IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	REPLY TO APPELLEE'S ANSWER
v.	)	Crim. App. No. 38005 (rem)
Airman Basic (E-1) JOSHUA KATSO, USAF, *Appellee.*	)	USCA Dkt. No. 17-0326/AF

UNITED STATES' REPLY TO APPELLEE'S ANSWER

TYLER B. MUSSELMAN, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

MARY ELLEN PAYNE, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 34088

INDEX

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

FEDERAL COURTS

STATUTES

OTHER AUTHORITIES

15 June 2017

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellant*,	)	REPLY TO APPELLEE'S ANSWER
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). As discussed in further detail below, this Honorable Court has jurisdiction to review the issues certified under Article 67(a)(2), UCMJ.

STATEMENT OF THE CASE

The United States adopts the statement of the case contained within its brief in support of the issues certified, dated 1 May 2017.

STATEMENT OF FACTS

The United States adopts the statement of facts contained within its brief in support of the issues certified, dated 1 May 2017. Any additional facts necessary to the disposition of the issues are set forth in the arguments below.

ADDITIONAL ARGUMENT

Despite Appellee's assertion otherwise, under this Court's Rules of Practice and Procedure and the plain language of Article 67, UCMJ, this Court has jurisdiction to consider the certified issues. Furthermore, Appellee failed to address in his answer brief whether his claim for relief was mooted by this Court's

reversal of AFCCA's original opinion. His inability to provide this Court counter-authority, in combination with the Supreme Court's precedent regarding mootness and issues raised post-conviction relating to pretrial bail conditions, further demonstrate that Appellee's claim for relief was moot.

Even if his claim was not moot, neither Miller nor the Constitution required the government to *sua sponte* hold a continued confinement hearing in this case. Next, it is apparent from the language of AFCCA's opinion that the Court did not conduct a prejudice analysis, but instead granted automatic administrative credit. Finally, as United States v. Gay, 75 M.J. 264 (C.A.A.F. 2016) addressed AFCCA's authority to grant sentence appropriateness relief, which is not at issue here, the decision is inapplicable to this case. The standard of review in this case is not an abuse of discretion as Appellee contends, but instead is *de novo*.

a. This Court has jurisdiction under Article 67(a)(2), UCMJ, as The Judge Advocate General's certificate for review complies with Article 67(a)(2), UCMJ and this Court's Rules of Practice and Procedure.

Under Article 67(a)(2), UCMJ, "The Court of Appeals for the Armed Forces shall review the record in all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review." Put simply, "[u]nder Article 67(a), this Court has jurisdiction to hear 'cases … which the Judge Advocate General orders sent … for review.'" United States v. Williams, 75 M.J. 244, 245 (C.A.A.F. 2016) (quoting Article

67(a)(2), UCMJ) (alterations in original). The language of Article 67(a), UCMJ contains no procedural limitations or requirements.

As Article 67(a)(2), UCMJ is silent on the issue, this Court's rules set the deadline for filing a certificate of review: "a certificate for review … shall be filed either (a) no later than 60 days after the date of the decision of the Court of Criminal Appeals (see Rules 22 and 34(a)), or (b) no later than 30 days after a petition for grant of review is granted." Williams, 75 M.J. at 245 (citing C.A.A.F. R. 19(b)(3)) (alterations in original). In the event a motion for reconsideration was timely filed with the court below, the 60 days runs from the date the lower court takes final action on the motion. Williams, 75 M.J. at 245 (citing C.A.A.F. R. 34(a)).

In his answer brief, Appellee asserts that this Court lacks jurisdiction to consider the certificate of review filed in the instant case. (App. Br. at 2.) He contends that The Judge Advocate General (hereinafter "TJAG") engaged in "ex parte" communications with government counsel, and that he "specified questions drafted by government counsel, nearly verbatim."[1] (App. Br. at 2.) He argues that TJAG, when acting under Article 67(a)(2), UCMJ in this case, was not impartial nor independent, but was instead "a member of the prosecution team." (App. Br.

[1] TJAG's adoption of the language of issues as drafted by counsel does not equate to partiality. For instance, when granting review under Article 67(a)(3), UCMJ this Court routinely adopts an appellant's draft of an issue.

at 2.)[2] Without citation to any legal authority, Appellee concludes that the certificate for review in this case was executed outside of TJAG's legal authority. (App. Br. at 2.)

Appellee seeks to impose limitations and procedural requirements which do not exist in Article 67(a)(2) UCMJ, or otherwise.[3] If Congress intended TJAG certification to be a judicial process and intended TJAGs be barred from direct communication with government personnel during the certification process, it would have included such limitations and procedures in Article 67(a)(2), UCMJ. Instead, Article 67(a)(2), UCMJ contains no prohibitions on what information a TJAG can consider, or how or in what format he or she can consider it.

