IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	APPELLANT'S BRIEF IN
Appellant,	)	SUPPORT OF THE ISSUES
	)	CERTIFIED
v.	)	
	)	Crim. App. No. 38005 (rem)
Airman Basic (E-1)	)	
JOSHUA KATSO, USAF,	)	USCA Dkt. No. 17-0326/AF
Appellee.	)	

APPELLANT'S BRIEF IN SUPPORT OF THE ISSUES CERTIFIED

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UNITED STATES, *Appellant*,	)))	APPELLANT'S BRIEF IN SUPPORT OF THE ISSUES CERTIFIED
v.	))	Crim. App. No. 38005 (rem)
Airman Basic (E-1) JOSHUA KATSO, USAF, *Appellee.*	)))	USCA Dkt. No. 17-0326/AF

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

ISSUES PRESENTED

I.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT UNITED STATES v. MILLER, 47 M.J. 352 (C.A.A.F. 1997) REQUIRED THE GOVERNMENT TO HOLD A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF THE JUDGE ADVOCATE GENERAL'S DECISION ON CERTIFICATION.

II.

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT FOUND THAT [THE] GOVERNMENT'S FAILURE TO HOLD A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF THE JUDGE ADVOCATE GENERAL'S DECISION ON CERTIFICATION AUTOMATICALLY RESULTED IN DAY-FOR-DAY SENTENCING CREDIT.

III.

WHETHER APPELLEE WAS PREJUDICED WHEN THE GOVERNMENT FAILED TO HOLD A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF CERTIFICATION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter "AFCCA") reviewed this case pursuant to Article 66(c), Uniform Code of Military Justice (UCMJ). This Honorable Court has jurisdiction to review this issue under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

On 22 December 2010, Appellee was charged with aggravated sexual assault for engaging in sexual intercourse with SrA CA[1] while she was substantially incapacitated, in violation of Article 120, UCMJ. (JA at 11.) He was also charged with burglary for unlawfully breaking and entering SrA CA's dorm room in the nighttime, with the intent to commit aggravated sexual assault therein, in violation of Article 129, UCMJ. (JA at 11.) Finally, he was charged with unlawful entry for unlawfully entering SrA CA's dorm room, in violation of Article 134, UCMJ. (JA at 11.)

[1] At the time of the offenses, SrA CA held the rank of Airman First Class. (JA at 11.) For continuity, she will be referred to as SrA CA throughout this brief.

On 6 May 2011, a general court-martial comprised of a panel of officer and enlisted members convicted Appellee of all charges and specifications. (JA at 13.) The panel sentenced Appellee to total forfeitures of all pay and allowances, 10 years confinement, and a dishonorable discharge. (JA at 13.) On 31 August 2011, the convening authority approved the sentence as adjudged. (JA at 13.)

On 11 April 2014, AFCCA issued a published decision holding that a government DNA expert improperly repeated testimonial hearsay during his findings testimony. (JA at 45-55.) AFCCA also found that the specification relating to unlawful entry failed to state an offense because it did not allege the terminal element. (JA at 56.) As a result, AFCCA set aside the findings of guilt and the sentence, and authorized a rehearing. (JA at 55-56.)

On 9 June 2014, The Judge Advocate General of the United States Air Force (hereinafter "TJAG") filed a certificate for review with this Court, raising issue with AFCCA's decision relating to the findings testimony of the government DNA expert witness. (JA at 44.) On 3 June 2015, almost a year after AFCCA's decision, Appellee requested a review of his continued confinement for the first time. (JA at 2.) On 4 June 2015, Appellee filed with this Court a motion for appropriate relief in the nature of a remand if this Court reversed AFCCA's decision. (JA at 160-65.) Appellee requested that in the event this Court overturned AFCCA's decision, that it remand the case back to AFCCA so that

Appellee could seek relief for his continued confinement. (JA at 161.) On 5 June 2015, Appellee filed with AFCCA a petition for extraordinary relief in the nature of a writ of habeas corpus requesting to be released from confinement. (JA at 156-59.)

On 6 June 2015, 319 ABW/CC ordered a continued confinement hearing to determine whether Appellee should remain confined. (JA at 130.) On 8 June 2015, Appellee filed at AFCCA a motion to attach, seeking to attach the continued confinement hearing order. (JA at 101-05.) On 8 June 2015, the United States filed at AFCCA an opposition to Appellee's motion to attach. (JA at 153-55.) In its opposition, the United States argued that AFCCA should not take action on Appellee's motion to attach, as jurisdiction over Appellee's case rested with this Court. (JA at 154.) AFCCA did not act on Appellee's petition for extraordinary relief or his motion to attach.

On 11 June 2015, the United States filed with this Court its opposition to Appellee's motion for appropriate relief. (JA at 93-105.) That same day, Appellee filed his reply to the United States' opposition. (JA at 145-52.) On 15 June 2015, 12 days after Appellee requested review of his continued confinement, the government held a continued confinement hearing. (JA at 134-36.)

After the hearing, the Continued Confinement Reviewing Officer (hereinafter "CCRO") determined that Appellee should remain confined. (JA at

132-36.) On 19 June 2015, the United States filed with this Court a motion to supplement the record with the CCRO's report. (JA at 106-13.) On 22 June 2015, Appellee filed with this Court an answer in opposition to the United States' motion to supplement the record.

On 30 June 2015, this Court reversed AFCCA's original decision and remanded the case for further proceedings under Article 66(c), UCMJ. (JA at 31-40.) In its decision, this Court also denied without prejudice both the Appellee's and the United States' motions to attach, as well as Appellee's motion for appropriate relief. (JA at 40.) On 26 September 2015, Appellee filed a petition for a writ of certiorari in the Supreme Court of the United States. On 4 April 2016, the Supreme Court denied Appellee's petition for a writ of certiorari.

On 2 February 2017, AFCCA issued its decision on remand. (JA at 1-8.) AFCCA held in a 2-1 published decision that the government failed to comply with United States v. Miller, 47 M.J. 352 (C.A.A.F. 1997) because it did not hold a continued confinement hearing within seven days of TJAG's decision on certification. (JA at 2-6.) In lieu of a prejudice analysis, the two-judge majority deferred to the policy determination contained in R.C.M. 305(k), granted an automatic day-for-day credit for the alleged error, and provided 365 days of confinement relief. (JA at 5-6.)

On 31 March 2017, 57 days after AFCCA's decision, TJAG certified to this

Court three issues for review. (JA at 9.) All three issues related to AFCCA's decision to grant relief based on the alleged Miller violation. (JA at 9.) Through a notice issued that same day, this Court docketed the certified issues. (JA at 9-10.)

