**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| U N I T E D S T A T E S,<br>Appellee | ) BRIEF ON BEHALF OF APPELLEE<br>)<br>) |
| v. | ) Crim.App. Dkt. No. 20080132<br>) |
| Staff Sergeant (E-6)<br>**DANIEL GASKINS,**<br>United States Army,<br>Appellant | ) USCA Dkt. No. 13-0016/AR<br>)<br>)<br>)<br>) |


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

## Statement of Statutory Jurisdiction

The United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ, which permits review in "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces (C.A.A.F.) has granted a review."[2]

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[1] Joint Appendix (JA) 50-52; UCMJ, art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, art. 67(a)(3), 10 U.S.C. § 867(a)(3).

## Statement of the Case

This case has a long procedural history, including three decisions by the Army Court, and two petitions for extraordinary relief at this Court.

A military panel composed of officer and enlisted members convicted appellant, contrary to his pleas,[3] of carnal knowledge, indecent acts with a child under the age of sixteen years, and indecent assault in violation of Articles 120 and 134, Uniform Code of Military Justice (UCMJ).[4] The panel sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for twelve (12) years, and a dishonorable discharge.[5]

On August 27, 2010, the Army Court, sitting *En Banc*, returned the case to the convening authority for a post-trial evidentiary hearing to reconstruct a missing defense sentencing exhibit, Defense Exhibit (DE) A, which was appellant's "Good Soldier Book" (*Gaskins I*).[6] Four judges dissented from the Court's decision, arguing that a non-verbatim record sentence was the appropriate remedy rather than an evidentiary hearing.[7]

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[3] JA 37.
[4] JA 40.
[5] R. 995. The convening authority approved the adjudged sentence and awarded appellant fifteen days credit. Action.
[6] *United States v. Gaskins*, 69 M.J. 569, 570-74 (Army Ct. Crim. App. 2010) (*Gaskins I*).
[7] *Id*. at 574-90 (Ham, J. dissenting; Tozzi, C.J., dissenting separately).

On September 23, 2010, appellant filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition at this Court ("First Petition"), seeking to stop the evidentiary hearing and compel a non-verbatim record sentence.[8] On December 9, 2010, this Court granted the writ of prohibition in part and stopped the hearing because a *DuBay* hearing to reconstruct DE A was "inappropriate under the facts of this case."[9] This Court remanded the case to the Army Court "for further consideration of its other options in light of this action."[10]

On remand, the Army Court, again sitting *En Banc*, affirmed the findings but set aside the sentence (*Gaskins II*).[11] The Court remanded the case to the convening authority and authorized a rehearing on sentence.[12]

On February 28, 2011, appellant submitted a Second Petition for Extraordinary Relief with this Court ("Second Petition"), seeking to prohibit the sentence rehearing and again compel the Army Court to affirm a non-verbatim record sentence. This Court denied appellant's writ-petition.[13]

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[8] *See* RCM 1103(f)(1) (a non-verbatim record sentence would be limited to 6 months confinement, reduction to E-1, and forfeiture of two-thirds pay per month for 6 months).
[9] *Gaskins v. Hoffman*, 69 M.J. 452 (C.A.A.F. 2010).
[10] *Id.*
[11] *United States v. Gaskins*, 2011 WL 498371 (Army Ct. Crim. App. 10 Feb. 2011) (*Gaskins II*).
[12] *Id.*
[13] 70 M.J. 207 (C.A.A.F. 2011) (Daily Journal, June 1, 2011).

Subsequently, on June 29, 2011, the Clerk of Court, acting on behalf of The Judge Advocate General, returned the case to the convening authority who referred appellant's case to general court-martial for a sentence rehearing only. At the rehearing on October 18, 2011, a military judge alone sentenced appellant to reduction to E-1, forfeiture of all pay and allowances, confinement for nine years, and a dishonorable discharge.[14]

The case again came before the Army Court for direct review under Article 66, UCMJ. Having previously affirmed the findings of guilty, the Army Court (*En Banc*) affirmed the sentence (*Gaskins III*).[15] The case is now before this Court for review under Article 67(a).

## Statement of Facts

A. Background

The facts surrounding the loss of DE A were described in detail in Judge Ham's dissent in *Gaskins I*.[16] Those facts necessary to resolve the granted issues are included below.

