

UNITED STATES OF AMERICA

AE033C

v.

MAJID SHOUKAT KHAN

Amicus Brief filed by James G. Connell, III
and Major Ann Marie Bush on behalf of
Ammar al Baluchi in Support of
Mr. Majid Khan's Defense Motion
To Apply Article 13, UCMJ in
Military Commission Proceedings

03 May 2019

1. Required Statements: Our names are James G. Connell, III and Major Ann Marie Bush, United States Air Force. We certify that Mr. Connell is licensed to practice before the highest courts of Virginia and Maryland, and that Major Bush is licensed to practice before the highest court of Ohio. We further certify:

a. We are detailed counsel for Ammar al Baluchi, also known as Ali Abdul Aziz Ali. Pursuant to Military Commissions Rule of Court 7(2)(b), we state that "the submission is only to be considered for its value as an *amicus* brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding."

b. We certify our good faith belief as licensed attorneys that the law in the attached brief is accurately stated, that we have read and verified the accuracy of all points of law cited in the brief, and that we are not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

2. Issue Presented: In *Bell v. Wolfish*, the Supreme Court held that pretrial detainees cannot be punished prior to trial under the Constitution's Due Process Clause.¹ The military has incorporated this right into Article 13 of the Uniform Code of Military Justice.² Violations of

¹ *Bell v. Wolfish*, 441 U.S. 520, 535, (1979).

² Article 13, UCMJ (2016).

Article 13 are remedied under Rule for Court Martial (RCM) 305(k) by awarding administrative confinement credit to the improperly punished detainee. While the Military Commissions Act of 2006 does not contain Article 13 or any reference to the treatment of pretrial prisoners, the protections of Article 13 and RCM 305(k) should nonetheless apply as the protections outlined in Article 13 are constitutionally protected rights under the Due Process clause and, even if they are not, the *ex post facto* clause would apply to Mr. Khan and any other similarly situated prisoner. Given that Mr. Khan was detained for years pretrial under horrifying conditions, he is entitled to a substantial sentencing credit under an analogue to RCM 305(k), or even the possibility of dismissal, for the government's egregious violations of Article 13 that he suffered while held in the CIA detention and interrogation program and after his transfer to Guantanamo Bay.

3. Statement of Facts: *Amicus* accepts the facts as stated by Mr. Khan. Further, Mr. Khan was captured by the CIA as part of the Rendition, Detention, and Interrogation (RDI) Program on March 5, 2003.³ Through this program, the CIA captured and detained alleged al Qaeda members and held them incommunicado in CIA black sites.⁴ While held at these black sites, the detainees were subjected to "Enhanced Interrogation Techniques (EITs)." The purpose of these interrogations was to persuade High-Value Detainees (HVD) to "provide threat information and terrorist intelligence in a timely manner."⁵ Mr. Khan was one of these HVDs.

³ REPORT OF THE SENATE SELECT COMMITTEE ON INTELLIGENCE COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY'S DETENTION AND INTERROGATION (UNCLASSIFIED), S. REP. NO. 113-288, at 89 n.497 (2014).

⁴ *Background Paper on CIA's Combined Use of Interrogation Techniques* (undated) (redacted), Fax from Central Intelligence Agency, to Dan Levin, Office of Legal Counsel, Department of Justice (30 December 2004) (released 24 August 2009) https://www.thetorturedatabase.org/files/foia_subsite/pdfs/DOJOLC001126.pdf (herein after Background Paper on CIA) at 2-3 (last accessed March 23, 2019).

⁵ Background Paper on CIA at 2.

Mr. Khan was held incommunicado in CIA black sites for three and a half years. During this time, he was unable to speak with family or contact an attorney. He was never given an opportunity to challenge his detention or seek relief from any court. Rather, the CIA, kept him under inhumane conditions and violated his liberty interests in nearly every conceivable way. At the black sites, HVDs were exposed to white noise/loud sounds and constant light.⁶ Mr. Khan, like all HVDs was subjected to forced nudity, sleep deprivation, and dietary manipulation.⁷ He was held in what was essentially solitary confinement from 2004-2006.⁸ He was hit in his face and stomach, thrown against walls, and doused with water.⁹ Mr. Khan was twice subjected to water torture:

Guards and interrogators brought him into a bathroom with a tub. The tub was filled with water and ice. Shackled and hooded, they placed Khan feet-first into the freezing water and ice. They lowered his entire body into the water and held him down, face-up in the water. An interrogator forced Khan's head under the water until he thought he would drown. The interrogator would pull Khan's head out of the water to demand answers to questions, and then force his head back under the water, repeatedly. Water and ice were also poured from a bucket onto Khan's mouth and nose when his head was not submerged.¹⁰

⁶ Background Paper on CIA at 4-5.

⁷ S. REP. NO. 113-288 at 89 n.497.

⁸ Press Release, Center for Constitutional Rights, Former CIA Detainee Majid Khan's Torture Finally Public (June 2, 2015) <https://ccrjustice.org/home/press-center/press-releases/former-cia-detainee-majid-khan-s-torture-finally-public> (last visited April 29, 2019).

⁹ Background Paper on CIA at 5-7.

¹⁰ Press Release, Center for Constitutional Rights, Former CIA Detainee Majid Khan's Torture Finally Public (June 2, 2015) <https://ccrjustice.org/home/press-center/press-releases/former-cia-detainee-majid-khan-s-torture-finally-public> (last visited April 29, 2019).