STATEMENT OF FACTS

On 10 December 2010, SrA CA celebrated her 21st birthday by drinking alcohol and going out with friends to an off-base bar. (JA at 2.) In the course of celebration, SrA CA consumed between 15 and 20 alcoholic drinks. (JA at 2.) Due to her intoxication level, SrA CA was unable to return to base on her own accord, and had to be assisted back to her dorm room. (JA at 2.)

After falling asleep in her bed, SrA CA awoke to Appellee penetrating her. (JA at 2.) SrA CA struggled, causing Appellee to abandon his assault and flee. (JA at 2.) After Appellee fled, SrA CA ran into another dorm room and reported to a friend she had been raped. (JA at 2.) DNA testing revealed a match between Appellee's DNA profile and semen retrieved from swabs taken from SrA CA during a sexual assault examination. (JA at 35.)

On 16 December 2010, Appellee's commander placed him in pretrial confinement. (JA at 173 ¶2.) On 21 December 2010, a pretrial confinement hearing was held. (JA at 169, 173 ¶3.) The Pretrial Confinement Review Officer (hereinafter "PCRO") considered not just Appellee's offenses against SrA CA, but also Appellee's previous misconduct. (JA at 170-71.) This prior misconduct

included engaging in wrongful sexual contact against another female airman, wrongfully using Oxycodone on divers occasions, falling asleep while on duty, and stealing a DVD player from the dorm dayroom. (JA at 166-67, 171.) The PCRO found that probable cause existed to continue pretrial confinement. (JA at 170.) He determined that Appellee committed an offense triable by court-martial, and that it was foreseeable that Appellee would engage in further serious criminal misconduct.[2] (JA at 170-71.)

On 6 May 2011, a general court-martial comprised of a panel of officer and enlisted members convicted Appellee of all charges and specifications. (JA at 12.) The panel sentenced Appellee to total forfeitures of all pay and allowances, 10 years confinement, and a dishonorable discharge. (JA at 12.)

On 11 April 2014, AFCCA issued a published decision setting aside the findings of guilt and the sentence and authorizing a rehearing. (JA at 45-56.) On 9 June 2014, the United States filed a TJAG Certificate for Review with this Court, challenging AFCCA's decision relating to the findings testimony of the government DNA expert witness. (JA at 44.) On 7 October 2014, this Court held oral argument on the issue. (JA at 31.)

On 3 June 2015, Appellee requested a review of his continued confinement

[2] At trial, Appellee requested release from pretrial confinement due to conditions of his confinement. *See* (JA at 173.) He did not, however, challenge the PCRO's decision. (JA at 175 ¶16.)

for the first time. (JA at 2.) On 6 June 2015, 319 ABW/CC ordered a continued confinement hearing to determine whether Appellee should remain confined. (JA at 130.) On 15 June 2015, 12 days after Appellee requested review of his continued confinement, the government held a continued confinement hearing. (JA at 2, 132-36.)

At the hearing, the CCRO considered evidence relating to Appellee's aggravated sexual assault of SrA CA, as well as Appellee's substantial prior misconduct. (JA at 133-35.) The CCRO also considered information from inmate disciplinary reports and a preliminary intake risk assessment from Appellee's confinement facility. (JA at 135.) The CCRO found by a preponderance that Appellee committed the offenses for which he was held. (JA at 134.) He also determined that continued confinement was necessary because Appellee was a flight risk, and because it was foreseeable that Appellee would engage in serious criminal misconduct if not confined. (JA at 134-35.)

Regarding the foreseeability of future misconduct, the CCRO determined:

> 1) There is a pattern of misconduct by AB Joshua Katso starting with a stolen DVD player as well as two Article 15's involving the unauthorized use of Oxycodone on 2 Nov 2010 and more importantly sexually assaulting another female airman in the dorms on 15 Mar 2010. Thus, there is already evidence of repeated sexual misconduct.
>
> 2) AB Katso has not received any sex offender treatment while in confinement. The Preliminary Intake Risk

> Assessment dated 14 Jul 2011 states AB Katso "will remain at risk to sexually reoffend" without this treatment. Further, "this becomes an even greater concern if he is not actively maintaining his sobriety." Given the large amount of alcohol AB Katso consumed on the night of the offense(s) along with his abuse of Oxycodone, this risk is too great to recommend release.

(JA at 134-35.) The CCRO found lesser forms of restraint inadequate, reasoning that Appellee "would be housed in the same dorm where he committed his offenses. Unless [Appellee] is placed under 24-hour surveillance, there is no way to guarantee the safety, good order and discipline, and healthy climate for other airmen living in the dorms." (JA at 135.)

On 30 June 2015, this Court reversed AFCCA's original decision and remanded the case back to AFCCA for further proceedings under Article 66(c), UCMJ. (JA at 31-40.) On remand at AFCCA, Appellee initially raised four assignments of error. (JA at 121.)[3] In his fourth issue, Appellee argued that by not holding a confinement hearing until a year after TJAG certification, the government subjected Appellee illegal pretrial confinement. (JA at 124-28.) As such, Appellee argued that relief should be granted under R.C.M. 305(k), or under the Court's Article 66(c), UCMJ power. (JA at 127-28.) In its answer, the United States argued that Appellee was not entitled to relief because this Court had

[3] Through a supplemental assignment of error, Appellee raised an additional assignment of error relating to the military judge's reasonable doubt instructions. This assignment of error was accepted by AFCCA, and answered by the United States. *See* (JA at 6, 80-91.)

reversed AFCCA's original decision, because a continued confinement hearing was likely not required, because a continued confinement hearing was ultimately held, and because even if there was error, Appellee was not prejudiced. (JA at 70-80.)

On 2 February 2017, AFCCA held in a 2-1 published decision that the government failed to comply with Miller because it did not hold a continued confinement hearing within seven days of TJAG's decision on certification. (JA at 2-6.) The two judge majority did not conduct a prejudice analysis. Although the Court found R.C.M. 305(k) inapplicable to Appellee's situation, it still deferred to the policy determination contained in R.C.M. 305(k), granted an automatic day-for-day credit for the alleged error, and provided 365 days of confinement relief. (JA at 5-6.)

