IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Granted Issue

WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED APPELLANT'S MOTION SEEKING SENTENCING 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.

Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] Joint Appendix (JA) 1; UCMJ, art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).

Statement of the Case

> Pursuant to his pleas, appellant was convicted [in 1996] of a violation of a lawful general regulation and larceny of military property, in violation of Articles 92 and 121, Uniform Code of Military Justice [UCMJ]. Contrary to his pleas, appellant was convicted by a general court-martial composed of officers and enlisted members of attempted premeditated murder (eighteen specifications), and premeditated murder, in violation of Articles 80 and 118, UCMJ. A unanimous twelve-member panel sentenced appellant to death, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to Private E1.[3]

On March 11, 2004, consistent with appellant's pleas, the Army Court affirmed,

> only so much of the findings of guilty of Specifications 1-15, 17, and 18 of Charge I and Charge I as finds that appellant did assault with a loaded firearm the individuals named in Specifications 1-15, 17, and 18, in violation of Article 128, UCMJ, and of the Specification of Charge III and Charge III as finds that appellant did murder MAJ Stephen A. Badger while engaged in an act inherently dangerous to another. The court affirm[ed] the findings of guilty of the Specification of Charge II and Charge II and the Specification of Charge IV and Charge IV. The remaining findings of guilty and the sentence [were] set aside.[4]

After certification by The Judge Advocate General (TJAG), on August 16, 2005 this Court affirmed the Army Court's decision.[5] The case was returned to the convening authority for a rehearing.

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[3] *United States v. Kreutzer*, 59 M.J. 773, 774 (Army Ct. Crim. App. 2004).
[4] *Id.* at 784-85.
[5] *United States v. Kreutzer*, 61 M.J. 293 (C.A.A.F. 2005).

On rehearing, a military judge sitting as a general court-martial convicted appellant, pursuant to his pleas,[6] of one specification of attempted premeditated murder, premeditated murder, assault with a dangerous weapon, violation of a lawful general regulation, and larceny of military property, in violation of Articles 80, 92, 118, and 121, UCMJ.[7] The military judge also convicted appellant, contrary to his pleas,[8] of an additional sixteen specifications of attempted premeditated murder, in violation of Article 80, UCMJ.[9] The military judge sentenced appellant to reduction to the rank of Private (E-1), forfeiture of all pay and allowances, confinement for life, and a dishonorable discharge.[10] The convening authority credited appellant with 4,897 days (13 years, 4 months, 25 days) of pretrial confinement credit and approved the adjudged sentence.[11]

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[6] JA 74.
[7] JA 75, 76; JA 17 (Charge Sheet); 10 U.S.C. §§ 880, 892, 918, and 921. Charges II and IV were previously affirmed by the Army Court and were not at issue on rehearing.
[8] JA 74.
[9] JA 76; JA 17; 10 U.S.C. § 920 and 928.
[10] JA 80.
[11] Action.

Statement of Facts

> Early in the morning on 27 October 1995, appellant's brigade planned to conduct a unit run to mark their assumption of Division Ready Brigade duties in the 82d Airborne Division at Fort Bragg, North Carolina. As the troops moved out from their pre-run formation, appellant, hiding in a nearby wood line, opened fire on them, using two different rifles. Seventeen soldiers were wounded, and Major (MAJ) Stephen A. Badger was killed. Upon hearing the shooting and commotion, other soldiers exercising in the vicinity approached the area and came upon appellant in the act of shooting toward the brigade soldiers. They heroically tackled and subdued appellant.[12]

The Government immediately placed appellant into pretrial confinement on October 27, 1995, followed by a review under R.C.M. 305.[13] Appellant remained in pretrial confinement until his conviction and sentence; subsequently, he was transferred to the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas.[14]

Appellate Proceedings:

On March 11, 2004, the Army Court set aside appellant's death sentence and portions of the findings.[15] On May 10, 2004, the Government timely moved the Army Court to reconsider its decision, but the Army Court denied that motion on June 22,

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[12] *Kreutzer*, 59 M.J. at 774-75.
[13] JA 185. The Government confined appellant at the United States Marine Corps Brig at Camp Lejeune, North Carolina. JA 211, 320.
[14] JA 2; JA 211; 565.
[15] *Kreutzer*, 59 M.J. at 784-85.

