day period, an accused has an inchoate interest in the decision and he is, therefore, still lawfully subject to the adjudged sentence, to include confinement. *Id.* at 361.

Even if a TJAG decides to certify to this Court, an appellant must either be released in accordance with the TJAG'S decision or a confinement review pursuant to R.C.M. 305 must occur once the thirty day period has expired. *Miller*, 47 M.J. at 362; *see also Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990)). (holding that "the servicemember must be released from confinement, unless and until the Government shows reasons, such as flight risk or obstruction of justice, that warrant keeping him in confinement.")

Failure by the government to timely seek reconsideration from the issuing service court, to certify to this Court, or to immediately notify an appellant of its decision not to challenge warrants relief in cases where an appellant remains confined after his sentence to confinement has been set aside by a CCA. *United States v. Combs*, 47 M.J. 330, 331 (C.A.A.F. 1997) (C.M.A.

1987)(ordering twenty-months confinement credit to appellant based on execution of his rank reduction after his first court-martial sentence had been set aside and before his second court-martial); *see also United States v. Duncan*, NMCCA 200800323 (N.M.Ct.Crim.App. Sept. 10, 2009)(unpub.)(granting credit to appellant for the fifty-seven additional days he served in confinement after the statutory 30-day reconsideration/appeal decision period had expired.)[3]

B. ARGUMENT

The military judge erroneously found that Appellant's command was correct in keeping appellant on death row after the Army Court had set aside his sentence and the thirty-day timeframe under Article 66(e) had expired. The only apparent explanation for this finding was the military judge's erroneous view of the law - i.e., that the government's appeal to this Court stayed the Army Court's decision to set aside Appellant's death sentence *during the full pendency of the appeal.* According to the military judge, "the accused's command was not required to release the accused from death row after the decision by the Army Court of Criminal Appeals *while the case*

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[3] A copy of the *Duncan* decision is included at Appendix C. *See Keys v. Cole*, 31 M.J. 228, 232 (C.M.A. 1990)(citing *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990)) for the general proposition that relief is warranted when an accused is caused to serve aspects of a sentence that have been set aside and not yet re-adjudicated.

was certified by TJAG to the Court of Appeals for the Armed Forces." (JA 77.) (emphasis added).

In reality, Appellant's status had changed from post-trial to pre-trial confinee as a matter of law after: (1) the sentence from his first court-martial was set aside, and (2) once the thirty-day time period for TJAG to make a decision and take action had expired. *See, e.g., Miller*, 47 M.J. at 362. Thereafter, Appellant should no longer have been required to endure confinement as a convicted prisoner. *See Combs*, 47 M.J. at 332 (indicating that "the courts will not tolerate . . . restrictions on [the] liberty [of an accused awaiting trial that is] so oppressive as to be more consistent with the status of prisoner.") Unlike Combs, who was not kept in confinement pending his second court-martial, Appellant was. Consequently, unlike Combs, who did not get confinement credit because he was "trapped in the twilight of the court-martial process, so to speak, adjudicated but unsentenced," Appellant was trapped behind bars under the most stringent of conditions. *Id.*, 47 M.J. at 331.

The law in cases such as Appellant's has been clear at least since *Moore* - after the thirty-day timeframe has expired, the government must either hold a pretrial confinement hearing to demonstrate "why the accused should be kept in confinement pending the conclusion of appellate review" or he should

immediately be released from confinement. *Id.*, at 253. The military judge had no basis, absent a pretrial hearing, to conclude that Appellant's move from death row could not come to fruition until that issue had run the appellate course.

Appellant's death row status after the Army Court's decision setting aside his death sentence and the government's failure to timely appeal violated Article 13, UCMJ. Appellant's continuing death row status specifically caused Appellant to endure more rigorous pretrial confinement conditions than was necessary to ensure his presence at his second court-martial. The military judge's decision not to grant Appellant any sentence relief under Article 13, UCMJ for his continuing death row status was unsupported by the law and warrants relief.

Relief

The government materially prejudiced a substantial right of Appellant when it failed to release him from death row after the Army Court set aside the underlying sentence. Even when the prospect of the death penalty no longer existed, Appellant was forced to endure the greatest of physical restrictions. This occurred despite the fact the law only allowed Appellant's confinement conditions to reflect his "reinstated" pre-trial status. The government's failure undermined Appellant's Article 13, UCMJ right not to be confined under conditions more restrictive than necessary to secure his presence at his second

court-martial. Appellant is, therefore, entitled to sentence relief. *See Mosby*, 56 M.J. at 310; *see also Suzuki*, 14 M.J. at 493. This Court has the authority to grant Appellant relief in light of the military judge's erroneous application of the law. *See Larner*, 1 M.J. at 372 ("If the [illegal] pretrial [confinement] error were not noted until review by the convening authority or appellate courts, the sentence would then be reassessed to render" what would have otherwise been judicial credit.)

To ensure Appellant is granted effective relief, this Court should award him ten days of credit for each of the 280 days he remained on death row after the government's allotted thirty days had expired. There is simply no excuse for the government's failure to transfer appellant from death row in a timely manner. The time restraints for releasing an appellant or holding a pretrial confinement review were clearly established in *Moore*, a case decided almost a decade before this Court ordered Appellant's release. Awarding Appellant **2800** (280 X 10) days for the government's failure will be effective in providing appellant meaningful and equitable relief, consistent with *Suzuki*. *see also Larner*, 1 M.J. at 371.

Conclusion

WHEREFORE, appellant respectfully requests this Court grant the requested relief.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Kreutzer, William J., Crim. App. Dkt. No. 19961044, Dkt. No. 11-0231/AR, was delivered to the Court and Government Appellate Division on May 3, 2011.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(d) because this brief contains 3,448 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2007 with Courier New, using 12-point type with no more than ten and ½ characters per inch.

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