After a contested trial on the merits, the panel convicted appellant of carnal knowledge and indecent acts with a child against the first victim, TS; and indecent assault against a second victim, Staff Sergeant (SSG) AD. The defense sentencing

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[14] JA 19 (Record of Sentence Rehearing (R.S.H.) 126).
[15] *United States v. Gaskins*, 2012 WL 2887988 (Army Ct. Crim. App. 12 July 2012) (*Gaskins III*).
[16] 69 M.J. at 574.

case consisted of three mitigation witnesses, appellant's unsworn statement, and a single documentary exhibit, DE A, appellant's "Good Soldier Book." The panel received DE A for its consideration on sentencing, but DE A was not included in appellant's record of trial when it was assembled. Despite the government's post-trial investigation, DE A could not be located.

Neither the defense, nor the government, maintained a separate index of the contents of DE A.[17] However, the parties were able to recollect that DE A was a three-inch thick binder consisting generally of a compilation of appellant's awards (from his time in both the Army and Marine Corps), college transcripts, letters of commendation, certificates of achievement, character letters from family and friends, as well as a number of photographs.[18]

The government's attempts to reconstruct DE A and provide a substitute were legally insufficient, and in *Gaskins II* the Army Court found that the omission of DE A from the record was substantial, and that the government did not rebut the

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[17] *Gaskins I*, 69 M.J. at 578; SJA 12 (Response to SJA Addendum ICO SSG Daniel Gaskins, USA, Enclosure 6 [Email from Mr. Court, dated July 30, 2008]).
[18] Supplemental Joint Appendix (SJA) 9; JA 42-45 (appellant's unsworn statement at the original sentencing hearing).

presumption of prejudice.[19] The Army Court set aside appellant's sentence and authorized a rehearing as the remedy for the incomplete record of trial.[20]

B. Sentence Rehearing

At the sentence rehearing, appellant moved the court to again limit the maximum punishment to the non-verbatim record sentence of six months confinement, reduction to E-1, and forfeiture of two-thirds pay for six months.[21] Appellant asserted two distinct grounds for this relief, which were often conflated. First, largely following Judge Ham's dissent in *Gaskins I*, appellant moved the military judge to limit the maximum punishment to the non-verbatim sentence because the record was incomplete.[22] The military judge correctly rejected this argument as being outside the scope of the remand because the Army Court already determined the appropriate remedy for the

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[19] Government counsel recognizes that this analysis is not expressly set forth in the Army Court's opinion in *Gaskins II*. 2011 WL 498371 at *1. However, as Judge Gifford noted in her partial dissent, this is the only logical conclusion in light of the procedural history of this case. *Gaskins II*, 2011 WL 498371 at *2 (Gifford, J. dissenting).
[20] *Gaskins II*, 2011 WL 498371 at *1.
[21] JA 20 (AE CI).
[22] JA 20 (AE CI); SJA 83-88 (RSH 45-50).

incomplete record was a sentence rehearing, not a non-verbatim sentence.[23]

Second, appellant argued that as a sanction for the government's failure to produce DE A at the rehearing, the court should limit the maximum punishment to the non-verbatim sentence, or in the alternative prohibit the government from putting on any sentencing case.[24] The military judge agreed that a remedy was appropriate for the government's failure to produce DE A at the rehearing.[25] However, she opted for neither of the defense's remedies and instead prohibited the government from presenting any live testimony during sentencing, and limited the government to a single stipulation of expected testimony from Ms. Jennifer Starn, the mother of TS.[26]

At sentencing the defense presented only the unsworn statement of appellant in which he denied committing the offenses. The military judge sentenced appellant to confinement for nine years (three years less than his original sentence),

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[23] JA 12 (RSH 74); *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).
[24] SJA 94 (RSH 60); *see, e.g.*, *Gaskins II*, 2011 WL 498371 at *1 (Sims, J. concurring) (noting the military judge should impose restraints on either the maximum sentence or the government's ability to present evidence in aggravation), citing *United States v. Murphy*, 2008 WL 5381239 (A.F. Ct. Crim. App. 2008)).
[25] SJA 93; 95-96.
[26] JA 11, 12.

reduction to E-1, total forfeitures, and a dishonorable discharge.[27]

**ISSUE I**

WHETHER THE GOVERNMENT'S LOSS OF A SENTENCING EXHIBIT RENDERED THE RECORD OF TRIAL INCOMPLETE 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.

