IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Before Panel No. 3

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Case No. 201600207
Matthew A. HARRIS, Lance Corporal (E-3) U.S. Marine Corps Appellant	)	Tried at Marine Corps Recruit Depot Parris Island, South Carolina, on September 9 and October 29, 2015, and January 19, 2016, by a general court-martial convened by Commanding Officer, Marine Corps Air Station Beaufort.

TO THE HONORABLE JUDGES OF THE UNITED STATES
NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Issue Presented

TO REMEDY R.C.M. 305(i)(2)(D) VIOLATIONS, R.C.M. 305(k) REQUIRES THE MILITARY JUDGE TO AWARD DAY-FOR-DAY CONFINEMENT CREDIT FOR THE PERIOD OF NONCOMPLIANCE. THE GOVERNMENT ADMITTEDLY FAILED TO COMPLY WITH R.C.M. 305(i)(2)(D) FOR 126 DAYS, BUT THE MILITARY JUDGE ONLY AWARDED LCPL HARRIS WITH 23 DAYS OF CONFINEMENT CREDIT. WAS THE MILITARY JUDGE'S REFUSAL TO ORDER DAY-FOR-DAY CONFINEMENT CREDIT AN ABUSE OF DISCRETION?

Statement of Statutory Jurisdiction

Appellant's approved sentence includes a dishonorable discharge and more than one year of confinement. Accordingly, this Court has jurisdiction pursuant to Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of attempted robbery, desertion, and aggravated arson, in violation of Articles 80, 85, and 126, UCMJ, 10 U.S.C. §§ 880, 885, and 926 (2012). The Military Judge sentenced Appellant to eight years of confinement, reduction to pay-grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged. In accordance with a Pretrial Agreement, the Convening Authority suspended all confinement in excess of seventy-two months. And, except for the punitive discharge, the Convening Authority ordered the sentence executed.

Statement of Facts

A. Appellant burned down the military residence he occupied because he did not want to clean it. After preferral of an arson charge, he deserted from his unit and attempted to rob a gas station.

Appellant and his seventeen-year-old brother-in-law set fire to Appellant's military residence in order to avoid cleaning it before his move-out inspection. (R.

232, 237; Pros. Ex. 1 at 4.) The house was destroyed resulting in a loss of approximately $150,000. (R. 240, 316; Pros. Ex. 1 at 2, 4.)

After receiving notice of an aggravated arson charge, Appellant drove home to Missouri, intending to remain permanently away from his unit to avoid the legal consequences of his arson. (R. 244-45, 248; Pros. Ex. 1 at 4-5.) While there, he entered a gas station with his face covered, pointed a toy pistol at the two attendants, and demanded the money from the cash register. (R. 256, 259-260; Pros. Ex. 1 at 6.) After the attendants fled to a back office, Appellant attempted to open the cash register. (R. 262-63; Pros. Ex. 1 at 6). When he failed, Appellant fled the scene. (Pros. Ex. 1 at 6.)

B. Appellant was apprehended and placed into pretrial confinement that was reviewed under R.C.M. 305(i).

On May 12, 2015, after being arrested by United States Marshals and returned to military custody, Appellant entered pretrial confinement. (R. 246; Pros. Ex. 1 at 5; Appellate Ex. XIX at 16.) On May 20, 2015, a Review Officer reviewed the propriety of Appellant's pretrial confinement pursuant to R.C.M. 305(i). (Appellate Ex. XVIII at 34.)

Appellant appeared at the review hearing, He presented no evidence challenging his continued pretrial confinement other than arguing that the Review Officer did not have evidence to prove that Appellant had been absent without authority. (Appellate Ex. XIX at 19.)

The Review Officer concluded that Appellant should continue in confinement "in order to insure [sic] the subject named Marine's presence at trial." (Appellate Ex. XIX at 19.) The Review Officer drafted a Memorandum with his conclusion, attaching his handwritten "factual findings" as Enclosure (1). (R. 416; Appellate Ex. XIX at 2, 19.) In his factual findings, the Review Officer cited "the severity of the accusation Article 126 (Aggravated Arson) and Evidence of Desertion [sic] letter and 72-hour letter and missing for three weeks." (Appellate Ex. XIX at 20.)