Mr. Khan was sodomized, sexually assaulted, and fed rectally.¹¹ Often the different techniques were combined so a detainee, such as Mr. Khan, was forced to stand in a stress position while naked, sleep deprived, and being water doused.¹² The express purpose of these techniques was to “eliminate” a detainee’s will and force them to cooperate with authorities.¹³ In Mr. Khan’s case, the techniques were severe enough to eliminate his will to live.¹⁴ The CIA’s goal in the interrogation was to “create a state of learned helplessness and dependence conducive to the collection of intelligence in a predictable, reliable, and sustainable manner.”¹⁵ The CIA intentionally subjected detainees to mental and physical pain and suffering as part of this process.¹⁶

Mr. Khan was transferred to Guantánamo in September 2006. After this transfer, he continued to suffer extensive abuse. Mr. Khan did not receive even a superficial review of his confinement until 15 April 2007, when he went before a Combatant Status Review Tribunal (CSRT).¹⁷ He was unable to meet with an attorney until 14 August 2007.¹⁸

¹¹ S. REP. NO. 113-288 at 115.

¹² Background Paper on CIA at 7-8.

¹³ Office of Medical Services (OMS), Central Intelligence Agency, *OMS Guidelines on Medical and Psychological Support to Detainee Rendition, Interrogation, and Detention* (December 2004) (redacted. released 24 August 2009) (hereafter *OMS Guidelines*), at 8 available at <https://www.cia.gov/library/readingroom/docs/0006541536.pdf>.

¹⁴ S. REP. NO. 113-288 at 114-115.

¹⁵ Background Paper on CIA at 1.

¹⁶ OMS Guidelines at 8.

¹⁷ *Verbatim Transcript of Combatant Status Review Tribunal Hearing for ISN 10020*, available at <https://ccrjustice.org/sites/default/files/assets/Majid%20Khan%20CSRT%20Transcript.pdf> at 1.

¹⁸ Gitanjali S. Gutierrez; *Going to See a Ghost: Majid Khan and the Abuses of the 'War on Terror'* (October 15, 2007) <https://ccrjustice.org/home/press-center/press-releases/going-see-ghost-majid-khan-and-abuses-war-terror> (last accessed 28 March 2019).

4. Law and Argument.

The right of pretrial detainees to be free from pre-conviction punishment has long been established as an important liberty. In *Bell v. Wolfish*, the Supreme Court held that under the Constitution's Due Process Clause, pretrial detainees cannot be punished.¹⁹ The government may hold people in jail to ensure they appear at trial and, while these detainees are in detention, their rights may be restricted, but these restrictions must be "reasonably related to a legitimate nonpunitive governmental objective."²⁰ Any restrictions that are "arbitrary or purposeless," are punishment.²¹ Absent proof of intent to punish, that determination generally will turn on "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned."²² The Supreme Court observed that:

loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.²³

Even before the Supreme Court's ruling in *Bell v. Wolfish*, the constitutional rights of detainees have been long acknowledged under the Uniform Code of Military Justice. Article 13, UCMJ provides:

¹⁹ *Bell*, 441 U.S. at 535.

²⁰ *Id.* at 538.

²¹ *Id.* at 539, 99 S.Ct. 1861.

²² *Id.*, quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69, (1963); see *Block v. Rutherford*, 468 U.S. 576, 584, (1984).

²³ *Id.* at 539 n.20.

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.

The development of Article 13 dates to the Revolutionary War and the original Articles of War.²⁴ A review of the history demonstrates the intentional way in which Congress acted to gradually increase rights of pretrial detainees under military jurisdiction and remove any semblance of pretrial punishment. Originally, the 1775 Articles of War did nothing to protect detainee rights. Article XLI discussed the treatment of pretrial service members. Under this Article, all pretrial detainees met with absolute confinement.

It provided:

To the end that offenders may be brought to justice; whenever any officer or soldier shall commit a crime deserving punishment, he shall, by his commanding officer, if an officer, be put in arrest; if a non-commissioned officer or soldier, be imprisoned till he shall be either tried by a court-martial, or shall be lawfully discharged by proper authority.

This Article remained unchanged until 1920. That year, Article 69 of the Articles of War 1920 was enacted. With this amendment, Congress took a view that was more “intelligent and humane” with regard to the treatment of pretrial detainees.²⁵ It provided that: Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require.²⁶

This article remained in effect until 1948, when the United States Congress passed the statute commonly known as the Elston Act, which was a comprehensive revision of the Articles

²⁴ *United States v. Bayhand*, 6 U.S.C.M.A. 762, 765-766 (1956).

²⁵ *Id.* at 765.

²⁶ Article of War 69 (1920).

of War and which also served as the precursor to the Uniform Code of Military Justice.²⁷ Included in the provisions was Article 16, which established for the first time protection for pretrial detainees. It stated: "...nor shall any defendant awaiting trial be made subject to punishment or penalties other than confinement prior to sentence on charges against him."²⁸

The 1949 Manual for Court-Martial expounded:

Any person subject to military law charged with crime or with a serious offense under the Articles of War shall be placed in confinement or in arrest as circumstances may require, but when charged with a minor offense only, he shall not ordinarily be placed in confinement... The character and duration of the restraint imposed before and during trial, and pending final action upon a case, will be the minimum necessary under the circumstances. No restraint need be imposed in cases involving minor offenses

Nor shall any accused who is confined while awaiting trial be made subject to punishments or penalties other than confinement for any offense with which he stands charged prior to execution of an approved sentence on charges against him.²⁹

It further stated:

"Confinement will not be imposed pending trial unless deemed necessary to assure the Accused's presence at trial, or because of the seriousness of the offense charged, as for an offense involving moral turpitude."³⁰

In 1950, Congress again updated the UCMJ and Article 16 became Article 13. The language of Article 13 was directly derived from Article of War 16 and the changes were

²⁷ Selective Service Act, Pub. L. No. 80-759, 62 Stat. 604, 627-44 (1948).