2004.[16] That same day, the Clerk of the Court, acting on behalf of TJAG, directed the Commandant of the USDB to release appellant from post-trial confinement.[17] Six days later, however, on June 28, 2004, TJAG certified the case for review to this Court, pursuant to Article 67(a)(2), UCMJ.[18] Consequently, on July 13, 2004, the Clerk of the Court amended his previous order directing appellant's release, and replaced it with an order authorizing a review of appellant's confinement status.[19]

On July 26, 2004, consistent with TJAG's amended order, the Commandant of the USDB notified appellant that he would conduct an R.C.M. 305(h) review.[20] In response, appellant's trial defense counsel submitted a memorandum to the Commandant requesting appellant's removal from "death row" and his placement in the general post-trial prison population.[21] On August 25, 2004, the Commandant determined that appellant's continued confinement was appropriate.[22]

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[16] Supplemental Joint Appendix (SJA) 4. Appellant's Brief mistakenly states that the Army Court denied the motion to reconsider on June 10, 2004. AB at 3.
[17] JA 201; Army Regulation (AR) 27-10, Legal Services: Military Justice (16 November 2005), para. 13-8b.
[18] SJA 25.
[19] JA 202.
[20] JA 203. As the Government noted during the motions hearing at retrial, the October 27, 1995, order placing appellant in pretrial confinement remained valid. JA 65. Thus, the Commandant's hearing is better classified as a periodic review for continued confinement under R.C.M. 305(g). JA 168; JA 65.
[21] JA 204-205.
[22] JA 206.

Appellant's Extraordinary Writs While on Direct Review:

After the Commandant's decision to continue appellant's confinement, on September 21, 2004, appellant petitioned the Army Court for extraordinary relief, seeking his removal from "death row" and placement in medium security in the general inmate population of the USDB.[23] The Army Court denied appellant's writ.[24]

Subsequently, on September 29, 2004, appellant petitioned this Court for a writ of mandamus seeking similar relief.[25] On January 5, 2005, this Court granted appellant's writ in part, ordering that appellant be removed "from death row at the United States Disciplinary Barracks" and placed in appropriate custody in light of the circumstances and status of his case.[26] The Court based its decision on Army Regulation (AR) 190-47, para. 12-6b, which prohibits commingling death-sentenced prisoners with other than death sentence prisoners.[27] Eight days later appellant was removed from death row, but remained in the SHU classified as a medium custody inmate.[28]

On August 16, 2005, this Court affirmed the Army Court's March 11, 2004, decision setting aside the sentence and portions

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[23] JA 2; 109.
[24] JA 2; 109.
[25] JA 103.
[26] *Kreutzer v. United States*, 60 M.J. 453, 453 (C.A.A.F. 2005).
[27] *Id.*; JA 98.
[28] JA 211; 246.

of the findings.[29] Appellant's case was returned to XVIII Airborne Corps and Fort Bragg for a rehearing.[30]

Article 39(a) Session on Article 13 Violation at Rehearing:

At his rehearing, appellant filed a motion for appropriate relief claiming, among other things, that the Government improperly held him on death row in violation of Article 13, UCMJ.[31] The military judge denied appellant's Article 13 motion, finding that: (1) the command did not act in bad faith in failing to remove appellant from death row; (2) the command complied with this Court's order to remove appellant from death row in January 2005; and (3) there was no evidence from which he (the military judge) could reasonably infer that appellant's command "intended in any way to punish the [appellant] in violation of Article 13."[32]

Any additional facts necessary for the disposition of this case are set forth below.

Summary of Argument

Appellant argues, as he did at trial, that the time he spent on death row while not subject to a death sentence violated Article 13. The record does not clearly establish why appellant's command left him on death row from April 9, 2004 to

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[29] *Kreutzer*, 61 M.J. at 308.
[30] JA 81-84.
[31] JA 209.
[32] JA 77; 80.

January 5, 2005. Regardless, appellant still failed to meet his burden to produce evidence that the command intended to denounce, degrade, or in any way punish him. Moreover, any mistake by the command in not removing appellant from death row was reasonable because the law requiring his removal is unclear. Appellant's claim amounts to no more than a violation of AR 190-47, which standing alone, does not justify the conclusion that appellant's confinement was a form of punishment or penalty. Appellant failed to meet his burden of establishing a violation of Article 13, and he is entitled to no relief.

Applicable Law and Standard of Review

Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial (illegal pretrial punishment); and (2) arrest or pretrial confinement conditions more rigorous than necessary to ensure an accused's presence at trial (illegal pretrial confinement).[33]

"The first prohibition of Article 13 involves a purpose or intent to punish, determined by examining the intent of detention officials or by examining the purposes served by the restriction or condition, and whether such purposes are 'reasonably related to a legitimate governmental objective.'"[34]

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[33] *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); *United States v. Gilchrist*, 61 M.J. 785, 796 (Army Ct. Crim. App. 2005).
[34] *King*, 61 M.J. at 227-28; *United States v. McCarthy*, 47 M.J. 162, 165-167 (C.A.A.F. 1997); *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005).

