

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES

Appellee

**BRIEF ON BEHALF OF
APPELLANT**

v.

Docket No. ARMY 20180477

Staff Sergeant (E-6)

DAVID C. TATE

United States Army

Appellant

Tried at Fort Huachuca, Arizona, on 20 February, 2 April, and 18-20 September 2018, before a general court-martial appointed by the Commander, Headquarters, Fort Huachuca, Colonel Michael Devine, Military Judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Assignments of Error¹

I.

**THE MILITARY JUDGE ERRED BY ALLOWING
THE GOVERNMENT TO PRESENT ITS
SENTENCING CASE ANEW.**

II.

**THE CONVENING AUTHORITY IMPROPERLY
APPROVED THE APPELLANT'S SENTENCE
WITHOUT A SUBSTANTIALLY VERBATIM
TRANSCRIPT, IN VIOLATION OF RULE FOR
COURTS-MARTIAL 1103(f)(1).**

¹ Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant respectfully requests this Court consider those matters set forth in the Appendix.

Statement of the Case

On 20 February, 2 April, and 18-20 September 2018, at Fort Huachuca, Arizona, a military judge sitting as a general court-martial convicted Staff Sergeant David C. Tate (the appellant), pursuant to his pleas, of one specification of aggravated assault, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2016). The military judge sentenced the appellant to be confined for 22 months, to be reduced to the grade of E-3 and to be discharged from the service with a bad-conduct discharge. (R. at 476). On 25 October 2019, the chief of military justice signed the promulgating orders, and the convening authority approved (on an unknown date)² the sentence as adjudged and credited the appellant with 30 days of confinement as a result of post-trial delay (action).

Statement of Facts

On 18 September 2018, during the government presentencing case, the court reporter's recording equipment stopped functioning from 1250 hours until 19 September 2018 at 1000 hours. (R. at 131-132). During that unrecorded afternoon session, the government presented the totality of their presentencing case. (R. at 133). Specifically, the government called four witnesses associated with the

² Appellant contests that this is an incomplete record since the original action is not dated in accordance with R.C.M. 1107(f)(1) and R.C.M. 1103(B)(2)(D)(iv) ("a complete record shall include... the original dated, signed action by the convening authority")

victim. The government's presentencing case included: victim's sister [REDACTED]; victim's friend [REDACTED]; victim's son [REDACTED]; an expert witness [REDACTED]; the victim's unsworn testimony; and the admission of prosecution exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15. (R. at 148-149.) The government also admitted prosecution exhibit 11, video footage the judge reviewed. (R. at 162). The defense called one character witness [REDACTED], and introduced defense exhibits F, G, H, J, K, L, P, Q, R., and I (R. at 149).

On 19 September 2018, the government informed the judge that the court reporting equipment had malfunctioned and none of the afternoon session, the day prior, had been captured. (R. 132). The judge ruled to allow the government to present "their case anew." (R. at 134). The defense objected and argued a motion for appropriate relief, "considering it is non-verbatim court-martial, is the jurisdictional limit of 6 months confinement and no authorized punitive discharge." (R. at 135-136). The defense argued that part of their ongoing discovery request includes all verbatim transcript from the earlier hearing in accordance with the Rules for Courts-Martial [hereinafter R.C.M.] 914. The defense also argued, "the government has already gotten one bite at the apple. There is prejudice in that they are allowed to perfect their case." (R. at 136). The defense further objected to allowing the government to present their case "anew:"

without a verbatim transcript both counsel and both sides asking and remembering the questions that had previously

been heard, *to include the 802 summaries* on the record as to appropriate dispositions in this case, are after four hours nearly impossible.

(R. at 136) (emphasis added).

The judge stated, “It is the court's intent to wash out that proceeding, as for purposes of record of trial, as if it never occurred.” (R. at 137). The defense then objected based on the inability to impeach the unrecorded sworn testimonies, and moved for an abatement until the government could produce the verbatim transcripts. (R. at 138-39). In response, the judge ruled that an abatement is not a proper remedy because of the inability to produce a verbatim record. (R. at 139).

The government in turn argued that the defense will have an “opportunity to perfect *their case*” through cross-examination, that the unrecorded proceedings “is similar to as if all of the parties sat in for a *witness interview* ahead of time,” and “it doesn’t benefit the government in any way.” (R. at 140 and 144) (emphasis added). The government asked the judge to disregard everything not recorded from the previous day and proposed that if the defense attempts to impeach a witness with previous unrecorded testimony the government “can stand up and agree that whatever was said was said.” (R. at 141). The judge then asked the government if “government will concede that that’s what the recording said?” if the defense raises an impeachment issue. (R. at 142). However, the government changed their position and instead of agreeing to concede, proposed that “if there is

a misinterpretation of what was heard, we would address that as we get there” on a “step-by-step basis.” (R. at 142). The defense argued that the court was proceeding with a non-verbatim transcript:

“I just don't see where the government has articulated a rule or responded to *Davenport* that allows for this. And so case law settled. The Rules for Court-Martial require a determination of a verbatim and non-verbatim hearing. And so I just am missing the rule that they are citing that allows us to do this without conceding that for us to go in this manner to the conclusion of a court-martial is that they cannot substantially re-create this testimony and that this is a non-verbatim transcript, period. Anything that went past yesterday and is now not part of the record by definition makes it non-verbatim.”