²⁸ Article of War 16 (1948).

²⁹ The Manual for Courts-Martial, U.S. Army (1949), para. 19.

³⁰ *Id.* at para. 19d(2)(c).

insubstantial.³¹ The legislative history demonstrates that lawmakers had become dissatisfied with the treatment of pretrial detainees and that the intent of Article 13 was to clearly establish a rule that distinguished the treatment of pretrial detainees from that of post-trial prisoners. The purpose of Article 13 was discussed by the House Armed Services Subcommittee during debate:

MR. SMART: . . . I might advise the committee that that likewise was a floor amendment during the consideration of 2575 and it was raised for the reason that apparently people who were confined pending trial were being subjected to rock breaking and everything else, the same as people who had already been convicted of offenses and happened to be incarcerated in the same place of confinement.

That is the reason for it. And this is merely a carry over from 2575.

MR. BROOKS. Is there any discussion on article 13?

MR. RIVERS. Well the case you have in mind is if you have a boy incarcerated for an alleged offense, unless he is just insubordinate in the jail there, there is the only time you can impose any disciplinary action?

MR. SMART. That is right.

MR. RIVERS. And in no case can you impose possible rock breaking on him.

MR. SMART. That is right.

MR. RIVERS. That is the case you have in mind.

MR. GAVIN. Yes.

MR. SMART. That is the intent of this article.

MR. GAVIN. In no case can rock breaking be imposed upon him, unless convicted.

MR. SMART. Correct.

MR. GAVIN. And sentenced for it.

MR. SMART. Correct.

MR. RIVERS. Sentenced for it as a result of conviction, I should say.

MR. LARKIN. Hard labor, that is right.³²

³¹ Article 13, UCMJ (1951). The words "the provisions of" were omitted as surplusage. The word "results" is changed to the singular. The word "may" is substituted for the word "shall". 10 USCS § 813 (1981).

³² Hearing on H.R. 2498 Before the H. Subcomm. on Armed Services, 81st Cong. 916-917 (1949).

This colloquy demonstrates that Congress recognized the sensitive position of pretrial detainees as individuals whose guilt had yet been established and that Congress intended at the inception of the new rule for these pretrial detainees to be treated preferentially.

Further, while the text of Article 13 remained substantially the same from 1949-1951, the enactment of the 1951 UCMJ again expanded the rights of pretrial detainees through the regulatory text. The UCMJ added the provision that:

. . . During such periods prior to the order directing execution of the sentence, an accused of those classes [pretrial detainees] will not be required to observe either duty hours or training schedules devised as punitive measures, nor required to perform punitive labor, nor required to wear other than the uniform prescribed for unsentenced prisoners, except that he may be subjected to minor punishment for infractions of discipline.³³

Article 13, as enacted in 1951, has remained unchanged to the modern day. The Court of Military Appeals described the changes as a recognition that “the earlier Articles of War... failed to take cognizance of the fact that confinement itself was a form of penal servitude, and that if the restraint imposed was more than that needed to retain safe custody, the unnecessary restrictions were in the nature of punishment.”³⁴ It is clear that the changes showed an intent by Congress to advance pretrial detainee protections and avoid the injustice that occurs when men and women whom the law presumes innocent are unfairly punished before they are given the opportunity to have their day in court.

Since the enactment of the modern day Article 13, the military has established a long and steadfast commitment to protecting the rights of pretrial detainees. These protections have advanced substantially since the Supreme Court’s confirmation of pretrial detainee’s rights in *Bell*

³³ UCMJ (1951) para.125.

³⁴ *Bayhand*, 6 U.S.C.M.A. at 768.

v. *Wolfish*. The prohibitions of Article 13 are commonly broken down into two categories.³⁵ The treatment of Mr. Khan violated both categories.

The first category bans treatment which 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."³⁶ The second prohibition of Article 13 prevents imposing "unduly rigorous circumstances" during pretrial detention.³⁷ Conditions 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.³⁸

a. *Treatment must be Tied to a Legitimate Government Objective*

Mr. Khan's pretrial treatment is punishment under the first category because the restrictions and conditions of confinement were not tied to a legitimate government interest. It is well established that coercing a confession is not a legitimate governmental objective."³⁹ The Supreme Court has held that in obtaining statements from an accused "neither the body nor mind of an accused may be twisted until he breaks."⁴⁰ In Mr. Khan's case the government's expressly stated

³⁵ *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005); see also *United States v. Harris*, 66 M.J. 166, 167-68 (C.A.A.F. 2008).

³⁶ *Bell*, 441 U.S. at 539; *United States v. McCarthy*, 47 M.J. 162, 165, 167 (C.A.A.F. 1997).

³⁷ *McCarthy*, 47 M.J. at 165; *United States v. James*, 28 M.J. 214, 216 (C.M.A. 1989).

³⁸ *Id.*

³⁹ *United States v. Fricke*, 53 M.J. 149, 155, (C.A.A.F. 2000).