SUMMARY OF THE ARGUMENT

AFFCA erred when it held that Miller required the government to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification. Any right Appellee had to request relief based on AFCCA's original decision evaporated when this Court reversed it. At a minimum, this Court's reversal of AFCCA's original decision mooted the issue. Assuming arguendo that Appellee's claim was not moot, a continued confinement hearing was not required, as United States v. Kreutzer, 70 M.J. 444 (C.A.A.F. 2012) limited Miller to circumstances

not present in this case. Finally, even if a continued confinement hearing was necessary, the government was not obligated to hold such a hearing until Appellee requested release.

Even if Miller required the government to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification, AFCCA erred in granting automatic day-for-day credit. The administrative credit provision of R.C.M. 305(k), and the policy determination behind it, did not govern Appellee's continued confinement. Instead, as with any other issue pertaining to deferment of confinement, AFCCA should have analyzed the alleged error in this case for prejudice under Article 59(a), UCMJ.

An analysis of the alleged error in this case under Article 59(a), UCMJ leads to one conclusion: Appellee was not prejudiced. AFCCA's original erroneous decision was reversed by this Court. Therefore, the time Appellee served in confinement after TJAG certification was pursuant to his adjudged and approved sentence. Furthermore, when Appellee finally asked for deferment of his confinement status, the government promptly held a continued confinement hearing. The impartial CCRO determined that Appellee, a violent offender with a slew of other misconduct, should remain confined. The same conclusion would have been reached regardless if the government held the hearing a year earlier.

ARGUMENT

I.

THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED WHEN IT HELD THAT MILLER REQUIRED THE GOVERNMENT TO *SUA SPONTE* HOLD A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF TJAG CERTIFICATION.

Standard of Review

Questions of law are reviewed de novo. United States v. Rapert, 75 M.J. 164, 172 (C.A.A.F. 2016).

Law and Analysis

In this case, AFCCA granted relief because it found that under Miller, the United States was required to *sua sponte* hold a continued confinement hearing within seven days of TJAG's decision on certification. (JA at 3-4.) This determination was erroneous for three alternative reasons. First, this Court's reversal of AFCCA's original decision dissolved any right to relief Appellee had based on that original decision. Second, a continued confinement hearing was not required as Kreutzer limited Miller to circumstances not present in this case. Third, even if a continued confinement hearing was required, it was not required until Appellee requested deferment of his confinement.

1) Overview – Moore, Miller, Kreutzer, deferral of confinement, and the inchoate nature of decisions of the lower court.

In order to appropriately analyze AFCCA's decision in this case it is necessary to engage in an overview of this Court's jurisprudence regarding continued confinement. In Moore v. Akins, 30 M.J. 249 (C.M.A. 1990), this Court first confronted the question of whether an appellee should be released while his case is on further appeal from a favorable decision of a Court of Military Review. Moore, 30 M.J. at 249. In Moore, the Navy-Marine Corps Court of Military Review dismissed all charges and specifications. Id. at 250. Based on this outcome, the appellee asked to be released, or in the alternative his sentence be deferred. Id. Subsequent to the appellee's request, the Navy TJAG certified two issues to this Court for review, and the convening authority denied the appellee's deferment request. Id. The appellee filed a petition for extraordinary relief with this Court requesting release. Id. at 249.

In addressing the appellee's petition, this Court first observed that although mechanisms existed for federal and state criminal defendants to be released on bail pending appeal, no similar authority existed in the UCMJ when it was first enacted. Id. at 251. This Court identified that Congress sought to address this deficiency by enacting Article 57(d), UCMJ. Id. This Court then analyzed the purpose and

history of Article 57(d), UCMJ,[4] as it existed at the time. Id. at 251-52.[5] This Court observed that through Article 57(d), UCMJ, Congress gave convening authorities the power to defer confinement when requested to do so by an accused. Id. at 251.

Under Article 57(d), UCMJ, a convening authority's power to defer a sentence to confinement was limited to sentences to confinement that had not yet

[4] At the time of this Court's decision in Moore, Article 57(d), UCMJ stated:

> On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement.

Moore, 30 M.J. at 251 (quoting Article 57(d), UCMJ).

[5] Based on Moore, Article 57, UCMJ has been modified and separated into Article 57, UCMJ and Article 57a, UCMJ. *See* 10 USC §§ 857, 857a. Still present in Article 57a(a), UCMJ is the language that a convening authority has the power to defer confinement only if the sentence has not been ordered executed. Article 57a(c), UCMJ gives the Secretary concerned the discretion to defer confinement in cases under review pursuant to Article 67(a)(2), UCMJ. For a discussion of this evolution, see Clark v. United States, 74 M.J. 826, 827-28 (N.M. Ct. Crim. App. 2015).

been executed.[6] Id. at 251. Based on that language, the government argued that Article 57(d), UCMJ did not authorize the convening authority to release the appellee because his sentence had long been ordered executed. Id. at 252. The government also argued that confinement review was unnecessary given the inchoate nature of the lower court's decision. Id. at 252-53.

This Court dismissed the government's arguments, finding that the legislative intent of Article 57(d), UCMJ was to create a practical means to release appellees whose cases are pending further appeal from a beneficial CCA decision, even if that decision was inchoate. Id. at 252-53. Accordingly, this Court held that the Court of Military Review had the authority under the All Writs Act to issue an order deferring the appellee's sentence to confinement. Id. at 253. This Court also determined that once the case was certified for review, it had the same authority. Id.

Recognizing that in certain circumstances the government may have a legitimate interest in maintaining an appellee in confinement, this Court proposed a process. Id. at 253. It held that the government may continue to hold an appellee

[6] In Moore, when addressing the principle of deferment of confinement, this Court also discussed United States v. Brownd, 6 M.J. 338 (C.M.A. 1979) and Pearson v. Cox, 10 M.J. 317 (C.M.A. 1981). In Brownd and Pearson, this Court held that it had the authority to review a convening authority's decision to deny a request for deferment. Brownd, 6 M.J. at 338; Pearson, 10 M.J. at 319. In both cases, deferment requests were submitted by the appellants and acted upon by the convening authorities prior to execution of the sentences. Brownd, 6 M.J. at 318; Pearson, 10 M.J. at 338.

in confinement if it could establish a basis under the most applicable procedure in the Manual, an R.C.M. 305-like continued confinement hearing. Id. at 253. This Court held, "This can best be handled by ordering a hearing before a military judge or special master who can make *the type of determination* that would be made by a military magistrate in connection with pretrial confinement." Id. (emphasis added). After conducting its own review of the circumstances in the case, this Court found no basis for continued confinement and released the appellee. Id. at 254.