(R. at 144)

The judge denied the defense motion for appropriate relief to limit the maximum punishment, characterizing the proceedings as a “rehearing:”

“defense is actually favored by the fact that they have heard the government witnesses an additional time to prepare their cross-examination and arguments based thereon. The court further finds that with regard to the one defense witness, Lieutenant Colonel [REDACTED], the defense would have an opportunity to hear her testimony and have her testify at a time when she is less tired...”³

“...The court does find that the admitted material from yesterday's session would be both *qualitatively and quantitatively substantial* were such testimony to be

³ The issue of the dense witness, [REDACTED], being tired unfolded during the unrecorded portion, when the defense requested a temporary excusal of [REDACTED]; the government requested permanent excusal, and the judge permanently excused the defense witness. (R. at 147).

considered by the court in determining an appropriate sentence. However, the court will not consider any of the testimony that was presented yesterday afternoon...”

(R. at 148) (emphasis added).

During post-trial processing, defense raised several legal errors on the matters submitted to the convening authority. The legal errors included that the judge erroneously allowed the government to perfect their case; the record was not substantially verbatim; the judge erroneously denied the defense motion for appropriate relief; the judge erroneously allowed improper evidence in aggravation; and the government’s failure to timely complete the post-trial process.

(R. at clemency matters).

Standard of Review

Whether a record is complete and a transcript is verbatim are questions of law to be reviewed de novo. *See United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law

“A ‘complete record of the proceedings,’ including a verbatim written transcript, must be prepared for each general court-martial in which the sentence includes a punishment” of a punitive discharge. *United States v. Allende*, 66 M.J.142, 143 (C.A.A.F. 2008); Article 54(c)(1)(A); R.C.M. 1103(b)(2)(B).

Records of trial that are not substantially verbatim or are incomplete cannot

support a sentence that includes a punitive discharge or confinement in excess of six months. R.C.M. 1103(b)(2)(B).

“A [nonverbatim] transcript and an incomplete record are separate and distinct errors under the R.C.M.” *Davenport*, 73 M.J. at 376. While prophylactic measures are not prescribed for most cases involving incomplete records, “and the missing material or remedy for same are tested for prejudice, where the record is incomplete because the transcript is not verbatim, the procedures set forth in R.C.M. 1103(f) control.” *Id.* at 377. “If...a verbatim transcript cannot be prepared when required by subsection (b)(2)(B)...of this rule...a convening authority” is limited to one of the following:

(1) approving only so much of the sentence that could be approved by a special court-martial, except that a bad-conduct discharge...may not be approved; or

(2) directing a rehearing...provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial.

R.C.M. 1103(f)(1)-(2).

In March 2019, this honorable court addressed a similar non-verbatim legal error in *United States v. Steele*, 2019 CCA LEXIS 95 (Army Ct. Crim. App. 2019) (mem. op.).⁴ Concluding that “under *Davenport*, we do not test for prejudice when

⁴[https://www.jagcnet.army.mil/Apps/ACCAOpinions/ACCAOpinions.nsf/MOD/2B6210A5433CA01E852583B600569B34/\\$FILE/mo-steele,%20ad%20\(cc\).pdf](https://www.jagcnet.army.mil/Apps/ACCAOpinions/ACCAOpinions.nsf/MOD/2B6210A5433CA01E852583B600569B34/$FILE/mo-steele,%20ad%20(cc).pdf)

we have a non-verbatim transcript.” *Id.* at *6. This court set aside the sentence without assessing prejudice:

Based on an error of law (no verbatim transcript) we are setting aside appellant's sentence without assessing whether the error of law prejudiced appellant.

Id. at *9.

In assessing whether a record is complete or a transcript is verbatim, the threshold question is “whether the omitted material was ‘substantial,’ either qualitatively or quantitatively.” *Davenport*, 73 M.J. at 377 (citations omitted). Qualitative omissions are substantial if the omitted material “related directly to the sufficiency of the Government’s evidence on the merits.” *Id.*, *cf.* *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000) (omission of three presentencing exhibits was substantial because the exhibits presumably related to the sentencing decision). Quantitative omissions are substantial unless “the totality of omissions...becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.” *Davenport*, 73 M.J. at 377 (citations omitted). Whether the omission of testimony from a record of trial is substantial is analyzed on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

The predecessor to the CAAF found the following to include substantial omissions; the absence of the word-for-word account of the announcement of the

sentence portion of the proceedings, *United States v. Eichenlaub*, 11 M.J. 239, 240 (C.M.A. 1981); unrecorded sidebar conferences that involved the admission of evidence, *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979); argument concerning court member challenges, *United States v. Sturdivant*, 1 M.J. 256 (C.M.A. 1976); several bench conferences had “inaudible” sections. “We believe that these inaudible portions were substantial omissions which, along with other non-transcriptions, render the record non-verbatim.” *United States v. Chollet*, 30 M.J. 1079, 1085 (C.G.C.M.R. 1990).