At no time after the review hearing did Appellant request another hearing or reconsideration under R.C.M. 305(i)(2)(E), nor did he request that his commander release him from pretrial confinement.

C. After receiving the Review Officer's Memorandum, which was missing Enclosure (1), Appellant opted not to raise the missing enclosure (1) in his second discovery request; (2) in his Motion to Compel Discovery; or (3) before the Military Judge.

Prior to his arraignment on September 9, 2015, Appellant had received the Review Officer's written Memorandum, but Enclosure (1) was missing. (R. 398.) At arraignment, Detailed Defense Counsel represented Appellant and did not raise the matter of the missing Enclosure.[1] (R. 2, 4.) The Military Judge ordered all

[1] At all subsequent sessions, Individual Military Counsel represented Appellant along with Detailed Defense Counsel. (R. 11, 216.)

parties to comply with the deadlines set forth in the Trial Management Order, which he signed on September 21, 2015. (R. 8-9; Appellate Ex. 1 at 2.)

Appellant requested discovery on September 15, 2015, asking for "[c]opies of all Rule for Courts-Martial (R.C.M.) 305 matters to include, but not limited to . . . the 7-day review officer's memorandum detailing his conclusions regarding any continued pretrial confinement and all factual findings on which they are based." (Appellate Ex. V at 17; Appellate Ex. XIX at 2.)

On October 7, 2015, Trial Counsel replied: "Copies of the 48-hour probable cause determination, the 72-hour memorandum, and the 7-day review officer's memorandum detailing his conclusions regarding any continued pretrial confinement will be provided." (Appellate Ex. V at 39; Appellate Ex. XIX at 2.) Two days later, Detailed Defense Counsel emailed Trial Counsel a list of items that "'the government [] agreed to produce' that the defense '[had] not received.'" (Appellate Ex. XIX at 24.) Detailed Defense Counsel did not mention the Review Officer's Memorandum or a missing Enclosure. (Appellate Ex. XIX at 24.)

Appellant filed a Motion to Compel Discovery of specific missing documents, but not the missing Enclosure to the Review Officer's Memorandum. (Appellate Ex. V at 6-8.) Appellant also filed six additional substantive motions, none of which related to pretrial confinement or missing discovery. (Appellate Exs. III, VII, IX, XI, XIII, XVII.)

At an Article 39(a) session on October 29, 2015, the Military Judge discussed Appellant's Motion to Compel Discovery and the status of the outstanding discovery. (R. 13.) Individual Military Counsel affirmed that he "[did not] believe there [were] any significant disputes as to what should be produced by the parties" and agreed to delay having the Military Judge hear the Motion until the scheduled Article 39(a) in December. (R. 13.) No Defense Counsel mentioned the Review Officer's Memorandum or any missing enclosure at the October 29 session of court. (R. 12-215.)

On December 12, 2015, before the next scheduled hearing, Appellant submitted a pretrial agreement offer, which the Convening Authority approved on December 17. (Appellate Ex. XX at 7; Appellate Ex. XXIII at 5-9.) No hearing was held in December 2015, and Appellant never requested that the Military Judge rule on the Motion to Compel Discovery, nor did Appellant ever seek judicial review of his pretrial confinement under R.C.M. 305(j).

D. A month after the Convening Authority signed the Pretrial Agreement, Appellant moved for 127 days of administrative credit, objecting for the first time that he did not have the Enclosure to the Review Officer's Memorandum. Trial Counsel provided the Enclosure and the Military Judge awarded twenty-three days of credit.

On January 12, 2016, one week before his plea hearing, Appellant moved for 127 days[2] of administrative confinement credit pursuant to 305(k), based on the

[2] Appellant later amended his request to 126 days. (R. 394.)