The first important takeaway from Moore is that this Court relied on Article 57(d), UCMJ as its legal authority. Thus, the continued confinement procedure identified in Moore is just a mechanism for deferral of adjudged confinement. This is also significant because Article 57(d), UCMJ required an appellee to actually submit a request for deferral of confinement pending appeal. Id. at 251.

The second important point is that this Court recognized that the decision of the lower court was inchoate. Moore, 30 M.J. at 253. This leads to the third important principle. At no point in Moore did this Court hold that the appellee became a pretrial prisoner. If this Court had made such a determination, there would have been no need to rely on Article 57(d), UCMJ. Instead, the Court could have just pointed to R.C.M. 305. The fourth important principle is that Moore did not require the government to scrupulously follow R.C.M. 305 procedures to

demonstrate continued confinement. Instead, it recommended a hearing where the officer would make "the type of determination" that is made "in connection with pretrial confinement." Moore, 30 M.J. at 253.

In Miller, this Court expanded upon Moore. In Miller, AFCCA set aside, dismissed, and modified some of the charges and specifications. Miller, 47 M.J. at 355. AFCCA ultimately reduced the appellee's sentence to confinement from 10 years to 4 years, a term he had already served. Miller, 47 M.J. at 355. Prior to TJAG's certification decision, the appellee requested release and petitioned AFCCA for release. Id. at 360. AFCCA declined to issue the requested writ. Id. The government released appellee from confinement after TJAG filed a Certificate for Review with this Court. Id.

As one of the certified issues, TJAG requested this Court review AFCCA's determination that its decisions were self-executing. Id. at 355. This Court also granted a number of issues from the appellee's cross-petition. Id. One of the granted issues concerned whether the appellee was entitled to sentence relief for the time he spent in confinement between AFCCA's favorable decision and his release. Id. at 355.

This Court first found that decisions of the lower court are not self-executing, but remain inchoate until executed by the TJAGs and lower officials. Miller, 47 M.J. at 361 (citing United States v. Kraffa, 11 M.J. 453, 455 (C.M.A.

1981); United States v. Tanner, 3 M.J. 924, 926 (A.C.M.R. 1977)). This Court also denied the appellee's request for sentence relief for his continued confinement. Miller, 47 M.J. at 362. This Court explained that if a TJAG does not appeal a favorable decision of the CCA, he must provide notice to the convening authority, and the appellant must be released or a hearing be held under R.C.M. 305 on "pretrial confinement." Id. at 362. However, if a TJAG determines certification is appropriate, "an accused's interest in the favorable decision of the court below (even if inchoate) requires either that the accused be released in accordance with that decision or a *hearing on continued confinement* be conducted under RCM 305." Id. at 362 (citing United States v. Turner, 47 M.J. 348 (C.A.A.F. 1997); Moore v. Akins, 30 M.J. 249 (C.M.A. 1990)) (emphasis added).

There are a number of important principles in Miller. First, this Court again held that decisions of the lower court are inchoate until executed. Miller, 47 M.J. at 361. Second, this Court identified that in cases where a TJAG does not pursue further appeal, an R.C.M. 305 hearing on "pretrial confinement" is required. Id. at 362. On the other hand, it directed a hearing on "continued confinement" in cases where a TJAG certifies the case to this Court for further review. Id. This distinction between pretrial and continued confinement is a recognition that if no further appeal is pursued, the decision of lower court takes effect, whereas a further appeal extends the inchoate nature of a decision. *See* Miller, 47 M.J. at 361 (citing

Article 66(e), UCMJ).

Next, when identifying the continued confinement process in cases pending further appeal, this Court cited to Moore.[7] Miller, 47 M.J. at 362. This Court did not do so when discussing the need for a "pretrial confinement" hearing in cases where the favorable decision of the lower court becomes final. Miller, 47 M.J. at 361. This demonstrates that the Miller procedures concerning continued confinement are an extension of Moore and its principles.

The evolution of this Court's jurisprudence regarding deferral of confinement during appellate proceedings continued in Kreutzer. In that case, the Army Court of Criminal Appeals set aside part of the findings and the appellant's sentence, and authorized a rehearing. The government moved for reconsideration en banc, which was denied, and the Judge Advocate General of the Army certified the case to this Court. Kreutzer, 70 M.J. at 445. While the reconsideration motion

[7] This Court also cited to Turner. Miller, 47 M.J. at 362. The decision in Turner did not address continued confinement. Instead, it resolved an alleged violation of Article 16, UCMJ based on a finding of substantial compliance. Turner, 47 M.J. at 350. This seems to suggest that this Court did not intend for the government to comply with the strict procedures of R.C.M. 305 when holding a continued confinement hearing. That said, interlocutory matters in the case addressed continued confinement. It appears the lower court ordered the appellee released after overturning the findings and sentence, as the government filed a writ of prohibition with this Court to keep the appellee confined. United States v. Dombroski, 46 M.J. 203 (C.A.A.F. 1996). This Court ultimately ordered the government to comply with R.C.M. 305. United States v. Dombroski, 46 M.J. 209 (C.A.A.F. 1996). The government then complied with that order, with a reviewing officer determining continued confinement was necessary. United States v. Dombroski, 47 M.J. 84 (C.A.A.F. 1997).

and the TJAG certificate for review were litigated, the appellant remained in confinement and on death row. Id. A post-trial continued confinement review occurred one to two months after certification of the case. Kreutzer, 70 M.J. at 448-49 (Erdmann, J., dissenting).

The appellant subsequently requested to be removed from death row via writs of mandamus filed with the CCA and with this Court. Id. at 446; *see also* Kreutzer v. United States, 60 M.J. 453 (C.A.A.F. 2005). This Court ultimately granted the appellant's petition, ordering him moved from death row. Kreutzer, 60 M.J. at 453. After this Court affirmed the CCA's decision, the appellant was sentenced to a dishonorable discharge, confinement for life, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Kreutzer, 70 M.J. at 446.

On appeal following his sentencing rehearing, the appellant requested sentencing relief based on his continued confinement on death row. Id. at 446. The appellant argued that his status changed from sentenced prisoner to pretrial confinee as a matter of law thirty days after his sentence was set aside and expressly relied upon Miller and United States v. Combs, 47 M.J. 330 (C.A.A.F. 1997) for his proposition. Kreutzer, 70 M.J. at 446. This Court firmly rejected the appellant's claim, and distinguished Miller and Combs.