This first prong does not necessarily require the accused be in any type of custody, as it can include public denunciations and degradations.[35] However, for the first prong to be violated there must be a finding that Government officials acted with "a purpose or intent to punish an accused before guilt or innocence has been adjudicated."[36]

The second prohibition of Article 13 prevents imposing "unduly rigorous circumstances during pretrial detention."[37] The inquiry on the second prong is focused upon the conditions of the accused's pretrial confinement and detention and whether they were "unduly rigorous." "[C]onditions which are 'arbitrary or purposeless,' and are 'not reasonably related to a legitimate' government objective, may allow a permissible inference of punishment."[38]

"The issue of whether appellant was subjected to pretrial punishment is a mixed question of law and fact."[39] This Court will not overturn a military judge's findings of fact, including a finding of no intent to punish, unless they are clearly

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[35] *United States v. Stringer*, 55 M.J. 92, 94 (C.A.A.F. 2001) (citing *United States v. Cruz*, 25 M.J. 326, 330 (C.M.A. 1987)).
[36] *McCarthy*, 47 M.J. at 165 (citing *Bell v. Wolfish*, 441 U.S. 520 (1979)).
[37] *King*, 61 M.J. at 227-28 (citing *McCarthy*, 47 M.J. at 165 and *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989)).
[38] *McCarthy*, 47 M.J. at 167 (citing *James*, 28 M.J. at 216).
[39] *United States v. Singleton*, 59 M.J. 618, 621 (Army Ct. Crim. App. 2003) *affirmed*, 60 M.J. 409 (C.A.A.F. 2005) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002).

erroneous.[40] But, this Court "conduct[s] a *de novo* review of the 'ultimate question whether an appellant is entitled to credit for a violation of Article 13.'"[41] The burden is on the appellant to prove, by a preponderance of the evidence, that there was a violation of Article 13 and that he is entitled to relief.[42]

Argument

A. Appellant failed to prove that his command intended to denounce, degrade, or punish him in any way.

As noted, the record in this case does not clearly establish the command's reasons for leaving appellant on death row from April 9, 2004, to January 5, 2005. But, it is appellant's burden to prove a violation of Article 13 by showing the command intended to punish him. Appellant failed to introduce or proffer any evidence that his command intended to punish him by keeping him on death row.

Moreover, the Court should not infer an intent to punish in this case because any error by the command was reasonable given the state of the law. Contrary to appellant's argument, the law governing when appellant should have been removed from death row

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[40] *Mosby*, 56 M.J. at 311; *McCarthy*, 47 M.J. at 165 (stating that purpose and intent are classic questions of fact).
[41] *Singleton*, 59 M.J. at 621 (quoting *Mosby*, 56 M.J. at 310).
[42] *United States v. Harris*, 66 M.J. 166, 168 (C.A.A.F. 2008) (citations omitted).

is, at best, unclear. And ultimately, the command's actions as a whole show that they did not intend to punish appellant.

Appellant argues that *United States v. Miller* and *Moore v. Adkins* govern the outcome here.[43] Pursuant to these two cases, appellant claims the law is clear: he became a pretrial confinee 30 days after the Army Court's decision setting aside the death sentence. Thus, as of April 9, 2004, appellant was no longer a post-trial prisoner, he had no sentence to death, and should have been removed from death row at that point. Any Government action to the contrary is a violation of "clearly established" timelines and indicates an intent to punish him.[44]

The law, however, is not as clear as appellant makes it out to be. Two points illustrate the confusion surrounding exactly when the Army Court's decision went into effect, requiring appellant's removal from death row. First, neither *Miller* nor *Moore* dealt with the specific facts of appellant's case, a point appellant previously acknowledged.[45] Those cases generally held that a service court's decision does not go into effect for 30 days, while TJAG decides whether to reconsider or certify the

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[43] AB at 15; *United States v. Miller*, 47 M.J. 352 (C.A.A.F. 1997); *Moore v. Adkins*, 30 M.J. 249 (C.M.A. 1990).
[44] AB at 1-2; 17.
[45] JA 204, para. 2 ("Furthermore, there is no clear Army regulatory guidance concerning this matter and the case law does not directly address Kreutzer's specific situation. (see, U.S. v. Miller, 47 M.J. 352 & Moore v. Adkins, 30 M.J. 429))."; *see also* SJA 9.

case.[46] Neither case addressed a scenario where the Government requested an extension to file for reconsideration; moved the court to reconsider; and then subsequently certified the case. Nor does it appear that Moore or Miller were in pretrial confinement pending their original trials.[47] Thus, as appellant previously noted, "there is no case law directly on point concerning the issue in this case...."[48]

Second, appellant has taken inconsistent positions on exactly when he became a pretrial prisoner not sentenced to death. During the Commandant's confinement review in July 2004, appellant argued forcefully that he "was not a pre-trial confinee" and "putting [him] in pretrial confinement [was] not appropriate."[49] Conversely, in his motion for relief at the rehearing, appellant argued that he immediately became a pretrial prisoner on the date of the Army Court's decision (March 11, 2004).[50] And finally, in subsequent motions (and at this Court), appellant maintained he became a pretrial prisoner 30 days after the Army Court's decision (April 9, 2004).[51] While