⁴⁰ See *Culombe v. Connecticut*, 367 U.S. 568, 584 (1961).

intent, to “break” Mr. Khan in order to force him to cooperate with authorities.⁴¹ This intent was explicitly outlined in official government memorandums discussing how to treat Mr. Khan, and other HVDs, in order to maximize the detainees’ pain and stress and increase the likelihood of their cooperating.⁴²

CAAF similarly has held that detainees cannot be punished with the intent to coerce confessions. In *United States v. Fricke*, Appellant alleged that he was housed in a 6-feet by 8-feet cell within the Disciplinary Segregation Unit. According to an affidavit submitted by appellant, he was:

...kept [in his cell] 23 hours a day, was fed in his cell, and was not allowed to talk to other prisoners. He claims he was required to sit at a small school-like desk from 4:30 a.m. to 10:00 p.m. each day. He was not allowed to sit or lie on his bunk or to sleep. He was only allowed to read the Bible or some other Christian literature.

Appellant alleged, and a witness corroborated, that these conditions were imposed in an effort on the part of the brig to produce a confession from appellant. Appellant's affidavit stated that “[t]he Government's intent was clear and summed up by Senior Chief Jacobs, the senior counselor assigned to the Naval Brig and the counselor assigned to me during my confinement there. Senior Chief Jacobs told me on a number of occasions that the Government would keep me ‘locked down until they broke’ me.”⁴³

CAAF held that the conditions alleged in *Fricke* are “genuine privations and hardship over an extended period of time, which might raise serious questions under the Due Process Clause as

⁴¹ OMS Guidelines at 8.

⁴² *Id.*

⁴³ *Fricke*, 53 M.J. at 151-152.

to whether those conditions amounted to punishment.⁴⁴ The Court held the Appellant's conditions were far more onerous than would be required to assure his presence.⁴⁵ In addition, coercing a confession is not a legitimate governmental objective.⁴⁶ CAAF ultimately remanded the case for a *DuBay* hearing to determine the validity of the claims.⁴⁷

Examining *Fricke* makes clear that the basis for the treatment Mr. Khan received while in confinement has no valid justification under the law. It was not related to a legitimate government interest. Therefore, his treatment qualifies as pretrial punishment under the first type of Article 13 violation.

b. Treatment cannot be unduly rigorous

Mr. Khan's pretrial treatment also qualifies as punishment under the second category of Article 13 because the condition under which he was kept were "unduly rigorous".⁴⁸ Article 13 prohibits conditions that are "arbitrary or purposeless."⁴⁹ Such conditions raise an inference of punishment, even where there is not a stated intent to punish.⁵⁰ Detainees cannot be forced to submit to conditions that are unnecessary to ensure their presence for trial.⁵¹ In order for a pretrial detainee to be exposed to more rigorous than normal conditions or to be singled out, there must be

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 155.

⁴⁸ *McCarthy*, 47 M.J. at 167.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

an individualized showing that these conditions are warranted.⁵² In determining the level of restraint necessary, “the nature and seriousness of the offenses and the corresponding potential length of confinement are relevant factors” that may be considered, but a detainee may not be placed under significant maximum custody-type restraints based solely on the seriousness of the charges. When this is done, it warrants credit under Article 13.⁵³ Despite these restrictions on the treatment of pretrial detainees, the conditions under which Mr. Khan and others in his position were held were “brutal”.⁵⁴

In *United States v. King*, the appellant was held in solitary confinement as a part of his classification as a maximum security prisoner. King was “was singled out and suffered segregation in a six-by-six, windowless cell.” The government did not demonstrate an individualized basis for these restrictive conditions and, therefore, the Court held that the solitary confinement was an Article 13 violation. King received three days of administrative credit for each day he endured solitary segregation.⁵⁵

In addition to arbitrary solitary confinement, CAAF has held unduly harsh circumstances occur in many scenarios. Incommunicado detention, forced standing, the removal of clothing, and sleep deprivation: these conditions are far more onerous than would be required to assure the detainee's presence.⁵⁶ Additionally, “exposing a detainee to the cold and not being allowed to put

⁵² *King*, 61 M.J. at 229.

⁵³ *United States v. Harris*, 2007 CCA LEXIS 55, *5-6, (N.-M.C.C.A.2007), *aff'd* 66 M.J. 166, 168-169 (C.A.A.F. 2007). *See King*, 61 M.J. at 225.

⁵⁴ S. REP. NO. 113-288 at xxi.

⁵⁵ *King*, 61 M.J. at 229.

⁵⁶ *See United States v. Palmiter*, 20 M.J. 90, 99, (C.M.A. 1985). (The Government admitted that appellant was initially placed in a single cell about 6-feet by 7-feet, with a desk, toilet, chair, ad bed. He was only allowed to wear his undershorts, and to either sit at the desk or stand from 0400

on additional clothing” qualifies as punishment under Article 13.⁵⁷ The Supreme Court has held that conditions of confinement, including the temperature of an inmate’s cell, can be so bad as to warrant cruel and unusual punishment.⁵⁸ In fact, the government has, in its own memorandum declared the tactics used on Mr. Khan to be “coercive” and “punishment” intended to cause him physical and mental pain.⁵⁹

In Mr. Khan’s case, the level of restraint was above and beyond what CAAF has previously held to be punishment. For example, in *Singleton*, the Appellant was “exposed to cold temperatures... because the heat went out two times and it was not repaired...” and “a guard told appellant that he was not permitted to wear his physical training uniform under his hospital scrubs to stay warm.” In *Singleton*, the Court determined that the treatment amounted to punishment worthy of Article 13 credit.⁶⁰ Compare this inadvertent exposure to cold, to Mr. Khan, who was purposefully exposed to the cold for extended periods of time and stripped of his clothing for the express purpose of causing him pain and discomfort.⁶¹ What’s more, compare *Singleton*’s inadvertent exposure to Mr. Khan’s experience of being dunked into ice water, having his head

hours to 2200 hours. His only reading materials were a Bible and the brig regulations. He was not allowed to write or receive letters, lie on the bed between reveille and taps, or communicate with other prisoners.)