This Court recognized that unlike the case before it, the CCA in Miller had reassessed the sentence to a period of time which the appellant had already served. Kreutzer, 70 M.J. at 446. Based solely on this dissimilarity, this Court found Miller inapplicable. Id. at 446-47. In distinguishing Combs, this Court questioned the precedential value of the decision given its plurality nature, and found the case otherwise distinguishable because in Combs, the appellant was released pending his rehearing. Id. at 447

This Court also rejected the appellant's claim that he was entitled to additional confinement credit under either Article 13, UCMJ or R.C.M. 305. Id. at 447-48. This Court held "that Appellant was not entitled to such credit because he was still subject to lawful confinement as a prisoner found guilty of a number of offenses. Therefore, Appellant's confinement was outside the scope of R.C.M. 305 and Article 13, which only applies to pretrial confinees." Id. at 445. Recognizing that the appellant remained convicted of serious offenses and never requested release from confinement, this Court found that he was not converted "from an adjudged prisoner to a person held for trial as regards the offenses which the CCA had affirmed" just because his sentence was set-aside. Id. at 447. Although this Court found appellant's confinement on death row was a violation of the applicable Army regulation, it determined that since the appellant's confinement

did not fall within the protections of Article 13, UCMJ, he was not entitled to relief. Id.

In sum, the following principles can be gleamed from the foregoing precedent. First, a decision of the CCA remains inchoate until executed by a convening authority or backed with a mandate from this Court. If a TJAG does not pursue further appeal of a decision of the CCA favorable to an appellant, such decision is returned to the convening authority for execution. At that point, the accused must be released or a pretrial confinement hearing must be held. On the other hand, if appealed, a favorable decision from a CCA remains inchoate. The decision does not transform an appellee, with an executed sentence to confinement, from a post-trial confinee to a pretrial confinee with no sentence. Instead, the findings and executed sentence remain, subject to an inchoate favorable decision of the CCA.

Regarding the requirement to hold a continued confinement hearing, Kreutzer substantially narrowed Miller to circumstances where the inchoate decision of the CCA reassesses the sentence to a term already served by the appellee. Kreutzer reaffirmed that appellees in continued confinement are not pretrial confinees, and are not subject to the protections of Article 13, UCMJ.

If the procedures of Miller do apply to a certain case, the appellee can request release. This is request is nothing more than a request for deferment of

confinement pending further appellate review. Once an appellee requests release, the government can release him, or hold a continued confinement hearing.

Miller's requirement to release an appellee or hold a continued confinement stems from this Court's determination that a confined appellee's interest in a favorable inchoate decision "becomes sufficiently weighty to warrant action" once a TJAG has made a decision to appeal the case further. Kreutzer, 70 M.J. at 446. This "interest" is the opportunity to avoid any further confinement in the event this Court upholds the lower court's favorable decision.

Finally, the technical procedures outlined in R.C.M. 305 are applicable only to "pretrial confinees." They do not apply to continued confinement hearings. Instead, R.C.M. 305 is merely used as a guide for conducting a continued confinement hearing, with the CCRO making the same type of determinations required by R.C.M. 305(h)(2)(B).

In this case, the application of the above principles reveals that AFCCA's conclusion that Miller required the government to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification was erroneous for a number of reasons. First, AFCCA erred in applying Miller because this Court's reversal of AFCCA's original opinion mooted Appellee's claim for relief. Second, even if AFCCA did not err by relying on its prior reversed decision to grant relief, a continued confinement hearing was not required, as Kreutzer limited Miller to

circumstances not present in this case. Third, even if a continued confinement hearing was necessary, the government was not obligated to hold such a hearing until Appellee requested deferment of his confinement pending this Court's review.

2) Any interest Appellee had in AFCCA's original decision evaporated when this Court reversed that decision. At a minimum, it mooted Appellee's claim for relief.

Based on Miller, AFCCA found that Appellee was entitled to a continued confinement hearing within seven days of TJAG certification because Appellee had obtained an interest in its original decision setting aside the findings and sentence. (JA at 5.) However, any "favorable interest" Appellee had in AFCCA's original decision evaporated when this Court reversed it. (JA at 40.) It follows then, that AFCCA granted relief based on a decision that no longer existed at the time of its second Article 66(c), UCMJ review. This was error, as AFCCA was bound to apply the law at the time of the consideration of Appellee's claim for relief. *See* United States v. Mullins, 69 M.J. 113, 116 (C.A.A.F. 2010) ("[a]n appellate court applies the law at the time of consideration of the appeal….").
Accordingly, this Court should reverse AFCCA's decision to grant relief based on its overturned original decision and Miller, and affirm the findings and sentence in this case.

At a minimum, AFCCA erred because this Court's decision mooted Appellee's claim for relief. In Brownd, this Court found that a convening authority abused his discretion when he denied the appellant's request for deferment of confinement while awaiting appellate review. Brownd, 6 M.J. at 340. Despite finding error, this Court held that the appellant's claim for relief was moot because he already served his adjudged confinement sentence. Id. at 340, 341; *see also* United States v. Sitton, 5 M.J. 394, 394 (C.M.A. 1978) (finding a claim for relief based on an denial of deferment because the appellee already served the adjudged period of confinement).

Obviously in this case, Appellee had not served his entire adjudged sentence to confinement when AFCCA came to their decision on remand. Despite this, Brownd is still applicable because it demonstrates that a claim for relief related to deferral of confinement can be mooted by subsequent circumstances. Brownd is also applicable because as discussed above, a request for a continued confinement hearing is merely a request for deferral of confinement pending appellate review. *See* Moore, 30 M.J. at 251-53.

The interest at stake for an appellant when requesting deferral of confinement pending appellate review is the opportunity to avoid confinement completely in the event that he later receives relief during the appellate process. It stands to reason that if the appellate process results in an affirmation of the

appellant's sentence, then any issues regarding the denial of a request to defer confinement while pending appeal are moot. Under those circumstances, affirmation of the sentence demonstrates that denial of the deferment was warranted. It also means that any abuse of discretion in denying such a request merely resulted in the appellant serving his lawfully adjudged sentence.

In this case, Appellee's complaint is analogous to an allegation that the government improperly denied a request for deferral of confinement while pending further appeal. Like a request for deferral of confinement pending appeal, the interest at stake for an appellee at a continued confinement hearing is the opportunity to avoid any further time in confinement in the event this Court upholds the lower court's favorable decision. When this Court reversed AFCCA's original decision in this case, the basis for Appellee's opportunity to avoid further confinement disappeared.