United States' failure to comply with R.C.M. 305(i)(2)(D), making known for the first time that he had received an incomplete Memorandum. (Appellate Ex. XVIII.)

On January 16, 2016, after receiving Appellant's Motion for confinement credit, Trial Counsel provided Appellant another copy of the Memorandum, this time with Enclosure (1) attached. (Appellate Ex. XIX at 17.) Upon receipt of Enclosure (1), Appellant raised no motions challenging the propriety of his pretrial confinement. (R. 219.)

Opposing Appellant's Motion, the United States conceded that the failure to ensure the Review Officer's Memorandum contained Enclosure (1) constituted an inadvertent violation of R.C.M. 305(i)(2)(D), but argued that 126 days was an inappropriate windfall. (R. 395, 401.)

Upon receiving evidence and hearing argument, the Military Judge found that Appellant had received the Memorandum, minus the Enclosure: "[R.C.M. 305(i)(2)(D)] says [sic] that the title of this is actually 'memorandum' . . . . So was a memorandum provided? Yes, it was. It was provided to the defense. Was it complete? No. Was it missing the enclosure? Yes." (R. 417-18.)

The Military Judge found that the counsel for the United States "believed that they complied [with the request] and were unaware that the defense only had

part of the memorandum." (R. 419.) The Military Judge then highlighted Appellant's failure to raise it before the court in discovery:

> So if we're in court on a discovery motion, the defense says, "Well, we asked for something to be discovered sometime back and we don't have it." I expect to see it in a motion, and I expect to argue about it in court. I expect to be informed about it because it's an important issue. . . .
>
> There's already a motion filed by the defense and the defense should have told the court, "We need this. We need to find if out accused is rightfully in pretrial confinement. We've asked for it. We asked for it on 15 September. We didn't get it. We only got half of it and we want the rest. Were [sic] is it judge?"

(R. 418-19.)

The Military Judge noted that "[R.C.M. 305] is not meant to give the defense a windfall when the government believes it had turned over an item, when in fact they have only turned over a portion of that item albeit unwittingly." (R. 417.) He then awarded Appellant twenty-three days of administrative credit under R.C.M. 305(k)—for the period from October 7, 2015, the day the Government agreed to provide the required R.C.M. 305 documents, to October 29, 2015, the day that Appellant declined to raise the missing Enclosure at the Article 39(a) session. (R. 416, 419.)

Argument

THE UNITED STATES COMPLIED WITH R.C.M. 305(i)(2)(D) BY PROVIDING APPELLANT ALL REQUIRED REVIEW OFFICER DOCUMENTS. A PLAIN READING OF R.C.M. 305(k) REQUIRES AN AWARD OF ADMINISTRATIVE CREDIT ONLY FOR NONCOMPLIANCE THAT CAUSES CONFINEMENT, WHICH DID NOT OCCUR HERE. REGARDLESS, THE MILITARY JUDGE APPLIED R.C.M. 305(k) AND *McCANTS* BY AWARDING APPELLANT DAY-FOR-DAY CREDIT FOR THE ENTIRE TERM OF NONCOMPLIANCE THE MILITARY JUDGE FOUND.

A. Interpretation of the Rules and entitlement to confinement credit under R.C.M. 305(k) are each questions of law reviewed *de novo*.

The interpretation of the Rules for Courts-Martial is a question of law this Court reviews *de novo*. *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). Whether an appellant is also entitled to confinement credit is a question of law this Court reviews *de novo*. *United States v. Rendon*, 58 M.J. 221, 224 (C.A.A.F. 2003); *United States v. Smith*, 56 M.J. 290, 292 (C.A.A.F. 2002).

In reviewing *de novo* whether the facts entitle an appellant to credit under R.C.M. 305(k), this Court "defers to a military judge's findings of fact unless they are clearly erroneous." *United States v. Williams*, 68 M.J. 252, 256 (C.A.A.F. 2010).