⁵⁷ *United States v. Singleton*, 59 MJ 618, 656-666 (A.C.C.A. 2003), *aff’d* 60 MJ 409, (C.A.A.F. 2005). In *Singleton*, the Army Court of Criminal Appeals remanded the case for a *DuBay* hearing related to the pretrial treatment of the Accused and to determine whether and to what degree credit was warranted.

⁵⁸ *Wilson v. Seiter*, 501 U.S. 294, 303 (1991).

⁵⁹ OMS Guidelines at 8-9.

⁶⁰ *Singleton*, 59 MJ at 656-626.

⁶¹ OMS Guidelines at 10-11.

held under water and water poured down his throat in an effort to simulate drowning.⁶² Certainly in *Singleton*, the guards and prison did not intend for the heat to go out. There was no primary purpose to punish the Accused in that case by denying him clothing. It is likely the guard was simply enforcing existing rules, even when it was illogical. Mr. Khan on the other hand was systematically exposed to cold while naked for long periods of time.⁶³ It was determined exactly how much of this exposure he could physically stand before it damaged his health and then his conditions were pushed right up to the line.⁶⁴ When Mr. Khan was waterboarded, the government even recognized how dangerous this torture method could be by specifically requiring a physician to be present to ensure that the interrogators didn't inadvertently kill him.⁶⁵ There is no realistic comparison between these two cases, but yet, if even *Singleton*'s far less egregious experience was deemed to be punishment worthy of pretrial confinement credit. This sort of treatment is clearly unduly rigorous and above and beyond what the court considered punishment in *Singleton*.

In *Bell*, the Supreme Court, with what they seemingly thought was over-exaggeration, denounced "loading a detainee with chains and shackles and throwing him in a dungeon."⁶⁶ Given Mr. Khan's treatment at the hands of the government, it appears Mr. Khan would have begged for a dungeon in lieu of the water boarding, anal rape, sexual assault, and beatings he received. Mr. Khan's treatment represented a level of restraint and severity of treatment far more rigorous than

⁶² Press Release, Center for Constitutional Rights, Former CIA Detainee Majid Khan's Torture Finally Public (June 2, 2015) <https://ccrjustice.org/home/press-center/press-releases/former-cia-detainee-majid-khan-s-torture-finally-public> (last visited April 29, 2019).

⁶³ OMS Guidelines at 10-11.

⁶⁴ *Id.*

⁶⁵ OMS Guidelines at 9.

⁶⁶ *Bell*, 441 U.S. at 539 n.20.

what was necessary to ensure his presence at trial. These restraints were imposed on him without any individualized showing necessity simply because of the crimes of which he was accused. Mr. Khan's treatment shows a blatant disregard for Mr. Khan's rights and a clear intent to punish him pretrial in violation of the due process clause,

Bell v. Wolfish, and Article 13.

c. *The remedy for article 13 violations*

Chief Justice Marshall cautioned that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."⁶⁷ A government cannot be called a "government of laws, and not of men . . . if the laws furnish no remedy for the violation of a vested legal right."⁶⁸ As established, the right of Mr. Khan to be free of pretrial punishment has been trampled on, but ruling this, with nothing more is useless, both for Mr. Khan and the future of the Republic.

When violations of pretrial detainee rights occur, the military justice system steadfastly punishes the government for noncompliance with Article 13. The standard remedy is for the trial court to liberally grant administrative credits against the aggrieved prisoner's adjudicated sentence.⁶⁹ In fact, detainees have a *per se* right to administrative credit for Article 13 violations.⁷⁰ This remedy works as an effective balance to ensure that the justice system is as committed to detainees rights as the law requires.

RCM 305(k), UCMJ, is the primary vehicle through which Article 13 credit is given. RCM

⁶⁷ *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

⁶⁸ *Id.*

⁶⁹ *See United States v. Zarbatany*, 70 M.J. 169, 174 (C.A.A.F 2011).

⁷⁰ *United States v. Adcock*, 65 M.J. 18, 24 (C.A.A.F 2007).

305(k) allows the military judge to order additional credit for each day of pretrial confinement that involves an “abuse of discretion or unusually harsh circumstances.” The “additional credit” is not limited to day for day credit for unlawful pretrial punishment, but where appropriate, the Military Judge has authority to increase the credit award as much as he or she deems appropriate under the circumstances.⁷¹

However, the military judge is not limited to granting sentencing credits. Article 13, UCMJ, relief “can range from dismissal of the charges, to confinement credit or to the setting aside of a punitive discharge.”⁷² Dismissal is appropriate where no other remedy can appropriately remedy the Government’s violations.⁷³ “Where relief is available, meaningful relief must be given...”⁷⁴

In the military justice system three for one credit is common for violations of Article 13. The list includes violations of Article 13 stemming from Accused’s being placed in improper solitary confinement, for Accused being forced to stay in unreasonably cold cells, for detainees having their clothes removed improperly, among others.⁷⁵ Given the significant disparity between the treatment Mr. Khan received and the type of treatment that typically warrants multiple day over day confinement, it is clear that significant credit is necessary to remedy the government’s egregious conduct. This is especially true given that the government acted purposefully against Mr. Khan to deprive him of his Due Process rights. His case must be given an appropriate remedy that takes into account the incredibly harsh conditions he was held under, the government’s intent to cause him suffering, and the great length of time under which Mr. Khan was forced to stay in these conditions. Given all of this, the only appropriate remedy in his case may be dismissal.