A record that is incomplete because it is missing an exhibit is different from a record that is incomplete because it lacks a verbatim transcript. *Cf.* R.C.M. 1103(b)(2) and R.C.M. 1103(f). However, the analysis regarding whether an omission is substantial is the same. *Cf. Davenport*, 73 M.J. 373 and *Gaskins*, 72 M.J. 225. Thus, such cases also provide guidance about an appropriate remedy.

In *United States v. Stoffer*, the CAAF ruled that the government’s failure to attach three defense presentencing exhibits to the record of a guilty plea constituted a substantial omission. 53 M.J. 26, 27 (C.A.A.F. 2000). In *United States v. Seal*, 38 M.J. 659 (Army Ct. Crim. App. 1993), this court found the loss of admitted presentencing evidence to be substantial. This court held such loss to preclude a finding the record was substantially verbatim as presented, and returned the record to the convening authority. *Id.* at 663. The Air Force has similarly found the

government's loss of presentencing evidence to be a substantial omission. *United States v. Johnsen*, ACM S32057, 2013 CCA LEXIS 1025 (A.F. Ct. Crim. App. 19 Nov. 2013) (where the accused offered both an oral and written unsworn statement, but where the government did not attach the written statement, the court found a substantial omission).

I.

THE MILITARY JUDGE ERRED BY ALLOWING THE GOVERNMENT TO PRESENT ITS SENTENCING CASE ANEW

Argument

The government lost the totality of their presentencing case and the initial portion of the defense case. To put the loss in perspective, during the unrecorded presentencing case, the government called five witnesses, the defense called one witness, the government introduced 13 exhibits, and the defense introduced 10 exhibits. (R. at 148-149). The judge also reviewed a video footage introduced by the government. (R. at 162). Furthermore, the loss of verbatim record included the discussions and statements of witnesses regarding the evidence introduced, and the summary of all 802 sessions held during the unrecorded version. Upon the judge's ruling denying the defense motion for appropriate relief, the government had an opportunity to perfect their case, cherry picking what witnesses and

evidence to present again. As a result, the government failed to reconstruct a substantially verbatim record.

A. The military judge erroneously ordered a rehearing of the government sentencing case.

Here, a verbatim transcript is required because the military judge sentenced appellant to 22 months of confinement and a bad-conduct discharge. R.C.M. 1103(b)(2)(B). By definition, if there is not a verbatim transcript, there is also no “complete record.” R.C.M. 1103(b)(2)(D). *Davenport*, 73 M.J. at 377. The military judge did not have the authority to order a rehearing because “setting aside the sentence is a precondition to ordering a rehearing. *See* UCMJ Art. 60(f)(3).” *Steele*, 2019 CCA LEXIS 95, at *8.

The military judge abused his discretion by ordering a rehearing as opposed to a reconstruction of the record. (R. at 148). “When omissions occur in the record, it is possible to *reconstruct* those portions affected so that the record is ‘substantially verbatim.’” *Seal*, 38 M.J. at 662 (citations omitted) (emphasis added). “The use of R.C.M. 1102 during a post-trial Article 39(a), UCMJ, session is the appropriate procedure for *reconstructing* lost testimony prior to authentication.” *United States v Crowell*, 21 M.J. 760,761 (N.M.C.M.R. 1985) (emphasis added). Here, the military judge failed to properly order an Art. 39(a) session to reconstruct the missing portions so that the record is substantially verbatim. Instead, the judge inserted himself as the convening authority directing a

rehearing, allowing the government to introduce new evidence and to discard evidence previously admitted in violation of R.C.M. 1102. *See* R.C.M. 1102 discussion (“Because the action at a proceeding in revision is corrective, a proceeding in revision may not be conducted for the purpose of presenting additional evidence”).

B. The record is not verbatim and is incomplete.

Once the military judge ordered a rehearing, the government presented a new presentencing case, different from the unrecorded session, and with substantial omissions. Insubstantial omissions do not make a record non-verbatim, but *substantial omissions* create a rebuttable presumption of prejudice that the government must rebut. *United States v. McCullah*, 11 M.J. 234 (C.M.A. 1981) (emphasis added).

The appellant’s defense counsel was unable to sufficiently cross-examine, or impeach by cross-examination, the government witnesses. During the rehearing, when conducting the direct examination of the victim’s sister, [REDACTED], the government elicited new evidence in aggravation regarding the impact of the appellant’s action on the *mother* of the victim; “Have you seen any emotional toll this has had *on anyone else in your family?*” (R. at 178) (emphasis added). The witness then went into details about how it affected her mother whom, at the time “was diagnosed with kidney cancer, and she was undergoing treatment, which was surgery to

remove the tumor.” (R. at 179). During cross-examination, the witness acknowledged that this was new information. (R. at 182).