**Summary of Argument**

This Court applies a three-part test to analyze claims that a record is incomplete. First, is the omission from the record substantial or insubstantial? Second, if the omission is substantial, has the government rebutted the presumption of prejudice to appellant? And third, if the government fails to overcome the presumption of prejudice, what is the appropriate remedy?[28]

The first two questions are not at issue in this case. The Army Court already decided that the omission of DE A from the record was substantial, and the government did not overcome the presumption of prejudice. The sole issue left in this case is whether the sentence rehearing, instead of a non-verbatim sentence, was an appropriate remedy for the incomplete record.

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[27] JA 19 (RSH 126).
[28] *See Gaskins I*, 69 M.J. at 580.

Appellant's brief at this Court, along with his petitions for extraordinary relief, and his motions at the sentence rehearing, appear to acknowledge only one remedy for an incomplete record: the imposition of a non-verbatim record sentence. Appellant's view of the law ignores other equally valid and available remedies. Among such other options, RCM 1103(f)(2) expressly authorizes a rehearing.

This Court has never articulated what factors lower courts should consider in determining the remedy for an incomplete record. The government submits that a rehearing was the proper remedy in this case based on four factors: (1) the circumstances of the loss of DE A; (2) appellant's ability to present "Good Soldier" evidence in other forms; (3) ability of the military judge to fashion meaningful relief for the lost evidence; and (4) the seriousness of the offenses, and the windfall to appellant if given a non-verbatim sentence. Considering these factors, the Army Court properly determined that a rehearing, rather than a non-verbatim sentence, was the appropriate remedy.

## Standard of Review

Whether a record of trial is complete is a question of law reviewed de novo.[29] That standard logically includes the lower court's determination of the appropriate remedy for an incomplete record.

## Law and Argument

Article 54(c)(1) requires that a "complete record of the proceedings and testimony shall be prepared...in each general court-martial case in which the sentence adjudged includes...a discharge...."[30] Among other things, a "complete" record includes all "[e]xhibits, or with the permission of the military judge, copies, photographs, or descriptions of any exhibits received in evidence...."[31] Missing exhibits, such as DE A, relate to whether the record of trial is "complete," as opposed to "verbatim" which applies only to the transcript of court proceedings.[32]

"Not every omission from the record of trial renders it incomplete."[33] Insubstantial omissions do not prevent a record's

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[29] *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).
[30] *See also* R.C.M. 1103(b)(2)(A).
[31] R.C.M. 1103(b)(2)(D)(v).
[32] *Gaskins I*, 69 M.J. at 579; *United States v. White*, 52 M.J. 713, 715 (Army Ct. Crim. App. 2000), citing *United States v. Cudini*, 36 M.J. 572, 573 (A.C.M.R. 1992) and *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981).
[33] *Gaskins I*, 69 M.J. at 580.

characterization as "complete."[34] Substantial omissions, on the other hand, render a record "incomplete and raise[] a presumption of prejudice that the Government must rebut."[35]

When the government fails to rebut the presumption of prejudice, as was the case here, several remedies are available. RCM 1103(f)(1) provides that the convening authority (or the court) may approve a "non-verbatim" sentence. Alternatively, RCM 1103(f)(2) authorizes a rehearing "as to any offense of which the accused was found guilty" if the findings of guilty are supported by a summary of the evidence in the record.[36] While the rule does not distinguish between findings and sentence rehearings, the authority to order both is logically included in the rule.[37] Finally, this Court's case law

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[34] *McCullah*, 11 M.J. at 237; *United States v. Henry*, 53 M.J. at 111.
[35] *Henry*, 53 M.J. at 111; *Gaskins I*, 69 M.J. at 580, citing *United States v. Seal*, 38 M.J. 659, 662 (A.C.M.R. 1993).
[36] In *United States v. Stacy*, 45 C.M.R. 48 (C.M.A. 1972), this Court applied the requirement that the finding be supported by a "summary of the evidence" in a situation where essentially no record was prepared because equipment failure. This rule is a reiteration of Article 63's prohibition against ordering a rehearing when there is a lack of sufficient evidence in the record to support the findings. *Stacy*, 45 C.M.R. at 49. That is distinct from a situation in which no record is prepared because of a mechanical failure. In the latter situation, neither RCM 1103(f)(2) nor Article 63 would prevent a rehearing.
[37] *See infra* pp. 12-14.