Effectively, this Court's reversal of AFCCA's original opinion established that continued confinement was warranted. It also meant that any error in the continued confinement process merely resulted in Appellee serving his lawfully adjudged sentence. Accordingly, even if the government was required to hold a continued confinement hearing within seven days of TJAG certification, any failure to do so was mooted by this Court's decision reversing the favorable decision of the lower court.

Given the above, this Court should find that AFCCA erred by relying on a decision that was extinguished by this Court to grant Appellee relief. At a minimum, AFCCA erred because this Court's reversal of AFCCA's original erroneous decision mooted any issues regarding Appellee's continued confinement. As such, the United States requests this Court reverse that portion of AFCCA's decision granting relief for a violation of Miller, and affirm the findings and sentence in Appellee's case.

3) Even if AFCCA did not err by relying on its prior overturned decision to grant relief, a continued confinement hearing was not required, as Kreutzer limited Miller to circumstances not present in this case.

In this case, AFCCA's original opinion setting aside the findings and sentence remained inchoate until executed by a convening authority or backed with a mandate from this Court. Clark, 74 M.J. at 827-28; United States v. Dearing, 64 M.J. 364, 365 (C.A.A.F. 2006) (observing that this Court has the power to issue mandates, whereas the CCAs do not). Of course, TJAG did not return AFCCA's original erroneous decision to the convening authority for execution, nor was the original decision backed with a mandate from this Court. Instead, TJAG certified the case to this Court for further review. (JA at 44.)

In accordance with the analysis above, TJAG certification of the case resulted in AFCCA's decision retaining its inchoate nature. As a result, Appellee remained subject to an adjudged and executed sentence to confinement. It follows

then, that AFCCA's original erroneous decision in this case did not transform Appellee from a post-trial confinee to a pretrial confinee with no sentence. Under the circumstances of this case, any requirement to engage in a review of Appellee's continued confinement would not come from R.C.M. 305, which by its plain language applies to only "pretrial" confinement. Instead, such a requirement would have to be derived from this Court's continued confinement jurisprudence.

In Kreutzer, this Court significantly narrowed Miller to the facts of that case. Kreutzer, 70 M.J. at 446. Specifically, this Court found Miller distinguishable because in that case the lower court had reassessed the appellee's sentence to a term of confinement he had already served. Kreutzer, 70 M.J. at 446. In Kreutzer, the lower court set-aside a number of specifications and the entire sentence, and authorized a rehearing. Id. at 455. Based on that distinction alone, this Court found Miller inapplicable. Id. at 446-47.

Unlike in Kreutzer, AFCCA's original decision in this case did not affirm findings of guilt for serious offenses. But Kreutzer distinguished Miller based solely on the fact that the lower court in Miller had reassessed Appellee's sentence to a term he had already served. Kreutzer, 70 M.J. at 446-47. In this case, AFCCA's original decision did not reassess Appellee's sentence to a term he had already served. Instead, AFCCA's decision, like the lower court's decision in Kreutzer, set aside the entire sentence and authorized a rehearing. (JA at 56.)

Thus, based on the rationale in Kreutzer, Miller is readily distinguishable from the current case. As such, Miller's requirement to hold a continued confinement hearing was inapplicable. AFCCA erred in holding otherwise. Accordingly, the United States requests this Court reverse that portion of AFCCA's decision granting relief for a violation of Miller, and affirm the findings and sentence in Appellee's case.

4) Even if a continued confinement hearing was necessary, the government was not obligated to hold such a hearing until Appellee requested it.

On 9 June 2014, TJAG certified AFCCA's original decision to this Court for review. (JA at 44.) As part of the appellate process, Appellee filed his substantive brief with this Court regarding the certified issue, and also took part in oral argument on 7 October 2014. *See* (JA at 31.) At no point in that process did Appellee raise any issue with his continued confinement. It was not until 3 June 2015, approximately 359 days after TJAG certification, that Appellee first requested release. (JA at 2, 94.)

Despite Appellee's failure to request deferment of his confinement, AFCCA found that Miller, in combination with R.C.M. 305, required the government to hold a continued confinement hearing within seven days of TJAG certification. (JA at 5.) In addressing the United States' argument that Appellee was required to request deferment of his confinement, AFCCA determined that "There is no

requirement that a detainee complain about the propriety of confinement, exhaust administrative remedies, or establish prejudice before R.C.M. 305(k) credit is due and we do not believe a different rule was intended to apply to Miller reviews." (JA at 6.) This holding was erroneous, and seems directly at odds with AFCCA's own conclusion that R.C.M. 305 does not control continued confinement review. *See* (JA at 5.)

As explained in the overview above, the strict requirements of R.C.M. 305 were inapplicable to Appellee's continued confinement. Instead, AFCCA should have looked to Moore and applied principles relating to requests for deferral of confinement, which require an appellant to actually submit a request. In Moore, this Court identified Article 57(d), UCMJ, and its legislative history, as the legal authority that provided for deferment of confinement pending further appeal once an appellee has won a favorable decision at the lower court. Moore, 30 M.J. at 250-52. At the time of this Court's opinion in Moore, Article 57(d), UCMJ required an accused to submit an application to defer requirement. Moore, 30 M.J. at 251 (quoting Article 57(d), UCMJ). It follows then, that the legal authority that provided for deferment of an appellee's sentence to confinement after receiving a favorable decision from a lower court required the appellant to apply for that deferment.

The idea that an appellee must request review of his continued confinement

is consistent not only with the legal authority relied on by this Court in Moore, and ultimately Miller which relied on Moore, but with the facts and circumstances of those two cases. In Moore, the appellee requested release from confinement promptly after receiving the favorable decision from the lower court. Moore, 30 M.J. at 250. He also filed a petition for extraordinary relief with this Court. Moore, 30 M.J. at 250. Likewise, in Miller, the appellee requested release after receiving the favorable decision from the lower court, and also filed a petition for extraordinary relief. Miller, 47 M.J. at 360.

In other words, Moore and Miller identified a process whereby an appellee may be entitled to a continued confinement hearing after receiving a favorable opinion from a lower court, but they did so relying on legal authority that required the appellee to ask for such relief, and in cases where the appellee had actually done so. Article 57a(a), UCMJ, the successor to Article 57(d), UCMJ, still requires an accused to apply for deferment pending action.[8] Article 57a(c), UCMJ, which allows the Secretary concerned to defer confinement when a case is certified

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[8] Article 57a(a), UCMJ states:

> On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under his jurisdiction, the officer exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may in his sole discretion defer service of the sentence to confinement.

for review, does not contain language mandating the appellant apply for deferral.[9] That said, it likewise does not contain language mandating the Secretary concerned make a *sua sponte* determination in every case.

