IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES, Appellee	)	FINAL BRIEF ON BEHALF OF APPELLANT
	)	
v.	)	
	)	
Daniel GASKINS Staff Sergeant (E-6), United States Army, Appellant	)	ACCA Dkt. No. 20080132 USCAAF Dkt. No. 13-0016/AR

FINAL BRIEF ON BEHALF OF APPELLANT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. Daniel GASKINS Staff Sergeant (E-6), United States Army, Appellant	)))))))))	FINAL BRIEF ON BEHALF OF APPELLANT ACCA Dkt. No. 20080132 USCAAF Dkt. No. 13-0016/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Appellant asks this Court to grant review pursuant to Rule 21, Rules of Practice and Procedure, United States Court of Appeals for the Armed Forces.

ISSUES PRESENTED

I. WHETHER THE GOVERNMENT'S LOSS OF A SENTENCING EXHIBIT RENDERED THE RECORD OF TRIAL INCOMLETE UNDER ARTICLE 54, UCMJ, RESULTING IN A JURISDICTIONAL LIMITATION ON THE SENTENCE TO ONE NO GREATER THAN THAT WHICH COULD BE APPROVED FOR A NON-VERBATIM RECORD.

II. WHETHER CHARGE II AND THE ADDITIONAL CHARGE SHOULD BE DISMISSED BECAUSE THE GOVERNMENT FAILED TO PLEAD THE TERMINAL ELEMENTS OF THE ARTICLE 134 CHARGES.

STATEMENT OF STATUTORY JURISDICTION

The statutory basis for the jurisdiction of the Army Court of Criminal Appeals was 10 U.S.C. § 866(b), Article 66(b), UCMJ. The statutory basis for the jurisdiction of this Court to consider Appellant's petition for grant of review, filed on 11

September 2012, and granted on 23 October 2012, is 10 U.S.C. § 867(a)(3), Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

A panel of officers and enlisted members sitting as a general court-martial convicted Staff Sergeant Daniel Gaskins ["appellant"], contrary to his pleas, of carnal knowledge, indecent acts with a child, and indecent assault, in violation of Articles 120 and 134 of the Uniform Code of Military Justice, ["UCMJ"]; 10 U.S.C. §§ 920 and 934 (2005). The panel sentenced appellant to a dishonorable discharge, confinement for twelve years, reduction to the lowest enlisted grade, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

On April 22, 2010, a panel of the Army Court of Criminal Appeals, comprised of Chief Judge Tozzi, Judge Ham and Judge Sims, heard oral argument in appellant's case. On August 27, 2010, that court sitting *En Banc* ordered that appellant's case be returned to the Army Judge Advocate General for a hearing pursuant to United States v. DuBay, 17 U.S.C.M.A. 146, 37 C.M.R. (1967).[1] That court's decision was made by a five to four margin, with Chief Judge Tozzi (in which Judge Sims joined) and Judge Ham (joined by Judge Gifford) writing separate dissenting

[1] United States v. Gaskins, 69 M.J. 569, 573 (Army Ct. Crim. App. 2010)

opinions. All judges of the panel who heard the oral argument joined in the dissent.

On September 16, 2010, appellant filed a petition for extraordinary relief in the nature of a writ of prohibition with this court. On December 9, 2010, this court granted the writ and concluded that a DuBay hearing to reconstruct Defense Exhibit A would be "inappropriate under the facts of this case."[2] This Court remanded appellant's case to the Army court "for further consideration of its other options in light of this action."[3]

On February 10, 2011, the Army court again sitting en banc set aside appellant's sentence and authorized a sentence rehearing by the same or a different convening authority.[4] The court's decision was made by a six to three margin, with Judge Sims and Judge Gifford writing separate opinions concurring in part and dissenting in part.

On February 28, 2011, appellant again filed a petition for extraordinary relief in the nature of a writ of prohibition with this court, seeking to block the sentence rehearing. On June 1, 2011, the petition was denied.[5]

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[2] Gaskins v. Hoffman, __ M.J. __, Misc. No. 11-8004/AR (C.A.A.F. Dec. 9, 2010)(summary disposition).
[3] Id.
[4] United States v. Gaskins, Dkt. No. 20080132 (Army Ct. Crim. App., Feb. 10, 2011).
[5] Gaskins v. Hoffman, 2011 CAAF LEXIS 454 (C.A.A.F. Jun. 1, 2011).