The government then called the victim’s friend, [REDACTED], and elicited new evidence in aggravation regarding the impact of the appellant’s action on herself:

“Q. And how did this impact your work life?”...

“Q. What was it about it that you think made you need to go to therapy and go on antidepressants?”...

“Q. Did you find it traumatic what you saw at the Tate home with [REDACTED]?”...

“Q. As you were going to these appointments and going through the week and the following with [REDACTED], did anybody ever ask you how you were doing?”...

“Q. How long did you have to take medication and go to counseling for this?”...

“Q. You said -- you described a little bit about how you felt like a prisoner in your own home.”...

“Q. Did you take any safety precautions as a result of this?”...

“Q. Was there any kind of safety mechanism put in place by the MPs?”...

“Q. How did that experience make you feel emotionally?”...

“Q. After what you witnessed on the 24th of July and what the accused did to [REDACTED] and everything that you saw, has this had a lasting emotional impact on you?”...

(R. at 200-204, 209-210).

The witness testified in detail about how the appellant’s action impacted her life, to include; needing antidepressants for her and her husband for six months; undergoing therapy for her and her husband for four months; flashbacks of previous domestic violence incidents involving her; trauma from the appellant’s

assault on his wife; anger because nobody took the time to ask her how she was doing; concerns about retaliation from the appellant towards her and her family; how she would not leave her house or let her dogs out to play; how she was frightened, and how it will always be with her. (R. at 200-210). During cross-examination, the witness acknowledged that it was new information stating, “That question never came up yesterday.” (R. at 212).

The government seized the opportunity to present a new case and erroneously elicited new evidence in aggravation, otherwise inadmissible, through the testimony of ■■■ and ■■■. Evidence in aggravation, as stated in R.C.M. 1001 (b)(4), includes “evidence of financial, social, psychological, and medical impact on or cost to any person or entity *who was the victim of an offense committed by the accused.*” (Emphasis added). Appellant was not charged with assaulting or harming the victim’s mother, the victim’s friend, ■■■, or ■■■’s husband, and no evidence was presented to indicate that appellant had ever assaulted them or retaliated against them.

During the rehearing, the government decided not to call the victim’s son, ■■■, even though he provided testimony under oath during the unrecorded hearing. (R. at 254-255). The testimony of ■■■, along with the complex direct, cross-examination, and objections, was not captured in the record, and there is no adequate substitute. The staff judge advocate (SJA) deemed the record verbatim

without [REDACTED]'s testimony, because the defense "did not have any questions" and "had no objection" (addendum). However, in *Seal*, this court concluded that it is the government's responsibility to prepare the record even if the defense does not ask for the missing evidence:

"The trial counsel, under the direction of the military judge, is responsible for preparing the record of trial. R.C.M. 1103(b)(1)."...

"While the *defense counsel here did not ask* that the videotapes be marked as an exhibit or entered into the record as an exhibit, *the military judge or trial counsel should have ensured that either the videotapes or a transcription of the verbal contents were included* in the record."

Seal, 38 M.J. at 662 (citations omitted) (emphasis added).

"We find that it was *error not to include a copy of the videotapes or an adequate substitute* in the record of proceedings. We hold that the record of proceedings is not complete and therefore not "substantially verbatim" in this case. Therefore, the government has not sufficiently rebutted the presumption of prejudice rising from the defective record."

Seal, 38 M.J. at 663 (citations omitted) (emphasis added).

During the unrecorded portion, the government introduced prosecution exhibit 11,⁵ a video that the military judge examined. (R. at 162). During the rehearing, the government decided not to introduce prosecution exhibit 11. The

⁵ Now appellate exhibit XXIV.

depiction of the video footage was not summarized on the record. The non-verbatim record does not allow this court to review the discussions and statements of witnesses regarding the evidence introduced, objections, cross-examinations, or the summary of all 802 sessions held during the unrecorded version.

The rehearing of the government sentencing case did not rebut the “presumption of prejudice” due to “substantial omissions.” *McCullah*, 11 M.J. at 237. Here, the omission was substantial quantitatively because the entire testimony of ■■■, as well as the video footage of prosecution exhibit 11, was omitted. The omission was substantial qualitatively because the substance of the omitted testimony and video footage presumably relates directly to the government's sentencing case, and the potential impeachment of the witnesses and objections regarding the video. Furthermore, the statements of the government witnesses, ■■■ and ■■■, were not recalled with fidelity during the rehearing, and served the purpose of introducing more damaging, otherwise inadmissible, evidence in aggravation. Indeed, the military judge conceded with regard to the substantial omission: “The court does find that the admitted material from yesterday's session would be both *qualitatively and quantitatively substantial* were such testimony to be considered by the court in determining an appropriate sentence.” (R. at 148) (emphasis added).

