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	)	REPLY 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 hereby Replies to the Government's Answer, filed on 14 January, 2014.

At the outset, Appellant notes that throughout its Answer the government places upon Appellant the responsibility for the reconstruction of DE A. Although at one point the government states that Appellant "is under no obligation to reconstruct or reintroduce DE A,"[1] the government nevertheless repeatedly takes Appellant to task for failing to do so. For example, under the rubric of "circumstances surrounding the loss" of the exhibit, the government states, "one reason DE A could not be reconstructed is the defense could not articulate with any specificity, nor provide substitutes for, the contents of their own exhibit."[2] Under the rubric of "Appellant's ability to

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[1] Answer at 17-18.
[2] Answer at 14. The government presumes that Appellant was personally aware of the content of DE A. Just as this Court should make no presumptions about

present 'Good Soldier' evidence in other forms at the rehearing" the government argues that Appellant "could have attempted to reconstruct and reintroduce portions of DE A."[3] Under the rubric of "the military judge's ability to fashion meaningful relief for lost evidence" the government argues that appellant "could have . . . attempted to recreate much of his original "Good Soldier" book."[4] Under the rubric of "windfall" the government argues that the exhibit "contained documents the defense could not identify, transcripts from schools whose names appellant could not remember, and character letters from authors who appellant could not remember."[5] Under the rubric of the government's claim that the record is now complete, the government argues, that the "lack of 'Good Soldier' evidence is borne solely out of [Appellant's] own volitional decision to not even attempt to present such evidence."[6]

The state of the record at the time of this Court's remand (and today) was that it was not substantially complete, and by operation of law the sentencing limitations would apply unless the government could overcome the presumption of prejudice. To require Appellant to personally reconstruct the record necessarily requires Appellant to act as "a witness against

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the content of the record, nor should it presume that Appellant himself was aware of the content.

[3] Answer at 16.

[4] Answer at 19.

[5] Answer at 22.

[6] Answer at 24.

himself" in violation of the Fifth Amendment to the United States Constitution. Clearly, Appellant was not required to risk the adverse consequence that was sure to flow from personally assisting the government in reconstruction of the record. Similarly, the government also ignores the very real ethical dilemma that requiring Appellant's original trial defense counsel to assist in reconstruction of the exhibit presented. Obviously, it was not in Appellant's interest for his defense counsel to assist the government in doing that, and would indeed have been a violation of the Army's Rules of Professional Conduct for Lawyers.[7]

The government has conceded that it was responsible for safeguarding the exhibit, and it is responsible for its loss. Yet, the government suggests that it should be excused for its own malfeasance because Appellant did not waive his right to not be a witness against himself, and his defense counsel did not violate his ethical duty to his client.

Without citation to any authority, the government argues that this Court should apply certain factors in determining the remedy for an incomplete record where the government has been unable to overcome the presumption of prejudice. Respectfully, we already know the remedy. But even if this Court were to consider the factors set forth by the government, they either

[7] See AR 27-26, May 1, 1992.

weigh in favor of Appellant or are inappropriate to the consideration of the issue.

The first factor suggested by the government is "the circumstances of the loss" of the exhibit. Appellant entrusted this exhibit to the government. The government lost it. This factor weighs in favor of Appellant.

Next the government argues that Appellant was afforded the opportunity to present "good soldier" evidence in other forms at the rehearing. But the problem with this argument is two-fold. First, whatever these "other forms" might have been, they did not render the record complete – it is still incomplete because DE A has been neither located nor reconstructed, and the government has not met its burden to overcome the presumption of prejudice. Second, in making this argument the government again places upon Appellant the burden of fixing its mistake. The government cannot overcome the presumption of prejudice by shifting the burden to Appellant, then blaming him for his failure to do so. This factor weighs in favor of Appellant.

Next the government argues this court should consider the fact that the military judge limited the sentencing case the government was permitted to put on, and "Appellant's only burden here (if it can be called that) was to put on a new sentencing case, which is no different than any other case remanded for a

new sentence rehearing because of government error."[8] The government argues that a rehearing somehow converted a case of an incomplete record subject to the limitations in Article 54, UCMJ, into a case involving unavailable evidence, subject to R.C.M. 703.

Respectfully, this case should never have been in front of a military judge for a rehearing on sentencing. The only options available to the Army Court of Criminal Appeals were to approve a sentence no greater than that authorized for an incomplete record under Article 54 and R.C.M. 1103, or remand to the convening authority with directions to issue a new action that comported with Article 54 and R.C.M. 1103 in the event DE A could not be located or reconstructed. A rehearing on sentencing shifted the burden from the government to Appellant to complete the record of trial. As discussed previously, the government now claims that it should prevail because the defense was unable to do that. More to the point, limiting the government's sentencing case under R.C.M. 703 does nothing to resolve the issue because it does not put DE A back into the record. This factor weighs in favor of Appellant.