A sentence rehearing was held on 18 October 2011. The defense filed a motion to limit the maximum punishment to that which could be awarded to six months confinement, reduction to E-1 and forfeiture of 2/3 pay per month for six months. The military judge initially stated she agreed with the defense position. However after a break in the proceedings she announced that the mandate from ACCA did not allow her that option. After hearing evidence, the military judge sentenced appellant to confinement for nine years, reduction to E-1, forfeiture of all pay and allowances and a dishonorable discharge. The convening authority approved the sentence as adjudged.

Appellant appealed that decision to ACCA. On 12 July 2012 ACCA summarily affirmed appellant's conviction and the sentence.[6] This appeal follows.

STATEMENT OF THE FACTS

Those facts necessary to a disposition of the case are set out in appellant's initial brief to ACCA, his briefs to this court, and his submission pursuant to Rule for Courts-Martial (R.C.M.) 1105/1106. Additionally, appellant notes that at his sentence rehearing the government agreed that there was a substantial omission from appellant's record of trial, but

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[6] United States v. Gaskins, Dkt. No. 20080132 (Army Ct. Crim. App., Jul. 12, 2012) (summary disposition).

disagreed as to the available remedy.[7] Further facts necessary to a resolution of the issues in this case can be found in the argument below.

SUMMARY OF THE ARGUMENT

Article 54, UCMJ, requires a complete record be made in each general court-martial. A complete record contains, among other things, all exhibits. A complete record is a jurisdictional prerequisite to the imposition of a sentence greater than that which could be adjudged at a special court-martial, except that a bad conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months may not be approved. In the event the record is not substantially complete, prejudice is presumed and the government bears the burden to rebut the presumption of prejudice.

The government lost Defense Exhibit A sometime after sentencing but before the convening authority's action. The loss of DE A resulted in a substantial omission from the record, rendering the record incomplete. In remanding the case for a new hearing on sentencing, the Army Court of Criminal Appeals implicitly held that the omission was substantial. Substantial omissions from the record create a presumption of prejudice that the government may rebut. Despite the fact of the rehearing, DE

[7] Sentencing Record (SR) at 51; JA at 8

A has never been located and the record is therefore still incomplete. To date the government has not carried its burden to show there is no prejudice flowing from the loss of DE A.

Appellant was prejudiced by the error because DE A was unavailable for consideration in five separate proceedings – it was not available for consideration by the convening authority in his initial clemency determination; it was not available for consideration by the Army Court of Criminal Appeals when the case was initially before that Court; it was not available for consideration by the military judge during the sentence rehearing; it was not available for consideration by the convening authority when the case was again considered for clemency; and it was not available for consideration when the case was again before the Army Court of Criminal Appeals.

Appellant was charged under Article 134, UCMJ, with two specifications, alleging an indecent act and indecent assault. Neither terminal element of Article 134, UCMJ, was alleged in either specification; no argument was made and no evidence was presented at trial that would have supplied Appellant with notice of the government's theory of the case. Appellant therefore lacked notice required by the due process clauses of the Fifth and Sixth Amendments.

This Court should set aside the findings of guilty of the Article 134, UCMJ, offenses, and affirm a sentence no greater than that authorized for a non-verbatim record.

ARGUMENT

I. WHETHER THE GOVERNMENT'S LOSS OF A SENTENCING EXHIBIT RENDERED THE RECORD OF TRIAL INCOMLETE UNDER ARTICLE 54, UCMJ, RESULTING IN A JURISDICTIONAL LIMITATION ON THE SENTENCE TO ONE NO GREATER THAN THAT WHICH COULD BE APPROVED FOR A NON-VERBATIM RECORD.

Standard of Review

Whether a record of trial is incomplete is a question of law which is reviewed de novo.[8]

Argument

Article 54(a), UCMJ, provides, in relevant part, "Each general court-martial shall keep a separate record of the proceedings in each case brought before it. . . ." This Court has "consistently interpreted Article 54(a) to require such proceedings to be substantially verbatim."[9] And while a "complete record" does not necessarily require a "verbatim record,"[10] a "complete record" must contain, among other things, "[e]xhibits, or with permission of the military judge copies,

[8] United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).
[9] United States v. Gray, 7 M.J. 296, 297 (C.M.A. 1979)(citations omitted).
[10] United States v. McCullah, 11 M.J. 234, 236 (C.M.A. 1981)(quoting United States v. Whitman, 11 C.M.R. 179, 181 (C.M.A. 1953)).

photographs, or descriptions of any exhibits which were received in evidence and any appellate exhibits."[11]

The Manual contemplates times when items required by Article 54(a) may be lost, and provides the remedies available to the convening authority during post-trial processing of the case. R.C.M. 1103(f) provides,

> If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B)[12] or (c)(1)[13] of [Rule 1103], a record which meets the requirements of subsection (b)(2)(C)[14] of [R.C.M. 1103] shall be prepared, and the convening authority may:
>
> (1) Approve only so much of the sentence that could be adjudged at a special court-martial, except that a bad conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or
>
> (2) Direct a rehearing as to any offense for which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudge any sentence in excess of that adjudged in the earlier court-martial.[15]

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[11] R.C.M. 1103(b)(2)(D)(v).
[12] General courts-martial including an adjudged sentence of more than six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or a bad-conduct discharge has been adjudged.
[13] Special courts-martial involving a bad conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.
[14] A summarized report of the proceedings.
[15] R.C.M. 1003(f).