The TJAG certificate for review in this case was filed on 31 March 2017, only 57 days after AFCCA's decision on remand. (JA at 1, 9.) This is within the 60-day window allowed by this Court's rules. Accordingly, this Court has jurisdiction under Article 67(a)(2), UCMJ.

b. The Supreme Court's precedent regarding mootness and issues related to pretrial bail conditions further demonstrates that Appellee's claim for relief was moot.

---

[2] To the extent Appellee asserts that no similar "ex parte" process was made available to him, there is no evidence that Appellee requested such a process in this case. *See* (App. Br. at 2.)

[3] In previous filings, the United States has addressed in detail Appellee's contention that TJAG is a judicial or quasi-judicial officer prohibited from directly communicating with government personnel during the certification process. *See* Opposition to Motion to Compel Discovery, dated 17 April 2017; *see also* Answer to Supplemental Petition, dated 7 May 2017.

In his answer, Appellee fails to address the United States' argument that any claim for relief based on AFCCA's original erroneous opinion was mooted when this Court reversed that decision. *See* (U.S. Br. at 24-27.) In addition to Appellee's apparent inability to provide counter-authority on this point, and the argument and authority presented in its initial brief, the United States draws this Court's attention to Murphy v. Hunt, 455 U.S. 478 (1982). In Murphy, the appellant was denied pretrial bail based on a Nebraska state constitution provision that categorically denied bail in cases involving first-degree sexual offenses. Murphy, 455 U.S. at 479. While the appellant's challenge to his bail denial was pending with the Court of Appeals for the Eighth Circuit, the appellant was tried and convicted. Id. at 480. The Court of Appeals for the Eighth Circuit subsequently found the state constitutional provision at issue violated the Eighth Amendment. Id.

The Supreme Court reversed the lower court's decision on mootness grounds. Id. at 481. The Court found that the appellant's claims for relief based on wrongful denial of pretrial bail were mooted by his conviction in state court. Id. at 481. The Court held the issue "was no longer live because even a favorable decision on it would not have entitled [the appellant] to bail." Id. The federal circuits continue to apply Murphy, routinely finding that challenges to pretrial bail conditions are mooted by a subsequent conviction. *See*, *e.g.*, United States v.

Villarman-Oviedo, 325 F.3d 1, 9 (1st Cir. 2003); United States v. O'Shaughnessy, 772 F.2d 112, 112 (5th Cir. 1985); United States v. Spilotro, 786 F.2d 808, 811 (8th Cir. 1986).

Although the instant case does not pertain to pretrial confinement, the rationale of the Supreme Court in Murphy is just as applicable in this case. Just as the subsequent conviction in Murphy justified the appellant's confinement, so too did this Court's reversal of AFCCA's original opinion. Reversal of AFCCA's original opinion 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.

c. Neither Miller nor the Constitution required the government to *sua sponte* hold a continued confinement hearing.

As discussed in the United States' initial brief, Moore v. Akins, 30 M.J. 249 (C.M.A. 1990) 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. However, the decisions 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. *See* (U.S. Br. at 13-19, 29-32.) The conclusion that an appellee is required to request review of his confinement conditions 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).

In arguing that the government had a *sua sponte* duty to hold a continued confinement hearing immediately upon TJAG certification, Appellee relies only a select quotation parsed from Miller. (App. Br. at 8.) He does not attempt to reconcile his theory with the legal authorities on which Miller is based, or the facts and circumstances underlying the opinion. Appellee's failure to do so demonstrates the erroneous nature of his position.

Regarding Appellee's argument that a continued confinement hearing was mandated by the Due Process Clause of the Fifth Amendment, there is no constitutional right to release pending appeal. *See* United States v. Affleck, 765 F.2d 944, 948 (10th Cir. 1985) ("There is no constitutional right to bail pending appeal."); *see also* Levy v. Resor, 37 C.M.R. 399, 403 (C.M.A. 1967) (per curiam) (recognizing that the right to bail pending appeal was "not of constitutional dimensions"); United States v. Brownd, 6 M.J. 338, 342 (C.M.A. 1979) (Cook, J., concurring) (observing that "no constitutional right to bail applies in the military,

and, more particularly, a convicted accused has no right to bail pending review of his conviction").

Similarly, Appellee's contention that confinement without due process is inherently prejudicial fails to acknowledge that he was a post-trial prisoner confined pursuant to an adjudged and executed court-martial sentence. In other words, Appellee was not confined without due process, but instead received due process in the form of a litigated court-martial. His confinement was the result of being tried, convicted, and sentenced by a panel of officer and enlisted members. Furthermore, any contention that confinement without due process is inherently prejudicial is directly opposed to this Court's precedent denying relief for erroneous denials of requests for deferment of confinement. *See* United States v. Sloan, 35 M.J. 4, 6 (C.M.A. 1992); United States v. Sylvester, 47 M.J. 390, 393 (C.A.A.F. 1998).

d. Gay is inapplicable as AFCCA did not grant relief in this case based on its sentence appropriateness authority. Furthermore, the plain language of AFCCA's decision demonstrates that it did not conduct a prejudice analysis.