B. This Court interprets the Rules under ordinary rules of statutory construction and is bound by the plain meaning of the text, giving effect to each word.

The first step in statutory construction is "to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent." *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). This Court is not entitled to "look beyond" the plain meaning of the statute if the language is clear and unambiguous to construct it in a different way. *United States v. Clark*, 62 M.J. 195, 198 (C.A.A.F. 2005) (citation omitted); *see also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon of statutory construction is also the last: judicial inquiry is complete.") (citations and internal quotations marks omitted).

"There is no rule of statutory construction that allows for a court to append additional language as it sees fit." *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014). Nor should courts interpret clear language in such a way that makes accompanying language superfluous. *See, e.g., Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal rule of statutory construction that we must 'give effect, if possible, to every clause and word of a statute'") (quoting

United States v. Menasche, 348 U.S. 528, 538-39 (1955) (citation omitted)); *United States v. Adcock*. 65 M.J. 18, 24 (C.A.A.F. 2007) ("Indeed, '[o]ne of the basic canons of statutory interpretation is that statutes should be interpreted to give meaning to each word.'").

This Court has a "duty to give effect, if possible, to every clause and word in the statute." *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (quoting *Menasche*, 348 U.S. at 538-39 (internal quotations omitted)); *Cf. Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("'Where Congress includes particular language in one section of a statute but omits in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'") (quoting *Russello v. United States*, 464 U.S. 16 , 23 (1983)).

The same canons of statutory construction apply to interpreting the Rules for Courts-Martial. *Hunter*, 65 M.J. at 401; *United States v. Lucas*, 1 C.M.R. 19, 22 (C.M.A. 1951) ("[An] act of Congress (the Code) and the act of the Executive (the Manual) are on the same level and that the ordinary rules of statutory construction apply.)."

C. Appellant is entitled to no administrative credit when the President requires credit under R.C.M. 305(k) only for "confinement served as the result of" noncompliance with the Rule, and Appellant demonstrates no such causal link.

"The remedy for noncompliance with [R.C.M. 305(i)] shall be an administrative credit for any confinement served *as a result of* such

noncompliance." R.C.M. 305(k) (emphasis added). "[C]redit shall be computed at the rate of 1 day credit for each day of confinement served as *a result of* such noncompliance." *Id.* (emphasis added).

1. This Court should decline Appellant's invitation to expand R.C.M. 305(k) beyond the President's plain language to permit credit for administrative violations that have no effect on pretrial confinement.

The Supreme Court made clear that the phrase "as a result of" indicates a causation requirement. *See Paroline v. United States*, 134 S. Ct. 1710, 1720 (2014). In *Paroline*, the Court was asked whether 18 U.S.C.§ 2259 (2012) limited restitution to victims whose losses were proximately caused by the defendant's crime. *Id.* at 1719. Under that statute, a victim is "the individual harmed as a result of a commission of a crime under this chapter." 18 U.S.C. § 2259(c). Analyzing the phrase "as a result of," the Court found it "plainly suggest[s] causation." *Id.* Thus, the Court held that if the defendant's crime did not cause the harm to the aggrieved individual, that individual would not be entitled to restitution under the statute. *Id.* In 18 U.S.C. § 2259, "the requirement of proximate cause is in the statute's text." *Id.*

So too here, R.C.M. 305(k) makes plain the requirement of a causal link between the violation of R.C.M. 305(i) and pretrial confinement. The Rule's language provides a mandatory remedy only if there is "confinement served as a result of noncompliance" with the referenced sections R.C.M. 305(k). Indeed, if

the President intended to confer the mandatory remedy without the causal link, the Rule would provide that "[t]he military judge shall order administrative credit under subsection (k) of this rule . . . for failure to comply with the provisions of subsections (f), (h), or (i) of this rule."