The military judge erroneously ordered a rehearing, concluding that the defense would benefit “by the fact that they have heard the government witnesses an additional time to prepare their cross-examination.” (R. at 148). However, the cross-examination is limited to the government’s direct examination, which seized the opportunity to elicit inadmissible aggravation evidence, while avoiding the pitfalls that opened their witnesses up to effective cross-examination during their practice round the day prior. The military judge failed to properly rule on the defense objection as to the ability to impeach the witnesses, and instead took the government’s proposition to treat the unrecorded portions as a “witness interview” (R. at 140), and to take it on a “step-by-step basis.” (R. at 142). Such approach is unprecedented and in direct contradiction with the court’s obligation to “reconstruct those portions affected so that the record is ‘substantially verbatim.’” *Seal*, 38 M.J. at 662 (citations omitted). The erroneous ruling to order a “rehearing” allowed the government to perfect their case by presenting new evidence in aggravation through their witnesses, excluding witnesses, and excluding evidence previously presented, thereby infringing on the appellant’s right to cross-examine witnesses and have a substantially verbatim record.

II.

THE CONVENING AUTHORITY IMPROPERLY APPROVED THE APPELLANT’S SENTENCE WITHOUT A SUBSTANTIALLY VERBATIM

**TRANSCRIPT, IN VIOLATION OF RULE FOR
COURTS-MARTIAL 1103(f)(1).**

Argument

The complete omission of the government's sentencing case, portions of the defense's sentencing case, the introduction of twenty-three exhibits, the discussions regarding such introduction, and the associated 802 sessions, constituted a substantial omission that rendered the transcript non-verbatim under R.C.M. 1103(b)(2)(B), as the government was unable adequately reconstruct the record. This complete omission was deemed "qualitatively and quantitatively substantial" by the military judge (R. at 148). As a result, and in accordance with *Davenport*, the convening authority was limited to those remedies listed in R.C.M. 1103(f), because the sentence included 22 months of confinement and a bad-conduct discharge, requiring a verbatim transcript. If an omission is either qualitatively or quantitatively substantial, a transcript cannot be deemed verbatim. *Davenport*, 73 M.J. at 373, 375.

Here, the government lost the totality of their presentencing case. This is not a matter of a missing few words during the sentencing announcement where both sides agree about the general nature of the content. *Eichenlaub*, 11 M.J. at 240. This is the entirety of the testimony of five presentencing witness and video footage examined by the military judge. Further, it is objectively unreasonable to conclude that the totality of the government's presentencing case is "so

unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.” *Davenport*, 73 M.J. at 377.

A. This honorable court is the only remedy available.

While the appellant raises the legal error of the convening authority improperly approving the sentence in violation of R.C.M. 1103, he acknowledges that the current applicable law is in contradiction, making it quite the “pickle.” *Steele*, 2019 CCA LEXIS 95, at *8. This court was faced with a similar legal challenge when dealing with a non-verbatim transcript and the application of R.C.M. 1103 without violating Art. 60, UCMJ:

“Thus, were we to strictly follow *Davenport*, we would place the convening authority in an impossible position. If there is no verbatim transcript, the convening authority cannot *approve* a sentence with a punitive discharge. The convening authority also cannot *disapprove* the punitive discharge because Congress specifically removed this power. The convening authority also cannot order a rehearing because setting aside the sentence is a precondition to ordering a rehearing. *See UCMJ art. 60(f)(3).*”

Steele, 2019 CCA LEXIS 95, at *7-8.

In *Steele*, this court rightfully decided to set aside the sentence and return the case to the convening authority “who may then fulfill his responsibilities under R.C.M. 1103(f) without violating *Article 60.*” *Steele*, 2019 CCA LEXIS 95, at *9. Here, this court should apply the same interpretation of the law as in *Steele*, that is;

“Because R.C.M. 1103(f), Manual Courts-Martial, and Unif. Code Mil. Justice art. 60, *10 U.S.C.S. § 860* are in conflict, the presidentially promulgated rule must yield to the more recently enacted statute.”

Steele, 2019 CCA LEXIS 95, at *8.

B. The Staff Judge Advocate erred in not commenting on legal errors in the addendum.

An SJA, although not required to examine the record for legal error, “must nonetheless respond to any allegations of legal error submitted by the defense.” *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996) (citations omitted). In *United States v. Williams-Oatman*, the court concluded that “Consideration of inadmissible evidence” is sufficient allegation of legal error, and that the SJA “erred in not commenting on the error.” 38 M.J. 602, 604 (A.C.M.R. 1993) (citations omitted). Here, the SJA failed to inform the convening authority of three out of five errors raised by the defense counsel. (Addendum). Instead, the SJA only advised on the error of a non-verbatim record of trial, and on the violation of appellant’s post-trial rights due to 401⁶ days of unexplained delay.