On appeal, where an omission from the record of trial is substantial, such omission raises a presumption of prejudice that the government must rebut.[16]

A. The loss of Defense Exhibit A was a substantial omission rendering the record incomplete.

It is beyond doubt that the loss of Defense Exhibit A, Appellant's "Good Soldier Book," was a substantial omission from the record. The government conceded at the sentence rehearing that the failure to include DE A in the record was a substantial omission.[17] The Army Court of Criminal Appeals, after "further considerations of its options," set aside the sentence and remanded the case for a sentence rehearing without making specific findings.[18] It can be inferred that the Army Court of Criminal Appeals concluded that the record was not substantially complete; the government acknowledged as much in its brief to the Army Court of Criminal Appeals.[19] Indeed, it likely would have been an abuse of discretion for the Army Court of Criminal Appeals to remand the case for a rehearing if it had not found a

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[16] United States v. Gray, 7 M.J. 296, 298 (C.M.A. 1979).
[17] Sentencing Record at 51. JA at 8
[18] United States v. Gaskins, 2011 CCA LEXIS 19 (Army Ct. Crim. App., 10 Feb. 2011).
[19] Government brief to ACCA at page 5. See also, Gaskins, 2011 CCA LEXIS 19 (Gifford, J., concurring in part and dissenting in part)(stating, "The majority's opinion does not state that it concluded the government's loss of Defense Exhibit A is a substantial omission from the record of trial or that it created a presumption of prejudice which the government had not overcome. By ordering a rehearing on the facts presented, and after issuance of the writ of mandamus by our superior court, however, such conclusions are the only rational and logical ones to make of the majority's action.")

legal error.[20] After the rehearing, when the case was again before the Army Court of Criminal Appeals, it affirmed the sentence as "correct in law and fact" without making specific findings with respect to whether there was a substantial omission from the record.

In determining whether the missing defense sentencing exhibit is a substantial omission, just as it refused to do in Stoffer v. United States[21], this Court should not presume what information was contained within the exhibit. Defense Exhibit A was the only defense exhibit admitted on sentencing. It was a completely filled 3-inch binder, consisting of Appellant's Marine Corps service record book, numerous awards from his time in both the Marines and the Army, and photographs and other documentary evidence sufficient to merit consideration by the panel in mitigation. The exact number of pages, or even a complete inventory of documents included, cannot be determined because the court reporter failed to inventory the exhibit or accurately describe it in her notes at trial.[22] The Record of Trial contains an incredibly limited insight into the contents of Exhibit A where, during appellant's sentencing case, he

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[20] See generally United States v. Nerad, 69 M.J. 138 (C.A.A.F. 2009).
[21] United States v. Stoffer, 53 M.J. 26, 27 (C.A.A.F. 2000).
[22] See undated Memorandum for Record of SFC Alejandra Guerra submitted with SJAR Addendum at ¶ 2 (hereinafter "Government MFR"). JA at 29-30

discussed a few of the photographs contained in Defense Exhibit A.[23]

B. The government has not carried its burden to rebut the presumption of prejudice flowing from an incomplete record of trial.

A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut.[24] Since it is the government that is charged with the responsibility for preparation of a verbatim record, the burden of rebutting the presumption of prejudice falls upon the government.[25]

The impact of an incomplete record of trial manifests itself in three ways. First, an incomplete record "transgress[es] a fundamental statutory right enjoyed by" the Appellant.[26] As this Court noted long ago, "what is of concern is not the sufficiency of the record for purpose of review, but with the statutory command regarding the type of record that must be made of courts-martial proceedings."[27] That is not to say that an incomplete record is irrelevant to the question of prejudice as it relates to clemency or appellate review; as discussed more fully below, it is relevant. But Congress has provided a

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[23] R. at 959-62. JA at 42-45

[24] United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981).

[25] Id.

[26] Id.