It follows then, that the government does not have a *sua sponte* duty to review an appellee's continued confinement after the appellee receives a favorable decision of the lower court. Instead, it must undertake such action upon application of the appellee. Such a conclusion is not only consistent with the rationale and authority relied up by this Court in Moore and Miller, but it also conforms to this Court's holding in another context that "[a] prisoner must seek administrative relief prior to invoking judicial intervention to redress concerns regarding post-trial confinement conditions." United States v. Wise, 64 M.J. 468, 469 (C.A.A.F. 2007). Accordingly, AFCCA erred when it determined that the government was required to hold a continued confinement hearing within seven days of TJAG certification despite Appellee's failure to request review of his continued confinement. If such hearing was required, it was required when Appellee requested release.

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[9] Article 57a(c), UCMJ states:

> In any case in which a court-martial sentences a person to confinement and the sentence to confinement has been ordered executed, but in which review of the case under section 867(a)(2) of this title (article 67(a)(2)) is pending, the Secretary concerned may defer further service of sentence to confinement while that review is pending.

In this case, a continued confinement hearing was ordered within three days of Appellee's request. (JA at 104.) The government held a continued confinement hearing 9 days after the order, and 12 days after Appellee's requested release. (JA at 2, 109-13.) At the hearing, Appellee was represented by counsel, offered evidence, and presented argument. (JA at 109-13.) The CCRO came to his decision the same day, determining that Appellee should remain confined. (JA at 109-13.) These efforts, taken within a reasonable time of Appellee's request for release, constituted compliance with the suggested procedures identified in Moore and Miller. As a result, the United States requests this Court reverse that portion of AFCCA's decision granting relief for a violation of Miller, and affirm the findings and sentence in Appellee's case.

II.

EVEN IF MILLER REQUIRED THE GOVERNMENT TO *SUA SPONTE* HOLD A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF TJAG CERTIFICATION, AFCCA ERRED IN GRANTING AUTOMATIC DAY-FOR-DAY CREDIT IN LIEU OF ANALYZING THE ALLEGED ERROR FOR PREJUDICE UNDER ARTICLE 59(a), UCMJ.

Standard of Review

"Whether a lower court utilized the appropriate standard to test for prejudice is a question of law reviewed de novo." United States v. Dockery, 76 M.J. 91, 16-0296/AF, slip op. at 12 (C.A.A.F. 2017) (citing United States v. Evans, 75 M.J.

302, 304 (C.A.A.F. 2016)).

Law and Analysis

In this case, AFCCA correctly observed that R.C.M. 305(k)[10] did not control Appellee's continued confinement. (JA at 5.) However, the Court erred by determining that the President's policy decision to provide mandatory day-for-day confinement credit for violations of R.C.M. 305 compelled them to provide the same relief in this case. (JA at 5.) This was error, as the administrative credit provision of R.C.M. 305(k), and the policy determination behind it, did not govern Appellee's continued confinement. Instead, as with any other case involving an error pertaining to deferment of confinement, AFCCA should have reviewed the alleged error in this case for prejudice under Article 59(a), UCMJ.

As explained above in more detail, in Moore and Miller, this Court did not hold that R.C.M. 305 applied to appellees who had won a favorable decision from the lower Court. Instead, this Court's reference to R.C.M. 305 merely identified a template for continued confinement hearings. In lieu of R.C.M. 305, this Court identified Article 57(d), UCMJ as the legal authority granting a right to request deferment of confinement while a case is pending further appeal. R.C.M. 305 simply does not control.

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[10] R.C.M. 305(k) states: "The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance."

A plain language reading of the R.C.M. 305 supports the same conclusion. *See* United States v. Fetrow, No. 16-0500/AF, slip op. at 6 (C.A.A.F. 17 April 2017) (holding that when a court interprets provisions in the Manual, it must begin with the plain language). R.C.M. 305 applies to "pretrial confinement." The Rule defines pretrial confinement as "physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges." R.C.M. 305(a). Appellee in this case was not pending disposition of charges, but was serving an adjudged and executed confinement sentence.

R.C.M. 305(k) identifies remedies for noncompliance with R.C.M. 305. R.C.M. 305(k) contains no language suggesting that it applies to anything but issues involving noncompliance with R.C.M. 305. In fact, R.C.M. 305(k) identifies the remedy for "noncompliance with subsections (f), (h), (i) or (j) of this rule…." The plain language of R.C.M. 305 demonstrates that it applies solely to pretrial confinement, and the remedy provision of R.C.M. 305(k) applies only to noncompliance with R.C.M. 305.

In this case, when addressing the Chief Judge's suggestion of a prejudice analysis, the two-judge majority explained:

> As neither [the Chief Judge] nor the CAAF have set forth the criteria we could or should use in such a situation, we believe we are bound to follow the policy determination contained within the Rules for Courts-Martial for the remedy for the failure to receive a confinement review hearing. R.C.M. 305(k).

(JA at 5.) Despite the majority's assertion, this Court has set forth the criteria necessary to determine whether relief was warranted in this case. In cases involving erroneous denials of requests for deferment of confinement, this Court has applied Article 59(a), UCMJ. Thus, instead of R.C.M. 305(k), or the policy determination underlying that provision, Article 59(a), UCMJ sets the standard in this case.

In United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992), this Court determined that a convening authority abused his discretion when he summarily denied the appellant's request for deferral of confinement. In lieu of granting automatic credit for the error, this Court considered prejudice. Sloan, 35 M.J. at 7. This Court determined that it was "unable to discern any relief to which appellant might be entitled." Id. In making this determination, this Court rejected the appellant's claim that he was prejudiced because the denial caused him to serve his adjudged sentence three weeks earlier than if his deferment had been granted. Id.

In United States v. Sylvester, 47 M.J. 390, 393 (C.A.A.F. 1998), this Court found that the convening authority erred by either not acting on a deferment request or by not reflecting any such action on the record. This Court held, "Whether the error is viewed in terms of a failure to act or a failure to reflect any action in the record, it is appropriate for the error to be tested for prejudice." Sylvester, 47 M.J. at 393. In reviewing the circumstances of the case, this Court

noted that the appellant was released from confinement only six days after submitting the deferment request. Sylvester, 47 M.J. at 393. Consequently, this Court held, "Under the circumstances of this case, we do not find that any error with respect to the deferment request materially prejudiced the substantial rights of appellant under Article 59(a), UCMJ, 10 USC § 859(a)." Id.