The SJA did not inform the convening authority about the errors identified in the subparagraphs “a,” “d,” and “e” of the clemency matters. Error “a” raised

⁶ The government took 401 days to prepare a record of trial for a 478-page guilty plea, involving one charge. However, appellant is unsure if this is the final version of the record since every page is marked with ink, and there are seven pages with undated corrections in pen.

the issue where the military judge “improperly allowed the government to perfect their sentencing case when he permitted the government witnesses to testify again after the court reporter realized several hours of witness testimony was not recorded the day before.” (Clemency matters). Within error “a,” the defense explained that appellant was prejudiced because counsel were “unable to sufficiently cross-examine or impeach by cross-examination, the government witnesses. Witness testimony on day two was inconsistent with what they originally stated, yet the defense could not adequately cross-examine them because their testimony in court was not recorded.” Indeed, there was a high impeachment value regarding the unrecorded sworn statements of all witnesses, especially [REDACTED] and [REDACTED]. The effectiveness of the inconsistent statements, coupled with the inability to properly cross-examine and impeach them, substantially contributed to the sentence.

Error “b” alleged that the “judge erred when he denied the defense motion for appropriate relief to limit the maximum punishment authorized in this case to that as provided in RCM 1103(f)(1).” (Clemency matters). The defense counsel cited the record where the military judge stated “the Convening Authority could limit the approved sentence to one no more than that reflected in RCM 1103 (f)(1).” (R. at 151). Here, the SJA failed to inform the convening authority of the possibility that the military judge erred when denying the defense motion for

appropriate relief. The SJA failed to advise the convening authority on the available corrective actions required under R.C.M. 1103(f)(1)-(2), when the judge explicitly deemed the unrecorded portions both “qualitatively and quantitatively substantial” (R. at 148), and further noted to the convening authority that he could “limit the approved sentence.” (R. at 151). Instead, the SJA made erroneous conclusions of law, deeming the record verbatim (addendum), and put the burden on the defense to produce a complete record by their posture not to call the government witness MG. However, this issue was decided in *Seal*, where the court determined it is the government’s burden to reconstruct the record, even if the defense does not request the missing portion. *Seal*, 38 M.J. 662-663. The SJA’s failure to address error “b” deprived the appellant the benefit of having the convening authority consider corrective actions under R.C.M. 1103(f)(1) and limit the sentence. Furthermore, the SJA’s erroneous conclusion that the record was verbatim deprived the convening authority the discretion to decide whether to conduct a post-trial Art. 39(a) session to capture [REDACTED]’s testimony, and properly introduce prosecution exhibit 11, under R.C.M. 1103(f)(2).

Error “e” alleged that the “judge improperly permitted the government to introduce evidence,” when referencing improper evidence in aggravation (clemency matters). The defense counsel cited R.C.M. 1001(b)(4). Just like in *Williams-Oatman*, the “plain reading” of each title unequivocally raised legal


errors that the SJA “must inform the convening authority whether corrective action is required,” and the defense counsel even cited the authority for each error.

Williams-Oatman, 38 M.J. at 603, 604. Here, the SJA failed to inform the convening authority of the judge’s “consideration of inadmissible evidence” in aggravation. As a result, the convening authority was left with the impression that the military judge took into consideration only the victim’s statement. However, in reality, the military judge heard ample additional evidence of how appellant’s actions affected the life of three other people that are not victims in this case, that is, the mother of the victim, ■■■, and the husband of ■■■.

The existence of this error does not result in an automatic return by the appellate court of the case to the convening authority. Instead, an appellate court may determine whether the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority. *Green*, 44 M.J. at 95 (citations omitted). Here, the three legal errors were meritorious, if the SJA was not inclined to provide a favorable recommendation based on his erroneous conclusion that it was a verbatim record, at a minimum he was to provide the different options as to corrective actions on the legal errors. As a result, appellant was deprived of his right to a verbatim record, and the opportunity for the convening authority to take corrective action.

Conclusion


Rule for Courts-Martial 1103(f) clearly prescribes the two remedies available when a record is missing a verbatim transcript. Appellant respectfully requests this honorable court set aside the sentence and remand the case to the convening authority with direction to approve only so much of the sentence as is permitted by R.C.M. 1103(f)(1).




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APPENDIX

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), appellant, Staff Sergeant David C. Tate [hereinafter appellant], through appellate defense counsel, requests this court consider the following matters:

A. The dilatory post-trial processing warrants relief where the government took 401 days to process the record of trial from sentencing to action.

Statement of Facts

On 20 September 2018, the military judge sentenced the appellant to be confined for 22 months, to be reduced to the grade of E-3, and to be discharged from the service with a bad-conduct discharge. (R. at 476). The defense demanded speedy post-trial processing on seven occasions: 30 January 2019 (App. Ex. XXVII), 25 February 2019 (App. Ex. XXVIII), 25 March 2019 (App. Ex. XXIX), 23 April 2019 (App. Ex. XXX), 28 May 2019 (App. Ex. XXXI), 27 June 2019 (App. Ex. XXXII), and 19 August 2019 (App. Ex. XXXIII). After receiving the record of trial and Staff Judge Advocate (SJA) Recommendation¹ (dated, 6 September 2019), defense submitted post-trial matters on 15 October 2019. (Post-Trial Matters). On 25 October 2019, the chief of military justice signed the promulgating order, and the convening authority approved the sentence as

¹ It is unknown when the record of trial, the Staff Judge Advocate recommendation, and the Addendum were served on the appellant or his counsel.

adjudged on an unknown date,² crediting the appellant with 30 days of confinement as a result of post-trial delay (Action).

