

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

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| UNITED STATES OF AMERICA v. MAJID SHOUKAT KHAN | AE 0330 RULING Government Motion to Reconsider AE 033K 18 February 2021 |
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1. BACKGROUND:

a. In May 2019, the Accused, through counsel, requested that the Military Judge find that he is entitled to meaningful relief for illegal pretrial punishment.¹ In their response, the Government recognized the Accused's right to request relief, but argued the proper mechanism for seeking such relief is presenting the evidence to the panel as extenuation and mitigation and/or the Convening Authority in clemency.² Ultimately, the Government takes the position that military judges lack authority to grant any such credit. In their reply, the Defense noted, *inter alia*, that confinement credit and pretrial punishment credit are not interchangeable.³

b. The parties and amicus filed several additional pleadings which are outlined in the Commission's ruling in AE 033K.⁴ On 21 November 2019, the Commission held an R.M.C. 803 motions hearing session which was closed pursuant to R.M.C. 806(b)(2) at U.S. Naval Station Guantanamo Bay, Cuba.⁵ The Commission heard oral argument on the question of the Military Judge's legal authority to grant the requested relief. The Commission issued AE 033K, finding

¹ AE 033, Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 1 May 2019.

² AE 033D, Government Response to Defense Motion for Pretrial Punishment Credit and Other Related Relief, filed 15 May 2019.

³ AE 033E, Defense Reply to Motion for Pretrial Punishment Credit and Other Related Relief, filed 22 May 2019.

⁴ AE 033K, RULING, Defense Motion for Pretrial Punishment Credit and Other Related Relief, dated 4 June 2020, at 3-4.

⁵ *Unofficial/Unauthenticated Transcript* of the *US v Khan* motions hearing dated 21 November 2019, from 1:01 P.M. to 1:49 P.M., at pp. 535-65.

“that, as a matter of law, this Military Judge has legal authority to grant administrative credit as a remedy for illegal pretrial punishment.”⁶

c. On 23 December 2020, the Government moved for the Military Judge to reconsider the ruling in AE 033K.⁷ The Government requests that the Commission reconsider its conclusion that it has the authority to grant illegal pretrial punishment sentencing credit to the Accused based on his claims regarding his treatment prior to the referral of his case to trial. The Government asserts that the Commission has “patently misunderstood” and misapprehended the law. AE 033L at 2.⁸ The Defense opposes the motion.

2. STANDARD OF REVIEW:

a. A military judge may reconsider a decision at any time prior to authentication of the record of trial. Rule for Military Commissions (R.M.C.) 905(f). As the moving party, the Government bears the burden of establishing that it is entitled to the relief it seeks. R.M.C. 905(c)(1)–(2). A motion for reconsideration “is discretionary and need not be granted unless the [trial] court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Foster v. Sedgwick Claims Mgmt. Servs., Inc.*, 842 F.3d 721, 735 (D.C. Cir. 2016); *United States v. Booker*, 613 F.Supp.2d 32, 34 (D.D.C. 2009) (citing *United States v. Ferguson*, 574 F.Supp.2d 111, 113 (D.D.C. 2008); *United States v. Libby*, 429 F.Supp.2d 46, 47 (D.D.C. 2006)). A trial “court should not grant a motion for reconsideration unless the moving party shows new facts or clear errors of law which compel the court to change its prior position.” *Nat’l Ctr. for Mfg. Scis. v.*

⁶ AE 033K at 42.

⁷ AE 033L, Government Motion to Reconsider AE 033K, Ruling, filed 23 December 2020.

⁸ The Defense responded (AE 033M, Defense Response to Government Motion to Reconsider AE 033K, Ruling, filed 6 January 2021), and the Government replied (AE 033N, Government Reply to Defense Response to Government Motion to Reconsider AE 033K, Ruling, filed 13 January 2021).

Dep't of Def., 199 F.3d 507, 511 (D.C. Cir. 2000). “When a party first argues an unavailing theory ... and then attempts to argue an alternative or contrary position in a motion for reconsideration, this constitutes neither new evidence nor a clear error of law sufficient to support a motion for reconsideration.” *Foster*, 842 F.3d at 735.

3. ANALYSIS:

a. For purposes of ruling on AE 033, the Commission bifurcated its ruling. AE 033K, the first ruling, contemplated only, as a matter of law, the military judge’s legal authority to grant the requested relief. The Commission assumed, without deciding, that the defense allegations were true. As analyzed at length in AE 033K, the Commission also took special factors into consideration, including the seriousness of the offenses and the abuse to which the Accused was subjected—which constitutes the violation of a known right. Accordingly, the narrowly-tailored, meaningful, and available remedy of administrative sentencing credit may be necessary and appropriate, arising from the military judge’s duty and responsibility to ensure the fundamental fairness of the proceedings. Although by no means required to do so, where no other remedy is available,⁹ military judges have broad authority to order administrative credit against the sentence. The Government agrees that the Military Judge has the duty to ensure the fundamental fairness of military commission proceedings and that “the Accused has a right to be free of cruel and unusual punishment under the MCA as it related to the charges before the military commission.” AE 033D at 3, 27.

b. Administrative credit for time spent in confinement and administrative credit for pretrial punishment are mutually exclusive. Day-for-day *Allen* credit given as a remedy for pretrial confinement (which is excluded under R.M.C. 1001(g)) is not to be conflated with

⁹ See AE 033L at 22, acknowledging that “the Accused has no [other] basis for relief.”

pretrial punishment credit given as a remedy for violations of Article 13 principles, including the presumption of innocence or the right to be free of punishment. The two are not interchangeable. *See United States v. Allen*, 17 M.J. 126 (C.M.A. 1984) (confinement credit is that which is credited toward the service of the sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed); *cf. United States v. Adcock*, 65 M.J. 18, 23 (C.A.A.F. 2007); *United States v. Suzuki*, 14 M.J. 491, 492 (pretrial punishment credit is the authorization of additional credit for “unusually harsh circumstances” in pretrial confinement).¹⁰ The Discussion to R.M.C. 1001(c) states that “no [*Allen*] credit is given for pretrial detention,” and adds that the defense may raise the nature and length of pretrial detention as a matter in mitigation. That the UCMJ and MCA are not identical in these areas is not dispositive. The authority to impose sentencing credit for illegal pretrial punishment is not even provided textually to a military judge under Article 13, UCMJ. *See* AE 033L at 31.

c. The Government has not met the burden to establish it is entitled to the relief sought. The Government has not shown either an intervening change of controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice. Furthermore, the arguments presented have been previously argued before, considered by, and rejected by the Commission.

¹⁰ While the Accused’s detention “does not constitute pretrial confinement,” R.M.C. 1001(g), and the Rules expressly prohibit the military judge from granting *confinement* credit, with regard to the UCMJ and MCA alike, “Congress has not ... constrained the authority of the President or the Secretary of Defense to grant credit” for pretrial punishment. *See United States v. Smith*, 56 M.J. 290, 293 (C.A.A.F. 2002); AE 033D at 11, 14 (“Congress itself made no effort to create [a] rule restricting the availability of *pretrial punishment* credit”) (emphasis added); *see also* AE 033K at 37.

4. RULING: The motion to reconsider as set forth in AE 033L is **DENIED**.

So **ORDERED** this 18th day of February, 2021.

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DOUGLAS K. WATKINS
COL, JA, USA
Military Judge