In United States v. Edwards, 39 M.J. 528 (A.F.C.M.R 1994), the Air Force Court of Military Review considered near identical circumstances to those in Sloan. Relying on Sloan, the Court found that the convening authority abused his discretion in denying a request for deferment of confinement, but did not grant relief due to a lack of prejudice. Edwards, 39 M.J. at 531*; but see* United States v. Sebastian, 55 M.J. 661, 664 (Army Ct. Crim. App. 2001) (finding prejudice when a convening authority failed to properly process requests for deferment of confinement and forfeitures). In United States v. Smith, 66 M.J. 556, 563 (C.G. Ct. Crim. App. 2008), the Coast Guard Court of Criminal Appeals likewise found a convening authority's denial of a request for deferment of confinement erroneous. Relying on Sloan, the Court in Smith reviewed the appellant's claim for prejudice. Smith, 66 M.J. at 563. The Court found the error harmless, reasoning "[a]ppellant served the same amount of confinement he would have served if the deferment had been granted, albeit without a week of delay in its commencement." Id.

The asserted errors in the above cases occurred in the context of requests for

deferment of confinement, which align these decisions with the complained of error in this case. *See* Moore, 30 M.J. at 351-53 (finding the legal authority for release pending further appeal in Article 57(d), UCMJ as it existed at the time). Put another way, in the above cases, the courts identified errors that resulted in the appellants being confined. In those cases, the government either failed to properly address the appellants' requests to defer confinement, or failed to consider them altogether.

In this case, AFCCA found the government failed to follow what it determined were the proper procedures to deny Appellee deferment of his confinement while his case was pending further review by this Court. Under Sloane and Sylvester, this error is reviewed for prejudice. Thus, even if the government in this case was required to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification, AFCCA erred in granting automatic day for day credit. Instead, the Court should have followed the above precedent and considered whether the alleged error resulted in prejudice.

III.

EVEN IF THE APPELLEE WAS ENTITLED TO A CONTINUED CONFINEMENT HEARING WITHIN 7 DAYS OF TJAG CERTIFICATION, HE WAS NOT PREJUDICED.

Standard of Review

Whether an alleged error prejudiced an appellant is a question reviewed de

novo. United States v. Ward, 74 M.J. 225, 227 (C.A.A.F. 2015) (citing United States v. Diaz, 45 M.J. 494, 496 (C.A.A.F. 1997)).

Law and Analysis

As the Chief Judge identified in his *dubitante* opinion, the majority's decision to grant 365 days of confinement relief resulted "in an inappropriate windfall for [Appellee]." (JA at 8.) Even if the government was required to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification, Appellee was not prejudiced in any way. First, unlike the appellees in Miller and Moore, Appellee did not request review of his confinement until almost a year from TJAG's certification. *See* Moore, 30 M.J. at 250; Miller, 47 M.J. at 360. Second, this Court reversed AFCCA's original erroneous decision granting relief. (JA at 31-40.) Thus, the time Appellee served in confinement between TJAG certification and the continued confinement hearing was time he owed in accordance with his adjudged and approved sentence. *See* Sloan, 35 M.J. at 7 (rejecting an appellant's argument that he was prejudiced by an erroneous denial of his deferment request because he served his adjudged sentence three weeks earlier than if his deferment had been granted).

Third, holding a continued confinement hearing earlier would not have resulted in Appellee's release. Appellee was a violent offender with substantial prior misconduct. In the middle of the night, he brazenly entered into an on-base

dorm room with the intent to assault an incapacitated fellow Airman. (JA at 2.) During the assault, Appellee penetrated the victim while she was incapacitated. (JA at 2.)

Even prior to the assault, Appellee had a history of serious criminal misconduct. (JA at 134-35, 166-72.) Appellee stole property from a dorm dayroom, wrongfully used Oxycodone multiple times, and committed wrongful sexual contact against another Airman. (JA at 134-35, 166-72.) Prior to the court-martial, a strict application of R.C.M. 305 and a pretrial confinement hearing resulted in Appellee's placement into pretrial confinement. (JA at 169-73.) The PCRO's decision was so well supported that Appellee did not challenge it at trial. (JA at 175 ¶16.)

A panel of officer and enlisted members verified the PRCO's determination. (JA at 13.) They convicted Appellee of all charges and specifications, and determined that his crimes warranted a significant term of confinement. (JA at 13.) After Appellee waited almost a year to request review of his confinement, the continued confinement hearing reaffirmed what was already established at the pretrial confinement hearing and the court-martial. Namely, that Appellee was a violent offender who presented a real risk of engaging in future serious

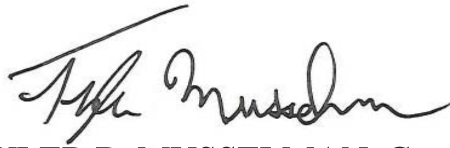
misconduct. (JA at 132-36.)[11] No matter when the government held a continued confinement hearing, the result would have been the same – Appellee would have remained confined.

Accordingly, even if the government was required to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification, Appellee was not prejudiced. When Appellee finally asked for review of his confinement status, the government promptly held a continued confinement hearing. Appellee, a violent offender with a slew of other misconduct, was ordered to remain confined. Ultimately, AFCCA's original erroneous decision was reversed by this Court. Thus, the time Appellee served in confinement after TJAG certification was pursuant to his adjudged and approved sentence. Appellee is not entitled to relief, and this Court should reverse AFCCA's decision granting him a windfall.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Honorable Court reverse that portion of the Air Force Court of Criminal Appeals decision granting 365 days of confinement credit, and affirm the findings and sentence in this case.

[11] The time between TJAG certification and the continued confinement hearing actually gave Appellee more time to take advantage of rehabilitative programs and to demonstrate he was no longer a threat. Instead, Appellee did not participate in any sex offender treatment while confined, failing to rebut the initial assessment that he "will remain at risk to sexually reoffend." (JA at 135.)



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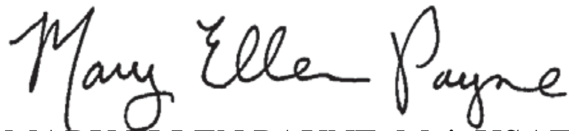

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 1 May 2017.

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2. This brief complies with the typeface and type style requirements of Rule 37 because:

☒ This brief has been prepared in a proportional type using Microsoft Word Version 2013 with 14 point font using Times New Roman.

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