Law

A convicted service member's right to due process includes a timely review and appeal of his conviction. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). "Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency." *United States v. Bauerbach*, 55 M.J. 501, 507 (Army Ct. Crim. App. 2001).

There is a presumption of unreasonable delay if the convening authority does not take action within 120 days of the announcement of sentence. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). The only defense delay that counts against this 120-day clock is the twenty-day extension for submitting R.C.M. 1105 matters authorized under Article 60(b)(2), UCMJ. *United States v. Banks*, 75 M.J. 746, 759 (Army Ct. Crim. App. 2016).

When there is a presumptively unreasonable delay, this Court conducts a due process review under the four-factor *Barker v. Wingo*, 407 U.S. 514 (1972) test: "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's

² Appellant alleges that this is an incomplete record since the original action is not dated in accordance with R.C.M. 1107(f)(1) and R.C.M. 1103(b)(2)(D)(iv) ("a complete record shall include... the original dated, signed action by the convening authority").

assertion of the right to timely review and appeal; and (4) prejudice.” *Moreno*, 63 M.J. at 135. No one factor is dispositive. *Id.* at 136.

The CAAF has recognized the need for prompt disposition of disciplinary matters, and that “the unique nature of review under Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), calls for, if anything, even greater diligence and timeliness than is found in the civilian system, in accordance with R.C.M. 1107.” *Banks*, 75 M.J. at 750 (citations omitted).

Argument

In this case, the government took 401 days from the announcement of sentence to action, for a guilty plea transcript totaling only 478 pages. The defense timely submitted seven requests for speedy-trial processing and objections to unreasonable delay. The defense did not request a delay to submit matters. Therefore, the totality of the processing time, under Art. 60(b), UCMJ, is attributable to the government. *See Banks*, 75 M.J. at 751. Accordingly, the delay is presumptively unreasonable.

Intervention by this court is necessary when the convening authority fails to grant *appropriate relief* or the Staff Judge Advocate fails to document an acceptable explanation for the untimely post-trial processing. *Banks*, 75 M.J. at 751 (emphasis added). Here, the convening authority granted 30 days of confinement credit, as there are no unusual circumstances to explain the delay in

the post-trial processing. This case was not long or complex, as it involves a guilty plea totaling 478 pages. The length of 401 days is over three times the mandate of 120 days. Appellant asserted his right to a timely review by submitting requests for speedy-trial processing and objections to unreasonable delay for over eight months. The excessive delay deprived the appellant of his right to a timely review and a meaningful appeal. As a result, appellant suffered oppressive incarceration because of the government's failure to adhere to the timelines for post-trial processing. This egregious delay warrants this Court's consideration of his meritorious matter. *See Moreno*, 63 M.J. at 135, 139. The 30 days of confinement credit does not suffice, in light of the oppressive incarceration appellant has suffered, the undue anxiety, and the denial of an opportunity to appear before the parole board or to be eligible supervised release once he served six months.

Once appellant had served nine months of his 21 month sentence, he could have been eligible for clemency under Army Reg. 15-130, Army Clemency and Parole Board, para. 3-1d (19 November 2018). Furthermore, the appellant would have been eligible for parole and supervised release once he served six months in accordance with Army Reg. 15-130, para. 3-2b. However, Army Reg. 15-130 requires convening authority action on the sentence prior to any form of clemency or parole. Here, the action is not dated, and the promulgating order took over a year. Appellant lost any meaningful opportunity to present his case within six

months of confinement to seek supervised release, or within twelve months of his confinement to seek clemency in front of the parole board. Furthermore, the undated action by the convening authority creates an additional unnecessary administrative hurdle for the parole board deeming it incomplete. Appellant was deprived of his due process because of the unreasonable delay of 401 days in post-trial processing, and because of the incomplete and undated action signed by the convening authority.

B. The government's lack of attention to detail and lack of urgency warrants meaningful relief.

Law

Even without a showing of “actual prejudice” within the meaning of Article 59(a), this court has the authority under Article 66(c) to grant relief for excessive post-trial delay. *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). “A timely, complete, and accurate record of trial is a critical part of the court-martial process. Every soldier deserves a fair, impartial, and timely trial, to include the post-trial processing of his case” *United States v. Collazo*, 53 M.J. 721,725 (A.C.C.A. 2000).