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[46] *Miller*, 47 M.J. at 361.
[47] *Moore*, 30 M.J. at 253 (stating that Moore was not in pretrial confinement); in *Miller*, there is no mention of the accused in that case being a pretrial prisoner at the time of the original trial. *See United States v. Miller*, 44 M.J. 549, 565 (A.F. Ct. Crim. App. 1996) (referring to accused's "pretrial restriction").
[48] SJA 9.
[49] JA 204, para. 3.
[50] JA 91; 95; 43.
[51] JA 225; 58.

appellant claims that the law is clear now, apparently it was not clear at the time of his original transfer request.

Finally, the command's overall actions in this case show that they did not intend to punish appellant. Appellant's command quickly complied with this Court's January 5, 2005 order to remove him from death row. Further, the command (including the Commandant, Deputy Commandant, and the Command Judge Advocate) provided timely responses to appellant's inquiries about his death row status in 2004.[52] These actions are simply not consistent with an intent to punish appellant.

In sum, this Court should not infer an intent to punish appellant because any error by the command was reasonable. The law in this area is not clear, so much so that appellant's own counsel had difficulty determining appellant's status. This was not a blatant disregard of well-established law, and it does not justify the inference that appellant's command intended to punish him.

B. Appellant failed to prove unduly rigorous circumstances during pretrial detention.

After this Court's January 5, 2005 order, the Commandant removed appellant from death row, but appellant remained in the SHU classified as a medium custody inmate.[53] While held for

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[52] JA 353-356.
[53] JA 211; 246.

retrial in 2006 and 2007, appellant was transferred to two different confinement facilities: Camp Lejeune, North Carolina and Charleston Naval Brig, South Carolina.[54]

Appellant claims that his continued death row status specifically caused him to "endure more rigorous pretrial confinement conditions" than were necessary to ensure his presence at trial. At no point, however, does appellant show how *his conditions* on death row were more rigorous than the conditions during the remainder of his pretrial confinement.

For example, he never alleges that, because he was on death row, he was prohibited from participating in vocational or religious courses.[55] Similarly, there's no evidence that he was required to spend more time in his cell because of his confinement on death row.[56] This is especially telling because appellant made these types of claims about the conditions at Camp Lejeune, but not about his time on death row.[57] In this case, appellant simply concludes - without any evidence - that on death row "he was trapped behind bars under the most

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[54] JA 476.
[55] Indeed, appellant's letter to the Commandant shows he was permitted to participate in courses while on death row. JA 205, para. 5.
[56] First Lieutenant (1LT) Arellano's sworn statement at JA 573-575 does not actually describe how much time appellant was required to spend in his cell while in protective custody as opposed to death row. He only states that appellant was permitted to have some level of interaction with other inmates in protective custody, which was not permitted on death row.
[57] JA 214, para. 5d, 5e.

stringent of conditions."[58] Because appellant never proved what those conditions were, or how they were unduly rigorous, he failed to carry his evidentiary burden under Article 13.

The only circumstances at issue in this case are the conditions of appellant's confinement; not the confinement itself.[59] At its core, appellant's Article 13 claim boils down to no more than a violation of AR 190-47, para. 12-6b, which prohibits commingling of death and non-death sentenced prisoners. This Court, however, has held several times that confinement in violation of a service regulation does not create a per se right to sentencing credit under the UCMJ.[60] Here, appellant should not receive sentencing credit because, as the military judge found, there is no evidence from which to infer an intent to punish, nor has he shown that the conditions were unduly rigorous. Consequently, appellant failed to prove a violation of either prong of Article 13, and he is entitled to no relief.

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[58] AB at 15.
[59] *United States v. Cox*, 30 C.M.R. 168, 169 (C.M.A. 1961)("Reversal of a conviction by appellate authority and the direction of a rehearing of the case generally leaves the proceedings in the same position as before trial."); *United States v. Von Bergen*, 67 M.J. 290, 296 (C.A.A.F. 2009)(Ryan, J. concurring).
[60] *United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007)(citing *King*, 61 M.J. at 228).

Conclusion

Appellant received 4,897 days of confinement credit, representing the number of days he spent in a jail cell between the day he murdered MAJ Badger on October 27, 1995, and his re-sentencing on March 24, 2009. The military judge did not abuse his discretion in denying appellant's request for additional confinement credit.

Therefore, the Government respectfully requests this Court affirm the Army Court's decision, and approve the findings and sentence in this case.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that the original was electronically filed to efiling@armfor.uscourts.gov and Ms. Wumie Konteh on 16 June 2011, and delivered to defense appellate counsel by hand on June 16, 2011.

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