⁷¹ *United States v. Suzuki*, 14 MJ 491, 493 (C.M.A. 1983).

⁷² *Zarbatany*, 70 M.J. at 170.

⁷³ *United States v. Fulton*, 55 MJ 88, 89 (2001, C.A.A.F.).

⁷⁴ *Zarbatany*, 70 M.J. at 170.

⁷⁵ *See Suzuki*, 14 MJ at 493.

d. Other RCM 305(k) administrative confinement credit

In addition to Article 13 credit, the UCMJ also provides a series of additional protections under RCM 305(k) that, when violated, result in administrative credit off the adjudged sentence. These protections are intended to ensure that individuals are not being unjustly deprived of their liberty. Credit for violations are in addition to any Article 13 credit received by the confine for pretrial punishment.⁷⁶ These protections provide a laundry list of specific and concrete steps that must be taken at clearly defined benchmarks anytime a detainee's liberty is being restricted or removed through confinement or conditions tantamount to confinement.⁷⁷

R.C.M. 305(k) provides in relevant part:

The remedy for noncompliance with subsections (f) [right to military counsel], (h) [right to a commander's review], (i) [right to a probable cause review within 7 days], or (j) [judicial review] of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance.

Three of these four protections were improperly denied to Mr. Khan, specifically, his right to counsel, the commander's review, and the military magistrate's review.

Mr. Khan's right to a review of his confinement was flagrantly violated. He was never given any sort of review of his detention for four years and one month from the time of his detainment until he went before a CSRT. Mr. Khan was never given an opportunity to speak with an attorney until four years and five months after his detainment and not until after his CSRT had already occurred. These are gross violations of the protections outlined in RCM 305 he deserves day for day credit for each of these violations in addition to the credit he receives under Article 13.

⁷⁶ RCM 305(k), UCMJ.

⁷⁷ RCM 305(f), (h), (i)

Further, under RCM 305(k), the Military Judge should award additional credit for the gross abuse of discretion that took place in denying him his due process rights and his right to an attorney.⁷⁸

e. Credits are applied administratively

Under the UCMJ, credit for illegal pretrial punishment is applied administratively, rather than judicially, against the adjudged sentence.⁷⁹ The right to administrative credit is an important one. While any credit against a sentence is always beneficial, administrative credit is particularly so due to the impact it can have on detainees' sentences.⁸⁰

Administrative credit is applied against the approved sentence to confinement after trial. When a military judge orders an administrative credit, it is annotated in the report of result of trial. Confinement officials then reduce the term of confinement by the appropriate amount. When the Convening Authority approves the sentence, at a minimum, the promulgating order must account for any administrative credit ordered by the Military Judge.⁸¹ After the promulgating order is published, confinement officials make further adjustments to the sentence, if necessary.⁸²

⁷⁸ See *United States v. Mack*, 65 M.J. 108 (C.A.A.F. 2007). (While the appellate case does not address this issue directly and faulted the trial judge in other areas, CAAF seemed to support the trial judge's decision to award credit for Constitutional violations. The judge also took exception that the accused's telephone conversations to his counsel were monitored which "chilled his ability and freedom to speak in a protected environment under the attorney/client relationship, intruding upon [Appellant's] ... Fifth and Sixth Amendment rights to counsel." Accordingly, the trial judge found these restrictions were violations of his constitutional rights and warranted day for day credit.)

⁷⁹ RCM 305(k), UCMJ.

⁸⁰ Major Michael G. Seidel, *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*, 1999 ARMY LAW. 1 (August, 1999).

⁸¹ The Convening Authority typically has the discretion to reduce a sentence in addition to any credit given by the military judge, although there are exceptions, for example in cases involving a sexual assault.

⁸² *Id.*

Judicial credit differs from administrative credit in that it reduces the adjudged sentence at trial. Judicial credit is essentially a form of evidence in mitigation. The military judge considers the evidence and subsequently reduces the sentence. For some prisoners, this ends up being a remedy without a benefit. Even worse, some may actually serve more time in confinement than a similarly sentenced service member who gets administrative credit.⁸³ There are two primary reasons this could occur: first is a pretrial agreement and second is due to the way confinement facilities calculate good time credit.