To read R.C.M. 305(k) as providing a remedy to all violations of the referenced sections without regard to the actual consequences of those violations renders the phrase "any confinement served as a result of" superfluous—violating the Supreme Court's admonition that whenever possible, a statute should be read to "give effect, if possible, to every clause and word of a statute." *Menasche*, 348 U.S. at 538-39.

2. Appellant fails to show a causal link between any purported violation of R.C.M. 305(i)(D)(2) and his pretrial confinement.

Appellant never contested the propriety of his pretrial confinement, either through Review Officer reconsideration under R.C.M. 305(i)(2)(E), or judicial review under R.C.M. 305(j). Despite having multiple opportunities prior to January 2016, Appellant never complained about missing any Factual Findings in the Review Officer's Memorandum. And even after receiving the Enclosure, Appellant has never identified an incorrect, erroneous, or unsupported finding.

Because R.C.M. 305(k) plainly requires administrative credit only for confinement served "as a result of" noncompliance with R.C.M. 305(i)(2)(D),

without the barest showing that the absence of the Enclosure contributed to Appellant's continued pretrial confinement, he is entitled to no relief.

D. Because R.C.M. 305(i)(2)(D) imposes no deadline for compliance, Appellant's claim here is properly limited to discovery—which he explicitly declined to pursue.

1. Because the text of R.C.M. 305(i)(2)(D) contains no disclosure deadline, any imposition of such a deadline improperly expands the Rule.

Within seven days of imposition of pretrial confinement, a "neutral and detached officer" must review "the probable cause determination and necessity for continued pretrial confinement." R.C.M. 305(i)(2). That review officer's "conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum," a copy of which "shall be . . . provided to the accused or the Government on request." R.C.M. 305(i)(2)(D).

R.C.M. 305(i)(2)(D) places an affirmative obligation on an accused to request the review officer's memorandum. The United States must provide the memorandum upon request, but R.C.M. 305(i)(2)(D) contains no deadline establishing a violation—unlike other provisions within the same Rule.[3]

[3] *See* R.C.M. 305(f) (requiring that, upon request for a military counsel, one be provided either prior to the initial review, or *within seventy-two hours of the request being communicated*); R.C.M. 305(h)(1) & (2) (requiring notification to commander *within twenty-four hours of a service member's placement in pretrial confinement*, and a and written memorandum from that commander *within seventy-two hours of confinement*); R.C.M. 305(i)(1) (requiring a probable cause determination *within forty-eight hours of confinement*); R.C.M. 305(i)(2)(A) & (B)

Thus, under R.C.M. 305(i)(2)(D), delay in disclosing a review officer's memorandum does not constitute a *per se* violation mandating remedy under R.C.M. 305(k). *Cf. United States v. Williams*, 68 M.J. 252, 253 (C.A.A.F. 2010) (holding that a confinement facility's violation of a service regulation does not create *per se* entitlement to R.C.M. 305(k) relief); *United States v. Whalen*, No. 201400020, 2014 CCA LEXIS 788, at *8-9 (Oct. 21, 2014) (same).

Here, Appellant cites no legal authority for the notion that disclosing the Enclosure in January 2016 violated R.C.M. 305(i)(2)(D). Nor does he argue that the United States violated its discovery obligations—which in any case Appellant declined to press before the Military Judge and then waived through his guilty plea. Instead, Appellant essentially invites this Court to divine a deadline within R.C.M. 305(i)(2)(D), and to find that the United States exceeded that implicit deadline.

The Court of Appeals for the Armed Forces rejected a similar attempt to expand R.C.M. 305 request in *Rendon*. *See* 58 M.J. at 225. There, the appellant sought R.C.M. 305 confinement credit based on the conditions of his pretrial restriction. *Id*. at 222. Reversing the lower court's award of credit, the *Rendon* court relied on the plain language of the Rule: "On its face, R.C.M. 305 applies to 'pretrial confinement.' . . . There is no support in R.C.M. 305 for applying R.C.M.

(requiring a reviewing officer's hearing to occur *within seven days of confinement*, unless a specific extension is granted upon showing of good cause).