The fourth factor the government wants this Court to consider is "the potential windfall" to Appellant, apparently because the government "has been unable to find . . . any case

[8] Answer at 18-19.

where a sentence to confinement was so drastically reduced for an incomplete record."[9] Appellant respectfully submits that this is an inappropriate factor for this Court to consider. Congress has already drawn the line.[10] The complete record required by Article 54 is a jurisdictional prerequisite to a valid sentence exceeding that which may be approved in absence of a complete record.[11] Nothing in Article 54 or any Rule for Courts-Martial suggests that Congress did not intend this jurisdictional prerequisite to stand or fall based on the seriousness of the offense. And in applying the limitation in United States v. Stoffer, this Court appears to have rejected the "windfall" argument expressed by the dissent in that case.[12]

Perhaps the reason there are no cases "where a sentence to confinement was so drastically reduced for an incomplete record"[13] is because it is so easily avoided. Not to put too fine a point on it, but if the government wants to ensure that the adjudged and approved sentence is affirmed on appeal, the government should keep track of the exhibits entrusted to its care.

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[9] Answer at 21.
[10] It is worth noting that the legislative history behind Article 54, UCMJ, specifically addresses not only the obligation of the government to prepare a complete record of trial, but the right of the accused to receive a copy. The House Report accompanying H.R. 4080 states, "It is felt to be appropriate that the accused should have a copy of such records for his personal use." H.R. Rep. No. 81-491 (1949), p. 27.
[11] United States v. Whitney, 48 C.M.R. 519, 521 (C.M.A. 1974).
[12] United States v. Stoffer, 53 M.J. 26, 28 (C.A.A.F. 2000).
[13] Answer at 21.

Finally, the government argues that the "record of trial for his new sentence hearing is complete, and can lawfully support the sentence he received." The government argues that Appellant's claim that the record is still incomplete is "nonsensical," apparently because the Air Force Court of Criminal Appeals, in a different case, under a different set of facts, in an unpublished opinion, rejected a similar argument.[14] When United States v. Kyle was first before the Air Force Court of Military Review, the appellant assigned a variety of errors, one of which was that the record was not substantially complete because the military judge failed to append as an appellate exhibit a document he had reviewed in camera. In a published opinion, the Air Force Court discussed the failure to append the exhibit as a teaching point for practitioners and judges, but ultimately set aside the findings and sentence, not because of the completeness or incompleteness of the record, but because of other errors having to do with the accused's understanding of the terms of the pretrial agreement and the maximum punishment.[15] After Kyle again entered a guilty plea, he argued that Article 54's sentence limitation applied because the exhibit was still not appended to the record. The Air Force Court, in the unpublished opinion cited by the government, held that the

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[14] Answer at 23, citing United States v. Kyle, 1993 WL 76296 at *1 (A.F.C.M.R. 1993).
[15] United States v. Kyle, 32 M.J. 724 (A.F.C.M.R. 1991).

"improvidence of the pleas required that the findings be set aside, and that mooted the discovery issue."[16] The Court noted the appellant's theory that the sentencing limitation should apply "overlooks the fact that we ordered no remedy for the incomplete record because the issue became moot,"[17] and notes that the appellant in that case did not raise the issue at the rehearing. In this case, of course, the issue is not moot. The Army Court of Criminal Appeals did order a remedy (albeit an inappropriate remedy), and Appellant did raise the issue with the Army Court of Criminal Appeals, this Court, the convening authority, and with the military judge. Because it is both factually and procedurally distinguishable, the Air Force Court's decision in Kyle is simply irrelevant to the resolution of any issue in case.

Citing R.C.M. 810, the government argues that "[b]y appellant's rationale, a rehearing would never remedy an incomplete record (on findings or sentence) unless the lost evidence was produced. That would defeat the purpose of a rehearing, which is to conduct the proceedings anew."[18] First of all, this case does not involve the propriety of rehearings generally, but rehearings specifically as a remedy for an incomplete record. Appellant does not suggest that a rehearing

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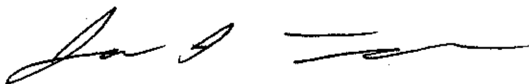
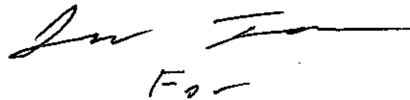
[16] United States v. Kyle, CMR LEXIS 128, *4 (A.F.C.M.R., 25 Feb. 1993).
[17] Id.
[18] Answer at 23.

is "never" a remedy for an incomplete record. It is a remedy if the conditions of R.C.M. 1103(f) are met. That is, that the case is pending before the convening authority, that the rehearing is "as to any offense of which the accused was found guilty," and "if the finding is supported by the summary of the evidence contained in the record."[19] But even if R.C.M. 1103(f) can be read so broadly as to include a rehearing on the sentence because of an incomplete record (a point Appellant does not concede), here there is no summary of the missing evidence in the record to support the sentence adjudged. And in any event, the government cannot make a new record in a completely different proceeding using different evidence and say the record is "now complete." The record is no more complete today than it was when it initially went before the convening authority in the summer of 2008.

Respectfully submitted,





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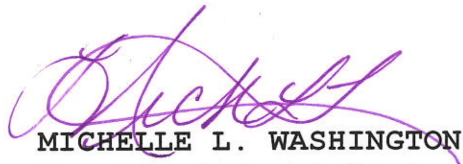
[19] R.C.M. 1103(f).

CERTIFICATE OF FILING AND SERVICE

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 January 24, 2013.



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