[27] United States v. Gray, 7 M.J. 296, 298 (C.M.A. 1979)(citing United States v. Sturdivant, 1 M.J. 256, 257 (C.M.A. 1976).

military appellant with certain statutory rights, and has provided the specific remedy when those rights have been abridged. Having been convicted at general court-martial and adjudged a sentence of more than six months confinement, Appellant had a right to a complete record. He had a concomitant right to a sentence that did not exceed the jurisdictional maximum[28] in the event that the government failed to make a complete record.

The second impact of an incomplete record where an exhibit is lost before action is on the convening authority's clemency decision.[29] Although decided in a different context, United States v. Wheelus[30] is instructive. In that case, this Court recognized that "an accused's best chance for post-trial clemency is the convening authority," and "[b]ecause clemency is a highly discretionary Executive function, there is material prejudice to the substantial rights of an appellant if there is error and the appellant 'makes some colorable showing of possible prejudice,'" in which case the Court of Criminal Appeals must "either provide meaningful relief or return the case . . . for a new post-trial recommendation and action." A

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[28] See United States v. Whitney[28], 48 C.M.R. 519, 521 (C.M.A. 1974)(holding that the existence of a complete record required by Article 19, UCMJ (for special courts-martial in which a punitive discharge is adjudged) and Article 54, UCMJ (general courts-martial) "is a jurisdictional prerequisite for the continued validity" of a sentence exceeding that which may be approved in the absence of a complete record.)
[29] See, RCM 1105 and 1106.
[30] United States v. Wheelus, 49 M.J. 283 (C.A.A.F. 1998).

Wheelus-type error is not precisely analogous to this case because rather than presuming prejudice, Wheelus places upon the appellant the requirement to "make a colorable showing of possible prejudice," even though the threshold is low.[31] And Wheelus requires the Court to either fashion a meaningful remedy or remand for a new action instead of applying the specific remedy required by Article 54, UCMJ. But Wheelus and its progeny recognize the importance to a member convicted at court-martial of accurate and adequate post-trial processing of his case: a convening authority has the unfettered discretion to modify the findings and sentence adjudged at trial "for any reason – without having to state a reason – so long as there is no increase in severity."[32] Needless to say, the "Good Soldier Book" would have been a vital document for the convening authority to review in determining whether to approve the findings of guilty, and whether he should grant clemency. Indeed, in its original R.C.M. 1105 submission the defense noted that DE A, which contained "a compilation of [Appellant's] awards, certificates, letters of commendation and character letters from family and friends, as well as a number of photographs," was missing from the record. And the Army Court of Criminal Appeals in its original decision in this case

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[31] United States v. Capers, 62 M.J. 268, 270 (C.A.A.F. 2005).
[32] United States v. Finster, 51 M.J. 185, 186 (C.A.A.F. 1999).

recognized that if the absence of the Good Soldier Book constituted a substantial omission, Appellant "may have suffered prejudice because the convening authority did not have an opportunity to review the contents of Defense Exhibit A as part of his clemency review."[33]

Finally, the third way the prejudice flowing from an incomplete record of trial is manifested, and was manifested in this case, is that the service court of criminal appeals is prevented from conducting a proper appellate review.[34] The Uniform Code of Military Justice provides for mandatory review of any court-martial resulting in a punitive discharge and confinement.[35] The Court, based on a review of "the entire record" is to determine the findings and sentence that "should be approved."[36] In its initial review of this case, The Army Court of Criminal Appeals recognized that Appellant "could be prejudiced if we as a court did not have an opportunity to review the exhibit as part of our consideration of appellant's sentence pursuant to Article 66, UCMJ."[37] Yet in the end the determination by that Court of the sentence that "should be approved" in this case was based on an incomplete record, the Court's remand for a new sentence hearing notwithstanding. As

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[33] Gaskins, 69 M.J. at 572.
[34] See Article 66, UCMJ.
[35] Article 66, UCMJ.
[36] Id.
[37] Gaskins, 69 M.J. at 572.

discussed more fully below, the Court did not have the discretion to order a new sentencing hearing. Even if it did, the new hearing did not resolve the problem of the missing exhibit; DE A has not been located or otherwise reproduced and the record is therefore still incomplete.