305(k) to any lesser form of restraint." *Id*. at 224. The court went on to repudiate past precedent that exceeded the plain text of the Rule: "To the extent that these decisions, or any others of this Court, suggest that R.C.M. 305 is per se applicable to restriction tantamount to confinement, that suggestion is beyond the clear language of the rule." *Id*. at 225.

Just as in *Rendon*, a finding that the R.C.M. 305(i)(2)(D) required a service of the Findings of Fact here before January 2016 would be "beyond the clear language of the rule." *See id*; *see also United States v. Wilder*, 75 M.J. 135, 138 (C.A.A.F. 2016) ("Based on the plain language in R.C.M. 707, we do not hesitate to conclude that when analyzing a . . . violation under R.C.M. 707, it is the earliest of actions listed in R.C.M. 707(a) . . . that starts the speedy trial clock . . . ."); *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015) (refusing to expand the language of R.C.M. 703(f)(2) to include constitutional due process standards when "there [was] nothing in the text or discussion of [the Rule] which indicates that the President intended to incorporate [those] standards"); *United States v. Muwwakil*, 74 M.J. 187, 194 (C.A.A.F. 2015) (holding that, under a plain reading of R.C.M. 914, the Rule does not require a prejudice analysis).

Because the United States met all the requirements of the Rule's plain language, the United States did not violate R.C.M. 305(i)(2)(D), and Appellant was not entitled to relief under R.C.M. 305(k).

2. Appellant's reliance on Trial Counsel's concession fails to demonstrate noncompliance with R.C.M. 305 based on the violation of an implicit deadline.

Appellant did not at trial and does not now dispute the necessity of his confinement, the procedures of his review hearing, or the substance of the Review Officer's findings or recommendations. Likewise, Appellant did not at trial and does not now contend that the United States failed to disclose the Review Officer's Memorandum and the Enclosure before trial. (R. 398, 416-17; Appellate Ex. XIX at 17.)

Instead, Appellant's attempt to establish a violation of R.C.M. 305(i)(2)(D) relies exclusively on Trial Counsel's concession. (Appellant's Br. at 5, 9, Oct. 4, 2016.) But this Court is not bound by a concession of error. *See United States v. Emmons*, 31 M.J. 108, 110 (C.A.A.F. 1991); *United States v. McNamara*, 7 C.M.A. 575, 578 (C.M.A. 1957); *United States v. Cain*, 5 M.J. 698 700 (N.C.M.R. 1978). Rather, this Court reviews *de novo* the question of whether Appellant is entitled to confinement credit. *See Rendon*, 58 M.J. at 224; *Smith*, 56 M.J. at 292.

3. The Military Judge did not abuse his discretion by treating Appellant's complaint as a discovery matter, which Appellant waived on October 29, 2015, by explicitly declining pursue either in his Motion to Compel Discovery or in argument.

This Court reviews a military judge's discovery rulings for abuse of discretion. *See United States v. Stellato*, 74 M.J. 473, 480 (C.A.A.F. 2015) (citing *United States v. Jones*, 69 M.J. 294, 298 (C.A.A.F. 2011); *United States v. Roberts*,

59 M.J. 323, 326 (C.A.A.F. 2004)). This Court also reviews a military judge's remedy for discovery violations for abuse of discretion. *See id.* (citing *United States v. Trimper*, 28 M.J. 460, 461-62 (C.M.A. 1989). This standard calls for more than a difference of opinion—an abuse of discretion occurs when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

a. A military judge may determine whether a pretrial confinement question implicates R.C.M. 305.

The Court of Appeals for the Armed Forces has declined to award confinement credit when the military judge did not clearly err in finding that the facts did not implicate R.C.M. 305(k). *See United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006).