In his answer brief, Appellee asserts that AFCCA did conduct a prejudice analysis and merely aligned its prejudice determination with R.C.M. 305. (App. Br. at 3.) Appellee also attempts to frame AFCCA's decision as simply reducing the sentence due to a "legal deficiency in the post-trial process." (App. Br. at 4-5, 7.) As a result, Appellee argues the standard of review in this case is an abuse of

discretion. (App. Br. at 4-5.) In support of his proposition, Appellee relies on this Court's decision in Gay.

Appellee's attempt to muddle the standard of review is fatally defective, as Gay addressed sentence appropriateness relief, and is therefore inapplicable to this case. In fact, the quotation relied on by Appellee concerning "a legal deficiency in the post-trial process" pertained to AFCCA's decision to grant sentence appropriateness relief. Gay, 75 M.J.at 269.[4] In its opinion in that case, AFCCA explicitly invoked its sentence appropriateness authority. United States v. Gay, 74 M.J. 736, 742-43 (A.F. Ct. Crim. App. 2015).

In this case, AFCCA did not utilize its sentence appropriateness authority when addressing whether relief was warranted for the government's alleged Miller violation. Instead, it granted "day-for-day administrative credit" based on its interpretation of R.C.M. 305(k) and Miller. (JA at 5.) Unlike in Gay, AFCCA did not justify its award of confinement credit based upon its authority under Article 66(c), UCMJ to affirm only such part or amount of the sentence as it determines should be approved. As a result, Gay is inapposite to the issues in this case.

[4] Specifically, this Court held "that the Air Force Court of Criminal Appeals' decision to grant sentence appropriateness relief in this case was based on a legal deficiency in the post-trial process and, thus, was clearly authorized by *Article 66(c)*." Gay, 75 M.J. at 269.

The standard of review in this case is *de novo* for the three certified issues. Whether the government was required to *sua sponte* hold a continued confinement hearing within seven days of TJAG certification is a question of law, which is reviewed *de novo*. United States v. Evans, 75 M.J. 302, 305 (C.A.A.F. 2016). Whether AFCCA erred in not conducting a prejudice analysis is also reviewed *de novo*. This Court has plainly held, "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, 98 (C.A.A.F. 2017) (citing Evans, 75 M.J. at 304). Whether Appellee ultimately suffered prejudice from the alleged error is also reviewed *de novo*. United States v. Fetrow, 76 M.J. 181, 187 (C.A.A.F. 2017). Appellee's attempt to alter the standard of review in this case is directly contrary to the above applicable precedent and must be rejected.

Likewise, Appellee's contention that AFCCA conducted a prejudice determination is similarly defective. Appellee fails to take into account that AFCCA identified in its opinion that it did not conduct a prejudice analysis, but instead granted an automatic administrative credit.

In dismissing the government's prejudice argument, the two-judge majority found that "[t]here 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) (emphasis added). The Court categorized the granted relief as "day-for-day administrative credit." (JA at 6.) In his *dubitante* decision, the Chief Judge recognized, "***We have found no prejudice*** Appellant has suffered for the procedural timing failure to follow the *Miller* rule." (JA at 8) (emphasis added). He also identified that the two-judge majority "provides an R.C.M. 305(k)-like automatic day-for-day administrative credit." (JA at 8.)

Based on AFCCA's own language in its decision, it is apparent that the Court did not conduct a prejudice analysis in this case. AFCCA's failure to do so constituted legal error. *See* (U.S. Br. at 33-38.) R.C.M. 305, which by its own terms applies to pretrial confinement, was inapplicable to Appellee's post-trial confinement. *See* (U.S. Br. at 34-35.) Furthermore, AFCCA's decision to forgo a prejudice analysis contravenes established precedent from this Court. On more than one occasion, this Court has analyzed alleged erroneous denials of requests for deferment of post-trial confinement for prejudice, and denied relief. *See* Sloan, 35 M.J. at 6; Sylvester, 47 M.J.at 393. This legal error on AFCCA's part compels reversal of its decision.

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.

TYLER B. MUSSELMAN, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

MARY ELLEN PAYNE, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 34088

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 15 June 2017.

TYLER B. MUSSELMAN, Maj, USAF
Appellate Government Counsel
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Rd., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar. No. 35325

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because:

☒ This brief contains approximately 2,990 words.

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 Times New Roman font.

/s/
TYLER B. MUSSELMAN, Maj, USAF
Attorney for USAF, Government Trial and Appellate Counsel Division

Date: 15 June 2017