As this Court said in McCullah, the government is responsible for the preparation of a complete record, and "it is fitting that every inference be drawn against the government with respect to the existence of prejudice because of an omission."[38] Appellant was convicted on 8 February 2008. In the intervening four and one half years the government has been unable to carry its burden to overcome the prejudice of the missing exhibit; it has yet to locate the only substantial, critical exhibit offered at trial directly relating to Appellant's extenuation and mitigation under R.C.M. 1001(c). As the defense noted in its 7 February 2012 R.C.M. 1105 submission,

> The exact contents of Defense Exhibit A are unknown; and recreation has been and remains impossible. To make matters worse, SSG Gaskins was held in pre-trial confinement in the Joint Regional Correctional Facility at Ft. Leavenworth, KS, more than 400 miles away from his detailed Military Defense Counsel and was in no way capable of assisting in his own sentencing re-hearing ordered by ACCA, as he was able to do so prior to and during his trial. Furthermore, the Government did nothing more than provide the Defense with a copy of the very same OMPF that the Government previously used in its failure to re-create Defense Exhibit A and has still failed to produce

[38] McCullah, 11 M.J. 234, 237.

Defense Exhibit A, despite the Defense's Discovery Request for it. SSG Gaskins has already served over three years of confinement, which is in excess of the jurisdictional limits of a case with a substantially incomplete record.

C. The Army Court of Criminal Appeals erred in remanding the case for a new sentencing hearing.

After the Army Court of Criminal Appeals ordered a DuBay hearing for the purpose of reconstructing Defense Exhibit A, this Court issued a writ of prohibition concluding that a DuBay hearing for such a purpose would be "inappropriate under the facts of this case," and remanded the case to the Army Court "for further consideration of other options in light of this action."[39] Appellant respectfully submits that for the same reasons a DuBay hearing was "inappropriate under the facts of this case," it was inappropriate for the Army Court of Criminal Appeals to remand the case for a new hearing on sentencing.

First, nothing in Article 54, UCMJ, R.C.M. 1103, or case law suggests that a sentence rehearing is an appropriate remedy for a missing defense sentencing exhibit. Article 54, UCMJ, in effect at the time of Appellant's trial, provided in its entirety,

> (a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of

[39] Gaskins v. Hoffman, __ M.J. __, Misc. No. 11-8004/AR (C.A.A.F. Dec. 9, 2010)(summary disposition).

> his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under this subsection.
>
> (b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the President may prescribe.
>
> (c) (1) A complete record of the proceedings and testimony shall be prepared—
>
> (A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and
>
> (B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.
>
> (2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.
>
> (d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

Nothing in Article 54, UCMJ, provides the authority to remand a case for a new hearing on sentencing if the mandates of Article 54 are not met because of a missing defense sentencing exhibit. And although Articles 60, 63 and 66, UCMJ, provide for

rehearings generally, none provide that a rehearing on the sentence is appropriate in the case of a record that does not meet the statutory mandates of Article 54.

As discussed previously, R.C.M. 1103(f) provides certain remedies to the convening authority in the event of an incomplete record. It provides,

> If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B)[40] or (c)(1)[41] of [Rule 1103], a record which meets the requirements of subsection (b)(2)(C)[42] of [R.C.M. 1103] shall be prepared, and the convening authority may:
>
> (1) Approve only so much of the sentence that could be adjudged at a special court-martial, except that a bad conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or
>
> (2) Direct a rehearing as to any offense for which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the court-martial in a rehearing may not adjudge any sentence in excess of that adjudged in the earlier court-martial.[43]

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[40] General courts-martial including an adjudged sentence of more than six months confinement, forfeiture of pay greater than two-thirds pay per month, or any forfeiture of pay for more than six months or other punishments that may be adjudged by a special court-martial; or a bad-conduct discharge has been adjudged.
[41] Special courts-martial involving a bad conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.
[42] A summarized report of the proceedings.
[43] R.C.M. 1003(f).

Nothing in R.C.M. 1103 provides the Court of Criminal Appeals the authority to remand for a new sentencing hearing the event of a missing defense exhibit. First of all, while R.C.M. 1103 does provide for a rehearing where the incompleteness of the record relates to findings, the rehearing is permitted only if the finding of guilty is supported by the summary contained in the record, and limits the sentence to that previously adjudged. R.C.M. 1103(f) does not address the specific facts here – that is, where the record is incomplete because a defense sentencing exhibit was lost by the government.

Appellant respectfully submits that R.C.M. 1103(f) cannot provide the basis for a rehearing on sentence where the incomplete nature of the record is caused by the government's loss of a defense exhibit. Unlike a rehearing on findings of guilt – where the government retains the burden to prove the accused's guilt beyond a reasonable doubt – a rehearing on sentencing in the case of the government's loss of a defense exhibit places upon the defense the burden to reproduce the lost evidence, and relieves the government of its obligation to construct the record.