Take this example from *Giving Service Members the Credit They Deserve: A Review of Sentencing Credit and Its Application*:

Assume two [detainees] both receive an adjudged sentence of thirty-six months, have pretrial agreements limiting confinement to eighteen months, and are given thirty days credit for their respective pretrial punishment. When the convening authority approves the eighteen month sentence, [Detainee] A's term of confinement is administratively reduced to seventeen months. [Detainee] B, however, receives the full eighteen-month approved sentence. While the military judge reduces his adjudged sentence to thirty-five months, the convening authority still approves the pretrial agreement limitation of eighteen months. Whether or not one considers [Detainee] B's result as just, [Detainee] A received a bonafide credit, while [Detainee] B's credit was preempted by the pretrial agreement. [Detainee] B received "no meaningful . . . credit at all."⁸⁴

In a second example: Assume two detainees each receive a six month sentence to confinement without any pretrial agreement. Both detainees are awarded 30 days of pretrial confinement credit, but Detainee A receives administrative credit and Detainee B receives judicial credit. Both detainees earn all the good time credit allowable and good time credit rate is five days per month for confinement term of less than one year:

Because of the way good time abatement credit is earned at the confinement facility, [detainee] A would serve a total of four months in confinement; but

⁸³ *Id.*

⁸⁴ *Id.*

[detainee] B, who also received thirty days of credit for pretrial punishment, would serve four months and five days. This occurs because the basis for earning good time credit is the adjudged sentence at trial adjusted for any pretrial agreement limitations... [Detainee] A earned thirty days good time credit based on his six month adjudged sentence. This good time credit combined with the thirty days of administrative Article 13 credit reduces the total term of confinement to four months. [Detainee] B, however, can only earn twenty-five days of good time credit. Because [detainee] B received judicial Article 13 credit, which reduced his adjudged sentence to five months, his basis for earning good time credit was only five months. Therefore, [detainee] B earned twenty five days of good time credit, which reduced his total term of confinement to four months and five days.⁸⁵

In this way, the military justice system is markedly different from the Federal system. In the Federal Court system, there are no laws or regulations that explicitly address issuing credit for pretrial punishment. The only place the Federal courts allow for the consideration of a detainee's pretrial conditions is in Section 5K2.0 of the United States Sentencing Guidelines (USSG), which outlines the permissible basis for a departure from the federal sentencing guidelines. This section does not specifically allow for a departure due to pretrial punishment, but some Federal courts have used Section 5K2.0 (a)(2)(b) to award a downward departure when pretrial confinement is particularly harsh. Under Section 5K2.0, a sentencing court may depart if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines."⁸⁶ Based on this, several circuits have held that pretrial conditions of confinement conditions may in appropriate cases be a permissible basis for downward departures.⁸⁷ This may occur when the conditions in question [were] extreme to an exceptional degree and their severity [fell] upon the defendant in

⁸⁵ *Id.*

⁸⁶ USSG § 5K2.0 (quoting 18 U.S.C. 3553 (b)).

⁸⁷ See *United States v. Brinton*, 139 F.3d 718, 725 (9th Cir. 1998); *United States v. Carty*, 264 F.3d 191, 196 (2d Cir. 2001); *United States v. Sutton*, 973 F. Supp. 488, 492 (D.N.J. 1997);

some highly unusual or disproportionate manner."⁸⁸ When a downward departure is granted under the Federal system, this is essentially a form of judicial credit.

The rights afforded to Mr. Khan under the military justice system: the award of administrative credit as opposed to judicial credit and the greater protections over his right to be treated justly pretrial, are far superior. The grant of administrative credit only avoids potential "absurdity," by avoiding the possibility of granting a remedy without a relief."⁸⁹

f. Ex post facto

Prior to the enactment of the MCA of 2006 and the removal of Article 13 protections, Article 13 and RCM 305 would have been applied to all military trials, both military commissions' trials and courts-martial.⁹⁰ In *United States v. Hamdan*, the Supreme Court analyzed the principle of uniformity between courts-martial and military commission procedure.⁹¹ The Court held that Congress mandated parity of [p]retrial, trial, and post-trial procedures between courts-martial and military commissions.⁹² Therefore, the absence of effective action establishing a departure, "the rules [of] courts-martial must apply."⁹³ At the time that Mr. Khan committed his offenses, there had not been any actions establishing a departure from the UCMJ with regard to Article 13 or RCM 305. Therefore, these provisions applied to Mr. Khan at the time his offenses were committed and at the time his detention began.

⁸⁸ *United States v. Mateo*, 299 F.Supp. 2d 201, 208 (S.D.N.Y. 2004).

⁸⁹ *United States v. Gregory*, 21 M.J. 952, 957 (A.C.M.R. 1986), *aff'd*, 23 M.J. 246 (C.M.A 1986).

⁹⁰ *Hamdan v. Rumsfeld*, 548 U.S. 557, 624-625 (2006).

⁹¹ *Id.* at 623.

⁹² *Id.* at 624-625

⁹³ *Id.* at 624.

In 2006, Congress enacted the Military Commission Act (MCA) of 2006.⁹⁴ The law codified a separate set of rules intended to govern the military commissions in lieu of the UCMJ. The MCA was modified in 2009 and this is the law under which the commission are currently operating. The MCA is based on the UCMJ, but has important distinctions. One of those distinctions is the removal of Article 13 and RCM 305.

The removal of Article 13 from the Uniform Code of Military Justice ultimately should have no impact on the rights of Mr. Khan or others whose alleged crimes were committed prior to the enactment of the MCA. The rights codified in Article 13 are simply an extension of rights that were clearly established as constitutional rights under *Bell v. Wolfish*. Removing Article 13 certainly cannot remove the constitutional protections that the Supreme Court has granted to pretrial detainees. This is especially true given that the Supreme Court has specifically banned the exact type of behavior that the government engaged in against Mr. Khan.⁹⁵ The Supreme Court has held that while interrogations are important, in their extreme form, they have been rejected.⁹⁶ "The Constitution proscribes such lawless means irrespective of the end."⁹⁷ Given the extensive long term "lawless" inflicted upon Mr. Khan in order to illegally extract a confession from him, the government's behavior remains unconstitutional, even if Article 13 did not exist. Therefore, the removal of Article 13 would not impact the finding of illegal pretrial punishment against Mr. Khan.