The completeness of a record of trial is discussed in R.C.M. 1103(b)(2)(D)(iv) “...a complete record shall include... *the original dated*, signed action by the convening authority” (emphasis added). The completeness of a record also includes all attachments prescribed in R.C.M. 1103 “The following

matters *shall be attached to the record...* If the trial was a *rehearing or new or* other trial of the case, the *record of the former hearing(s)...*” R.C.M.

1103(b)(3)(A)(iii) (emphasis added). Regarding the exhibits to be attached to a complete record the rules also allow “Exhibits or, with the permission of the military judge, copies, photographs, or *descriptions of any exhibits which were marked for and referred to on the record* but not received in evidence... R.C.M.

1103(b)(3)(B) (emphasis added).

Before forwarding the recommendation (SJAR) and the ROT to the CA for action, “the staff judge advocate or legal officer shall cause a *copy of the recommendation to be served on counsel for the accused. A separate copy will be served on the accused.*” R.C.M. 1106(f)(1) (emphasis added).

Argument

The government took 401 days to prepare a record of trial for a 478-page guilty plea, involving one charge. The record provided is far from being a complete record due to the government’s lack of attention to detail and lack of urgency. The action signed by the convening authority is not dated in accordance with R.C.M. 1103(b)(2)(D)(iv). It is not clear at what point the convening authority signed the action. This date is particularly important because the convening authority can take action “only after the applicable time periods under R.C.M. 1105(c) have expired or the accused has waived the right to present matters

under R.C.M. 1105(d)..." R.C.M. 1107(b)(2). Here, appellant submitted matters in accordance with R.C.M. 1105 on 15 October 2019. However, it is unknown when the record of trial, the SJAR, and the Addendum were served on the appellant or his counsel. The lack of due diligence from the government to capture the service on the appellant and his counsel, if any, of these documents, is in violation of R.C.M. 1106, and reflects carelessness and lack to attention to detail.

The initial legal advice provided by the SJA, dated 6 September 2019, included the recommendation of granting 30 days of confinement credit due to post-trial delay. The addendum, signed by the same SJA on 23 October 2019, had the same recommendation of confinement credit. Meanwhile, the appellant had raised five legal errors. Because the action signed by the convening authority is not dated, it is not clear when the convening authority took action on the appellant's sentence and whether he took into consideration the five legal errors. Furthermore, the record of trial appears to be a draft when compared to the errata, as every page is marked with ink, and there are seven pages with undated corrections in pen.

The military judge ruled to allow the government to present their sentencing case as "anew" (R. at 134) and characterized it as a "rehearing" (R. at 148). However, the "record of the former rehearing" should have been attached to the record in accordance with R.C.M. 1103(b)(3)(A)(iii). If the "rehearing" was

actually a reconstruction of the missing session, the judge and the government failed to include in the record “*descriptions of any exhibits which were marked for and referred to on the record* but not received in evidence”... R.C.M.

1103(b)(3)(B). Specifically, the record did not capture prosecution exhibit 11, nor the testimony of [REDACTED], the son of the victim. The description of prosecution exhibit 11 was never captured in the record, even though the military judge reviewed it during the unrecorded session. The government called [REDACTED] as evidence in aggravation during the unrecorded portion. [REDACTED] testified about his good relationship with appellant, how appellant was a nice person, and how [REDACTED] got along with the appellant. During the recorded portion, the government decided not to call [REDACTED] as a witness. The description of [REDACTED]’s testimony, a summary, or the notes from the judge were not included in the record. The SJA attempts to put the burden of a complete record on the appellant by concluding that appellant did not object to the government strategy. However, it is the government’s job, and not the appellant’s, to comply with the rules and provide a complete record.

In *Collazo*, the Army court granted four months of confinement relief to remedy a variety of post-trial processing errors, including the Government's failure to provide the appellant with a copy of the record prior to authentication as required by Rule for Court-Martial (R.C.M.) 1103, its failure to provide a complete

copy of the record of trial for use in preparing R.C.M. 1105 matters, as well as the 10-month delay in preparing the 519-page record of trial. *Collazo*, 53 M.J. at 727.

Here, just like in *Collazo*, the government lacked due diligence in its post-trial processing. Appellant requests meaningful relief because of the government's failure to provide a verbatim record; the incomplete undated action from the convening authority; the numerous pen changes on what appears to be a draft of a record; the lack of proof of service on both the appellant and his counsel on all post-trial documents; and the 401 days of delay for a guilty plea with only 478 pages. The government not only lacked attention to detail, but also lacked urgency when preparing the record of trial. This is not a case where a justification provided by the SJA puts in context the unreasonable delay. Indeed, the SJA never provided an explanation, and for eight months, the government was well aware of the urgency from the defense to afford the appellant speedy post-trial processing.

If this Court does not find that this constitutes prejudice, it should use its Article 66(c), UCMJ, authority to grant appropriate relief against his sentence to confinement.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically submitted to Army
Court and Government Appellate Division on March 30, 2020.

[REDACTED]

Paralegal Specialist
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[REDACTED]