Finally, although a few cases suggest that a remand for a new hearing because of an incomplete record might be appropriate in certain circumstances, none involved remand for a new sentencing hearing where the record is incomplete because the

government lost a defense sentencing exhibit.[44] Although this Court returned the case to the Army Court of Criminal Appeals "for further consideration of other options in light of this action,"[45] Appellant respectfully submits that the Army Court only had two options available to it, both of which were limited by the constraints of Article 54 and R.C.M. 1103. The Court of Criminal Appeals could have approved a sentence no greater than that authorized for an incomplete record under Article 54 and R.C.M. 1103, or it could have remanded the case to the convening authority, providing the government with yet another opportunity to locate or reconstruct the missing exhibit (which, as noted, the government was never able to do), and directing the convening authority to issue a new action that comported with the constraints of Article 54 and R.C.M. 1103 in the event that DE A could not be located or reconstructed.

As this Court noted, a DuBay hearing was inappropriate in circumstances effectively requiring the defense to cooperate in

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[44] See for example, United States v. Boxdale, 47 C.M.R. 351 (C.M.A. 1973)(where evidence of defense alibi witnesses was lost, rehearing was appropriate "not to provide a reconstruction of the record on which findings of guilty and a sentence may be approved, but to provide a transcript on which the convening authority may direct a rehearing and at the same time protect the accused by establishing that the evidence at the first trial was sufficient."); United States v. Embry, 60 M.J. 976 (C.A.A.F. 2005)(rehearing on findings was appropriate remedy where military judge failed to include psychologist's intake notes as appellate exhibit, which notes were relevant to the interlocutory question regarding the admissibility of the appellant's confession); United States v. Snethen, 62 M.J. 579 (A.F.Ct.Crim.App. 2005)(rehearing consideration by the convening authority was appropriate where omission included two defense witnesses on suppression motion).
[45] Gaskins v. Hoffman, ___ M.J. ___, Misc. No. 11-8004/AR (C.A.A.F. Dec. 9, 2010)(summary disposition).

reconstructing the evidence that the defense entrusted to the government and the government lost. Appellant respectfully submits that a rehearing on sentencing in these same circumstances was similarly inappropriate because it shifted from the government to the defense the burden to complete the record of trial. And, as discussed previously, the defense was unable to do that in any event, so Appellant was effectively punished for his inability to carry the government's burden.

D. Even if the Court of Criminal Appeals did not abuse its discretion in ordering a rehearing, the record is nevertheless still incomplete because DE A is still missing from the record, and the government has not carried its burden to show there was no prejudice.

Even if a rehearing on sentencing was an option available to the Court of Criminal Appeals, the Record of Trial in this case is still incomplete. Defense Exhibit A has never been located; nor is there any "summarization meticulously detail[ing]" the exhibit[46], or any summary within the meaning of R.C.M. 1103. It was not presented at Appellant's rehearing, nor was it presented after the rehearing to the convening authority or to the Army Court of Criminal Appeals for their respective determinations regarding an appropriate sentence.

The fact that Appellant had a rehearing on the sentence, and the fact that the adjudged sentence at the rehearing was lower that the sentence originally adjudged, does nothing to moot the

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[46] United States v. Eichenlaub, 11 M.J. 239 (C.M.A. 1981).

prejudice in this case. The right to a complete record of the proceedings of a general court-martial is a "fundamental statutory right" as recognized in McCullah[47]; given that a complete record "is a jurisdictional prerequisite for the continued validity" of a sentence exceeding that which may be approved in the absence of a complete record, it is a "substantial right" under Article 59(a), UCMJ.

Appellant's best evidence, that which was generated at the time of trial by his original trial defense counsel, was unavailable for consideration by the military judge, the convening authority, or the Court of Criminal Appeals, in the exercise of their required functions. Throughout these proceedings the burden has remained on the government to rebut the presumption of prejudice. It has failed to do so.

Based on the foregoing, this Court should affirm a sentence no greater than that which could be approved for a non-verbatim record. WHEREFORE, Appellant so prays.

II. WHETHER CHARGE II AND THE ADDITIONAL CHARGE SHOULD BE DISMISSED BECAUSE THE GOVERNMENT FAILED TO PLEAD THE TERMINAL ELEMENTS OF THE ARTICLE 134 CHARGES.

Standard of Review

"Whether a specification is defective and the remedy for such error are questions of law, which we review de novo."[48]

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[47] McCullah, 11 M.J. at 237.
[48] United States v. Humphries, 71 M.J. 209 (C.A.A.F. 2012)(citing United States v. Ballan, 71 M.J. 28 (C.A.A.F. 2012); United States v. Crafter, 64 M.J. 209,

Argument

A. The failure to object to the defective Article 134, UCMJ, offenses at the sentence rehearing did not waive this issue.

"Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"[49] "'Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake."[50]

Here, the right at stake is appellant's Fifth and Sixth-Amendment rights to due process because he was not put on notice of the terminal elements of Article 134, UCMJ offenses. "[T]here is a presumption against the waiver of constitutional rights, and for a waiver to be effective it must be clearly established that there was an intentional relinquishment of a known right or privilege."[51] The Constitution protects against conviction of uncharged offenses through the Fifth and Sixth Amendments.[52] In Fosler, the Court found that the right to have

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211 (C.A.A.F. 2006); United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011).

[49] United States v. Olano, 507 U.S. 725, 732 (1993)(quoting Johnson v. Zerbst, 304 U.S. 458,464 (1938)); see also United States v. Harcrow, 66 M.J.154, 156 (C.A.A.F. 2008).

[50] Harcrow, at 156 (quoting Olano, 507 U.S. at 733).

[51] United States v. Sweeney, 70 M.J. 296 (C.A.A.F. 2011).

[52] United States v. Fosler, 70 M.J. 225, 229 (C.A.A.F. 2011).

notice of the Article 134 terminal elements as constitutional under the Fifth and Sixth Amendments.[53]

The Army Criminal Court of Appeals stated in a footnote that this issue was waived because appellant did not object at the hearing.[54] ACCA also noted that Appellant made "no mention of a Fosler issue in the eleven pages of matters submitted pursuant to Rule for Courts-Martial 1105 on 10 February 2012." Although ACCA referred to this as a failure to object occurring at a rehearing, it was in truth only a rehearing on the sentence; the military judge was limited in what she was permitted to consider under the terms of the remand.[55] And whether Appellant raised the issue with the convening authority is irrelevant to the question of waiver. The legislative history of the UCMJ suggests that the failure to raise legal issues with the convening authority should not result in waiver; the Senate Armed Services Committee Report on the Military Justice Act of 1983 states, "Because the convening authority is not acting as an appellate tribunal, the accused is not required to raise legal objections to the court-martial in his submission to the

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[53] Id.
[54] United States v. Gaskins, Dkt. No. 20080132 (Army Ct. Crim. App., Jul. 12, 2012)(summary disposition)
[55] See United States v. Smith, 41 M.J. 385, 386 (C.A.A.F. 1995)(quoting United States v. Montesinos, 28 M.J. 38 44 (C.M.A. 1989))(holding that a "court can only take action that conforms to the limitations and conditions prescribed by the remand").

convening authority in order to preserve such objections for appellate consideration."[56]

Also, there was no clear intentional relinquishment of these constitutional rights, and therefore no waiver. The trial court had a limited purpose, which was to determine an appropriate sentence. The military judge was not free to disturb the findings of the original court-martial. Appellant did not affirmatively participate in a voluntary waiver of these constitutional rights. Indeed, there was no discussion of this issue on the record from which this Court could conclude a knowing and intentional waiver. In light of the President's designation in R.C.M. 907(b)(1) of the failure to state an offense as a "nonwaivable ground[]" which shall result in dismissal "at any stage of the proceedings," and considering this Court's conclusion in Humphries that questions regarding defects in a specification raised for the first time on appeal are reviewed for plain error, it was error for ACCA to conclude that Appellant had waived this issue. ACCA should have found the error had been forfeited rather than waived, and reviewed the issue for plain error.

B. The failure to object to the defective Article 134, UCMJ offenses does not change the Court's analysis under Humphries.

[56] S. Rep. No. 98-53, 98th Cong. 1st sess. at 21 (1983).

This Court should dismiss the contested Article 134, UCMJ specifications in light of Humphries. In Humphries, this Court clarified the legal landscape for contested cases where the government fails to plead the terminal elements under Article 134, and otherwise presents no evidence or argument sufficient to place the accused on notice of the terminal element he must defend against.

Identical to appellant's case, Humphries was a contested case where the defense counsel did not challenge the government's failure to plead the terminal element of the Article 134, UCMJ offenses.[57] Appellant's original trial occurred on February 6-8, 2008. As in Humphries and Fosler, the specifications were legally sufficient at the time of trial. However, under current law, the terminal element of Article 134, UCMJ, must be separately charged and proven.[58] Thus, in Humphries this Court held that "because the law at the time of trial was settled and clearly contrary, it is enough that the error is plain now, and the error was forfeited rather than waived."[59]

In the context of a plain error analysis of defective indictments, "[the] [a]ppellant has the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious;