The removal of Article 13 and RCM 305(k) do however greatly and impermissibly impact

⁹⁴ Military Commissions Act of 2006 (2006 MCA).

⁹⁵ See *Culombe*, 367 U.S. at 588 (citing *Chambers v. Florida*, 309 U.S. 227, 240-241 (1940)).

⁹⁶ *Id.*

⁹⁷ *Id.*

the remedy. Given that Mr. Khan's charged conduct took place between 2002-2003, before enactment of the Military Commission Act, military courts were permitted to award Article 13 credit.⁹⁸ Removing RCM 305(k), leaves no law or regulation that would award similar credit to Mr. Khan. This means he would be left to rely on some amorphous theory of judicial credit to remedy his illegal pretrial punishment, similar to how it is applied in the Federal system. As established, this is wholly inadequate and would leave Mr. Khan in a position of having his sentence unlawfully increased. Mr. Khan is entitled to administrative RCM 305(k) credit for any Article 13 violations. The United States Constitution's prohibition on *ex post facto* laws bars removing this right.⁹⁹

The Constitution states that "No Bill of Attainder or *ex post facto* law shall be passed."¹⁰⁰

Ex post facto laws consist of:

- 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action;
- 2d. Every law that aggravates a crime, or makes it greater than it was, when committed;
- 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed; and
- 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.¹⁰¹

⁹⁸ *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984); *Suzuki*, 39 M.J. at 1083.

⁹⁹ U.S. CONST. art. I, § 9, cl. 3

¹⁰⁰ U.S. CONST. art. I, § 9, cl. 3.

¹⁰¹ *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798); *see also Stogner v. California*, 539 U.S. 607, 611 (2003) (*Calder* provides the "authoritative account of the scope of the *Ex Post Facto* Clause").

In this case, the removal of Article 13 is the third type of ex post facto law because the change in law creates a significant risk of increasing the punishment for a given crime.¹⁰²

In *Peugh v. United States*, the Supreme Court invalidated the retrospective application of the 2009 Federal Sentencing Guidelines (“Guidelines”) to conduct that occurred in 1999 and 2000.¹⁰³ The advisory Guidelines range was 30 to 37 months at the time of the offense and under the 2000 Guidelines, but it had increased to 70 to 87 months by the time of trial and under the 2009 Guidelines. The Court invalidated the defendant’s sentence of 70 months under the 2009 Guidelines. “[T]here is an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense.”¹⁰⁴ Additionally, “a law can run afoul of the Clause even if it does not alter the statutory maximum punishment attached to a crime.”¹⁰⁵ And “the coverage of the *Ex Post Facto* Clause is not limited to legislative acts.”¹⁰⁶

Like the advisory Guidelines at issue in *Peugh*, the removal of Article 13 and RCM 305(k) credit creates a significant risk of increased punishment by denying Mr. Khan, and any Accused subjected to illegal pretrial punishment, administrative sentencing credit for the violation of their constitutional and procedural rights. This “offend[s] ‘one of the principal interests that the *Ex Post*

¹⁰² *Garner*, 529 U.S. at 250 (2000).

¹⁰³ *Peugh v. United States*, 133 S. Ct. 2072 (2013).

¹⁰⁴ *Id.* at 2078.

¹⁰⁵ *Id.* at 2086.

¹⁰⁶ *Id.*

Facto Clause was designed to serve, fundamental justice.”¹⁰⁷ Accordingly, the Commission should find that the removal of Article 13 and RCM 305(k) is an *Ex Post Facto* law and that justice requires applying its provisions and the associated case law to all defendants being tried under the MCA whose crimes were committed prior to the enactment of this law.

In addition to simply enforcing Mr. Khan’s rights, providing Mr. Khan administrative sentencing credit for the crimes of government serves an even more powerful purpose. Mr. Khan committed very serious crimes against the United States. It is imperative to the rule of law that those who commit crimes are appropriately punished and rehabilitated. Equally however, it is imperative that the government be punished when it violates the law and the Constitution. Backward-looking remedies can deter future violations by both offenders. Just as with criminal offenders, government officials or agencies must know that they will be held to account. This will encourage them not commit future violations. The government’s violations in this case are incredibly serious. They involve behavior by government agencies that most Americans never thought possible prior to their revealing in 2006. These actions are contrary to the principals our Country has built and prided itself since its inception. A message much be sent, both to the government and to the public that the Constitution will always prevail over injustice and the rights of the people will be enforced against government overreach.

There is no question that the government engaged in behavior that violated the Constitutional rights of Mr. Khan under *Bell v. Wolfish*. His treatment was cruel, arbitrary, and completely disengaged from any legitimate government interest. Far from having his liberty protected while in pretrial confinement, Mr. Khan suffered treatment that amounted to more than simply punishment, but by any objective standard constituted cruel and unusual punishment and

¹⁰⁷ *Id.* at 2088 (citation omitted).

actual torture. Mr. Khan deserves an appropriately tailored remedy, up to and including dismissal of his case pursuant to RCM 305(k) and Article 13.

5. **Request for Oral Argument:** Amicus requests oral argument.

//s//

JAMES G. CONNELL, III
Learned Counsel

//s//

ANN MARIE BUSH
Major, USAF
Defense Counsel

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Attachment A

CERTIFICATE OF SERVICE

I certify that on the 3rd day of May, 2019, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

//s/
JAMES G. CONNELL, III
Learned Counsel