In *Regan*, the appellant, after testing positive for cocaine for the third time, was given the option to either enter an inpatient drug treatment program, or be ordered into pretrial confinement. *Id.* at 300. At trial, the military judge found that being effectively forced into inpatient treatment amounted to "restriction tantamount to confinement," and awarded credit under *United States v. Mason*, 19 M.J. 274 (C.M.A. 1985). *Id.* at 301. The military judge declined, however, to award additional credit under R.C.M. 305(k). *Id.* On appeal, the Court of Appeals

for the Armed Forces affirmed, deferring to the military judge's finding that the conditions surrounding the appellant's restraint "did not amount to 'physical restraint characteristic of confinement'" and therefore did not implicate R.C.M. 305. *Id.* at 303 (citation omitted).

b. The Military Judge did not abuse his discretion—either in treating Appellant's failure to raise the Enclosure after October 29, 2015, as a discovery matter, or in crafting a remedy.

Here, the Military Judge awarded R.C.M. 305(k) administrative credit only for the twenty-three days from the United States' October 7 agreement to provide documents until Appellant's October 29. As in *Regan*, the Military Judge was within his discretion to treat any complaint about the missing Enclosure after October 29, 2015, as a discovery matter rather than a matter implicating R.C.M. 305.

Subject to the Code and the Manual for Courts-Martial (MCM), a military judge may "exercise reasonable control over proceedings . . . ." R.C.M. 801(a)(3). "Reasonable control" includes determining when motions will be litigated. R.C.M. 801(a)(3) Discussion. "Failure by a party to raise . . . objections or to make requests or motions which must be made at a time set by [the MCM] or by the military judge under the authority of [the MCM], . . . shall constitute waiver thereof, but for good cause shown [the military judge] may grant relief from the

waiver." R.C.M. 801(g); *see also* R.C.M. 905(e) (providing that objections not raised are waived).

The Military Judge had ordered specific deadlines for motions to be filed and litigated. (Appellate Ex. I at 1.) In his Order, the Military Judge specifically instructed the parties that should a filing be required after the deadlines, they were required to notify the court and articulate good cause. (*Id*. at 2.) Further the Military Judge admonished that the parties to make efforts to litigate all ripe motions at the first motions' date, including discovery motions. (*Id*.)

Ruling on Appellant's Motion for R.C.M. 305 credit, the Military Judge found that the United States served a copy of the Memorandum on Appellant before October 29, 2015, (R. 398, 417-18), and that Trial Counsel was unaware Appellant's copy was missing the Enclosure. (R. 417.) The Military Judge found that the United States agreed on October 7, 2015, in response to Appellant's discovery request, to provide documents required by R.C.M. 305(i)(2)(D). (R. 416; Appellate Ex. XIX at 2, 22; Appellee's Mot. to Attach.) The Military Judge found that Appellant's Motion to Compel Discovery did not list any of those documents, and that Appellant failed to raise the issue in argument on October 29, 2015. (R. 416; Appellate Ex. XIX at 25-32; Appellee's Mot. to Attach.) Each finding is supported by the Record and is therefore not clearly erroneous. *See Williams*, 68 M.J. at 256.

The Military Judge ruled that because Appellant knew or should have known of the defect in the Memorandum, he could not claim a windfall from failing to alert Trial Counsel. (R. 417-18.) The Military Judge's refusal to grant relief prevents such a windfall—and appropriately discourages defense "sandbagging" of known R.C.M. 305(i) defects. Appellant fails to identify how this ruling fell outside "the range of choices reasonably arising from the applicable facts and the law." *See Miller*, 66 M.J. at 307.

E. By pleading guilty unconditionally, Appellant waived any argument that he is entitled to credit beyond that which the Military Judge awarded. Regardless, Appellant is not entitled to 126 days of credit under *McCants*, which addresses only the required remedy—not what constitutes R.C.M. 305 noncompliance.

An appellant "bears the burden of raising an issue of compliance with any [R.C.M. 305] procedures by making a motion that specifically focuses the attention of trial participants on the alleged shortcoming." *United States v. Chapa*, 57 M.J. 140, 142 (C.A.A.F. 2002).