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[57] Humphries, 71 M.J. at 211.
[58] Fosler, 70 at 232.
[59] Humphries, 71 MJ at 211; Harcrow, 66 M.J. at 156-58.

and (3) the error materially prejudiced a substantial right of the accused."[60] Given that appellant's trial occurred before the change in the law, like Humphries, there was plain error that was forfeited rather than waived and the question is whether the error "has prejudiced the substantial rights of the accused."[61]

Humphries held that an appellant demonstrates material prejudice to his substantial right to notice under the Fifth and Sixth Amendments where the charging error is not corrected in the course of the trial through application of a totality of the circumstances test.[62] As in Humphries, a totality of the circumstances review of the record of trial in appellant's case should result in dismissal of the Article 134, UCMJ convictions due to the government's failure to cure the constitutional notice error.

Appellant's case is nearly identical to Humphries. In Humphries, the specification failed to provide notice of which terminal element or theory of criminality the government pursued in that case.[63] The same is true in appellant's case; he was not aware of which theory of criminality the government was pursuing. Additionally, in Humphries, "[i]n its opening

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[60] Humphries, 71 MJ at 211 (citing United States v. Girouard, 70 M.J. 5, 11 (C.A.A.F. 2011); United States v. Powell, 49 M.J. 460, 463-65 (C.A.A.F. 1998).
[61] Humphries, at 214 (citing Ballan, 71 M.J. at 30). (C.A.A.F. 2012).
[62] Humphries, at 215.
[63] Id., at 216

statement, the Government never mentioned how Appellant's conduct satisfied either clause 1 or 2 of the terminal element of Article 134, UCMJ."[64] The government's opening statement in appellant's case similarly fails to provide constitutional notice. Here, the focus of the opening statement was on the Article 120, UCMJ charge and the underlying conduct of the indecent act and indecent assault charges. Nothing was even mentioned regarding facts that would form the basis showing the effects his conduct had on the unit or how his conduct was service discrediting. Nothing in the opening statement could be read to focus appellant on which terminal element the government would use.

Second, just like in Humphries, there was nothing during the government's case-in-chief that reasonably placed the appellant on notice of the government's theory regarding which clause (or clauses) of the terminal element of Article 134, UCMJ, he had violated.[65] Identical to Humphries, in Appellant's case the government offered no witness to establish a particular theory that would have given appellant notice as to whether he was defending against this charge on the basis that his conduct was not service discrediting, not prejudicial to good order and discipline or both.[66]

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[64] Id.
[65] Id.
[66] Id.

Finally, similar to Humphries, the government failed to cure the charging error in appellant's case at closing argument. The government only focused on the Article 120, UCMJ charge and appellant's alleged conduct toward the alleged victim underlying the remaining Article 134, UCMJ charges. In fact, the government claimed that Sergeant Dubry's testimony alone established all the elements of Article 134, UCMJ, indecent assault.[67] The government also asserted that the testimony of Tara Stern was enough to find the accused guilty of Article 134, UCMJ, indecent acts with a child.[68] But neither of these witnesses testified to any facts that could have proved either of the terminal elements under Article 134, UCMJ. And no mention was made at any time during closing arguments of the terminal element.

The question is not whether the evidence was legally sufficient.[69] The question is whether before or during the trial, under the totality of the circumstances, the government ever put Appellant on notice of which terminal element they were proceeding under. Appellant respectfully submits that it did not. Charge II and its specifications must therefore be set aside.

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[67] R. at 867; JA at 38
[68] R. at 878; JA at 39
[69] Humphries, 71 M.J. at n.8.

CONCLUSION

Based on the foregoing, Appellant respectfully submits that the appropriate remedy in this case is to set aside the convictions under Article 134, UCMJ. Given the error with respect to sentencing discussed in Issue I, the appropriate remedy is to affirm a sentence no greater than that allowed by a nonverbatim record.

WHEREFORE Appellant so prays.

Respectfully submitted,

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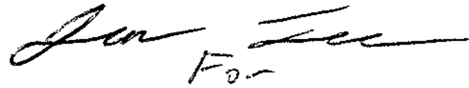

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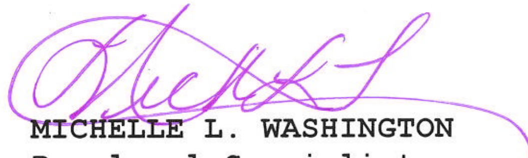
I certify that a copy of the foregoing in the case of *United States v. Gaskins,* Crim.App.Dkt.No. 20080132, USCA Dkt. No. 13-0016/AR, was electronically filed with both the Court and Government Appellate Division on December 7, 2012.



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