IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Cross-Appellee,

v.

JOSHUA KATSO,
Airman Basic (E-1),
United States Air Force,
Cross-Appellant.

USCA Dkt. No. 17-0326/AF

Crim. App. Dkt. ACM 38005 (rem)

ANSWER

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v.	)	
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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Issues Presented

The Air Force Government Trial and Appellate Counsel Division (AFLOA/JAJG), via the Air Force Judge Advocate General (TJAG), specified the following questions for this Court to answer:

> 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 [Cross-Appellant] was prejudiced when the government failed to hold a continued confinement hearing within 7 days of certification.

Lack of Statutory Jurisdiction

TJAG may have signed the certificate for review in this case, but this is, in truth, a government, partisan, appeal. When acting to certify this case under Article 67(a)(2), and to specify issues for review under Article 67(c), TJAG was neither impartial nor independent. Instead, he was a member of the prosecution team. Over Airman Katso's objections, he communicated *ex parte* with government counsel, and he specified the questions drafted by government counsel, nearly verbatim. No similar *ex parte* process was made available to Airman Katso.

Allowing such disparate treatment in the procedures by which a party may obtain review by this Court violates Airman Katso's right to due process of law. As such, TJAG's certificate for review is *ultra vires*, and forms a poor foundation for this Court to exercise jurisdiction.

Statement of the Case and Statement of Facts

Airman Katso agrees with the government's statement of the case, except for the last complete sentence on page 5 of the government's brief. He adopts the government's statement of the case, with that

exception, as his statement of facts. Airman Katso does not adopt or concede the assertions contained in the portion of the government's brief entitled "statement of facts." Those assertions are either already contained in the statement of the case, or they are not relevant.

Concerning the disagreement over the last complete sentence on page 5 of the government's brief: There, the government asserts that the Court of Criminal Appeals deferred to the policy behind R.C.M. 305(k) rather than conducting a prejudice analysis of its own. That summarization does not do the decision below justice. Here is what the decision said:

> 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. While not stated explicitly in the Rule, the reason Appellant need not raise those issues is likely because the President, in promulgating the Rules, recognized that incarceration without due process is inherently prejudicial.

J.A. at 6.

Given that quote, it would be more accurate to say that the court below considered the policy underlying R.C.M. 305(k), found that policy to be persuasive authority, and conducted its prejudice analysis in line with that authority.

Argument

I. The Air Force Court of Criminal Appeals did not err 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. The Air Force Court of Criminal Appeals did not err 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 warranted [1] day-for-day sentencing credit.

III. Cross-Appellant was prejudiced when the government held him in post-trial conditions, for over a year, without affording him the hearing he was entitled to receive.

Standard of Review

A Court of Criminal Appeals is authorized to reduce a service member's sentence due to "a legal deficiency in the post-trial process." *United States v. Gay*, 75 M.J. 264, 269 (C.A.A.F. 2016). This Court reviews such actions for an abuse of discretion. *Id.*, 75 M.J. at 267.

> When judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.

[1] Cross-Appellant does not agree with the government's assertion that the Court of Criminal Appeals' decision makes such relief "automatic."

United States v. Sanchez, 65 M.J. 145, 149 (C.A.A.F. 2007); *United States v. Houser*, 36 M.J. 392, 397 (C.M.A. 1993).

> Furthermore, the abuse of discretion standard of review recognizes that [the court below] has a range of choices and will not be reversed so long as the decision remains within that range.

Sanchez, 65 M.J. at 148-149; *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004)

> As long as [the court below] properly follows the appropriate legal framework, we will not overturn a ruling for an abuse of discretion unless it was 'manifestly erroneous.'

Sanchez, 65 M.J. at 149; *United States v. Griffin*, 50 M.J. 278, 284 (C.A.A.F. 1999).

The "manifestly erroneous" standard articulated above seems indistinguishable from the "clearly erroneous" standard used in other contexts. Under the clearly erroneous standard, to be reversed, a decision below must be "more than just maybe or probably wrong; it must … strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *United States v. French*, 38 M.J. 420, 425 (C.M.A. 1993). "Appellate courts must think long and hard before reversing a [lower] court[.]" *Id.*

Law and Analysis

The error in the post-trial processing of this case was one of Constitutional dimension.

United States v. Miller, 47 M.J. 352, 362 (C.A.A.F. 1997) established that an accused is entitled to receive the following process after a favorable Court of Criminal Appeals decision: In general, when the decision of a Court of Criminal Appeals would require the accused to be released from post-trial confinement, the government must take immediate action to give effect to that decision. The exception to that general rule arises when a TJAG decides to certify a Court of Criminal Appeals' decision for further review. If that happens, then the government must convene a hearing to determine whether the accused will remain in confinement during the pendency of that appeal.

Airman Katso was entitled to receive such a continued confinement hearing. The obligation of the government to afford him that due process of law was therefore guaranteed by the Fifth Amendment.[2] The government did not give Airman Katso the due

[2] U.S. CONST. amend V – "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"

process he was entitled to receive. Instead, without explanation, it deprived him of a continued confinement hearing for a full year.

Faced with those circumstances, the Court of Criminal Appeals was left to figure out what to do about that "deficiency in the post-trial process." *See Gay*, 75 M.J. at 269. The Court of Criminal Appeals did not abuse its discretion when it found that error to be worthy of a remedy. As it correctly observed: "[I]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." J.A. at 5 (*citing Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 153, 2 L. Ed. 60 (1803)).

The court below also did not err when it pointed out the truism that "incarceration without due process is inherently prejudicial." J.A. at 6. Neither did the Court of Criminal Appeals abuse its discretion when it found that the President's remedy for violations of pretrial confinement procedures, codified in R.C.M. 305(k), constituted persuasive authority for the post-trial confinement problem that the government, through its own unexplained inaction, had caused.

Having found R.C.M. 305(k) persuasive, the court below did not err when it applied the principles underlying that rule to the facts of

Airman Katso's case. As a result, the court below did not err when it awarded Airman Katso day-for-day confinement credit.

That is not to say Airman Katso agrees with everything the court below did. For example, *Miller* makes clear that if TJAG decides not to certify the decision of a Court of Criminal Appeals, then there must be "immediate direction to release an accused or conduct a hearing under RCM 305 [if a rehearing has been authorized.]" 47 M.J. at 361. In contrast, under the decision below, the government has 7 days to hold a continued confinement hearing in cases where TJAG decides to certify a case for review. That distinction makes little sense. The timing of a continued confinement hearing after TJAG's decision on certification should be the same regardless of whether the decision is "go" vs. "no go."

But, Appellant has not raised that issue because the abuse of discretion standard is resistant to reversal. Allowing the government to take 7-days to muster a continued confinement hearing does not "strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *French*, 38 M.J. at 425. That is especially true considering the heavy burden a party must carry to successfully challenge a merely procedural

rule. *See Medina v. California*, 505 U. S. 437 (1992); *see also Nelson v. Colorado*, 137 S. Ct. 1249 (2017).

The government's appeal must fail for the same reason. The Court below did not rely upon an erroneous understanding of the facts. It did not misinterpret this Court's decision in *Miller*. It acted within an acceptable range of choices to resolve a rare problem that the government, through its own inaction, created. The court below weighed relevant factors, including considering how similar procedural violations are handled in the pretrial confinement context.

In summary, the Court of Criminal Appeals' handling of this issue was not manifestly erroneous. Accordingly, it must be upheld.

Very Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically mailed to the Court and to the Air Force Government Trial and Appellate Counsel Division, on June 5, 2017.

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