1. Appellant's unconditional guilty plea waived this issue.

"An unconditional plea of guilty waives all nonjurisdictional defects at earlier stages of the proceedings." *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010). Appellant's pretrial agreement contained no provision preserving his ability to appeal the Military Judge's ruling on R.C.M. 305(k) matters. Accordingly, Appellant has waived this issue on appeal. *But see United*

States v. West, No. 201200189, 2013 CCA LEXIS 230, at *12, n.9 (N-M. Ct. Crim. App. Mar. 21, 2013) (citing *United States v. Adcock*, 65 M.J. 18 (C.A.A.F. 2007)).

2. Appellant mistakenly relies on *United States v. McCants*, 39 M.J. 91 (C.M.A. 1994).

In *McCants*, the appellant was convicted after a contested trial of attempted murder, assault, and unauthorized absence. 39 M.J. at 91-92. The appellant was in pretrial confinement, and moved for administrative credit based on the United States' failure to provide the review officer's memorandum—from the time of the review officer's decision until trial. *Id*. at 92. The military judge appeared to find a violation of R.C.M. 305, but demurred ruling on credit, instead leaving the matter to the Staff Judge Advocate and Convening Authority to award the required credit. *Id*. The Court of Military Appeals held that this was error, and that the appellant was to receive one day of credit "for each day of noncompliance" with R.C.M. 305. *Id.* at 94.

Appellant's case diverges from *McCants* in several significant ways. First, in *McCants*, the appellant received no memorandum and raised the issue of noncompliance. Here, Appellant received the Review Officer's Memorandum early in the proceedings, never alerted Trial Counsel to a missing Enclosure, and then explicitly declined to "focus[] the attention of trial participants on the alleged shortcoming" when he agreed not to pursue the Enclosure in motion arguments. (R. 13, 398, 417); *see Chapa*, 57 M.J. at 142.

Second, in *McCants*, the military judge declined to award credit despite an apparent finding of noncompliance with R.C.M. 305. Here, however, the Military Judge found noncompliance—ending on October 29, 2015—and then awarded day-for-day credit under R.C.M. 305(k). Contrary to Appellant's argument, *McCants* does not define what constitutes an R.C.M. 305 violation, but instead only the required remedy. 39 M.J. at 94. Here, the Military Judge, having found twenty-three days of noncompliance, followed both R.C.M. 305(k) and *McCants* by awarding twenty-three days of credit. *See id*.

3. To the extent that *McCants* suggests day-for-day credit mandatory for any ongoing ministerial violation of R.C.M. 305(i)—regardless of consequence—that holding conflicts with the plain language of the Rule.

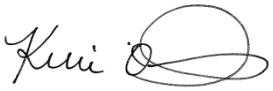
Appellant's request under *McCants* for additional administrative credit—totaling 126 days—also fails because it ignores and conflicts with the plain language of the Rule, requiring "administrative credit against the sentence adjudged for any *confinement served as the result of such noncompliance*." R.C.M. 305(k) (emphasis added); *see also Paroline*, 134 S. Ct. at 1720 ("The words 'as a result of' plainly suggest causation.").

Where the Rule's language is plain, this Court should analyze the Military Judge's award of credit under that language alone. *See McPherson*, 73 M.J. at 395. Thus, even if this Court were to accept Appellant's argument that R.C.M. 305 noncompliance here ran 126 days from September 15, 2015, to January 19, 2016,

because Appellant fails to make any showing that he served confinement "as the result of such noncompliance," this Court should deny Appellant additional relief. *See* R.C.M. 305(k); *Paroline*, 134 S. Ct. at 1720.

Conclusion

WHEREFORE, because the United States respectfully requests that this Court affirm the findings and sentence as adjudged and approved below.



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Certificate of Filing and Service

I certify that the United States filed this brief with the Court, served a copy on Appellate Defense Counsel, and electronically filed the brief in CMTIS with the Court pursuant to N-M. Ct. Crim. App. Rule 5.2(b)(1) on January 3, 2017.

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