establishes that a *DuBay* hearing to reconstruct the record may be appropriate in some cases.[38]

Since this Court found that a *DuBay* hearing was not appropriate here, in *Gaskins II* the Army Court was left with only two options: either approve a non-verbatim sentence, or authorize a rehearing. The Army Court ordered a rehearing, which was the appropriate remedy based on four factors: (1) the circumstances of the loss of DE A; (2) appellant's ability to present "Good Soldier" evidence in other forms; (3) ability of the military judge to fashion meaningful relief for the lost evidence; and (4) the seriousness of the offenses, and the windfall to appellant if given a non-verbatim sentence.

A. Appropriateness of a Sentence Rehearing, in General

As a threshold matter, appellant argues that a rehearing is impermissible *per se* because "[n]othing 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

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[38] *United States v. Abrams*, 50 M.J. 361, 364 (C.A.A.F 1999); *Seal*, 38 M.J. at 663; *United States v. Church*, 23 M.J. 870, 871 (A.C.M.R. 1987); *United States v. Williams*, 14 M.J. 796, 801 (A.F.C.M.R. 1982). *See also United States v. Crowell*, 21 M.J. 760, 761 (N.M.C.R. 1985) (finding that RCM 1103(f) does not provide exclusive remedy when the record is incomplete, and affirming judge's decision to conduct sentence rehearing when error discovered prior to authentication).

a missing sentencing exhibit."[39] This argument is flawed because Article 54 does not discuss remedies for incomplete records at all.[40] Article 54 only defines the circumstances where a complete record of proceedings is required. The President, in RCM 1103(f), separately defined the remedies for an incomplete record and authorized rehearings "as to any offense of which the accused was found guilty...."

While the words "sentence rehearing" do not specifically appear in RCM 1103(f)(2), the plain language of the rule clearly encompasses them. First, the language of the rule - "rehearing as to any offense" – is broad enough to encompass both findings and sentence rehearings. This interpretation is also supported by Article 60(e)(3), UCMJ, which authorizes a convening authority to order a rehearing, and Article 66(d), UCMJ, authorizing a Service Court to order a rehearing when the findings or sentence is set aside.[41]

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[39] AB at 17-18. If appellant's argument is that every action by an appellate court must be contained somewhere in the Code, then that is fatally flawed as well. *See, e.g., United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967); *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986).

[40] By appellant's logic, rehearings on findings are impermissible as well because they are not mentioned in Article 54. But it is well-established, and appellant concedes at AB 18-19, that findings rehearings are authorized. *United States v. Boxdale*, 47 C.M.R. 351, 352 (C.M.A. 1973); *United States v. Gray*, 7 M.J. 296, 298 (C.M.A. 1979); *McCullah*, 11 M.J. at 238.

[41] Further, it would be nonsensical for the rule to allow findings rehearings, which necessarily involve a sentencing

Second, independent sentence rehearings are consistent with this Court's case law that reviewing authorities may determine whether the lack of completeness affects findings, sentence only, or both, and then shape relief accordingly.[42]

Appellant's argument that sentence rehearings are *per se* impermissible would lead to absurd results. Hypothetically, under appellant's interpretation, convicted murderers would automatically receive a non-verbatim sentence if the government lost a sentencing exhibit. Congress and the President could not have intended that result when they drafted Article 54 and RCM 1103(f). The authority to authorize a rehearing as an alternative to approving a non-verbatim sentence is clearly intended to prevent circumstances such as this, where a serious offender might receive a potential windfall due to administrative error.

B. Circumstances of the loss of DE A

It is black letter law that the trial counsel, under the direction of the military judge, is responsible for preparing

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portion, but at the same time prohibit independent sentencing rehearings.

[42] *McCullah*, 11 M.J. at 237; *see also United States v. Myers*, 48 C.M.R. 176 (C.M.A. 1974) (noting that the convening authority ordered a rehearing on sentence when it appeared that a malfunctioning recording device precluded preparation of a verbatim record of presentencing procedures); *United States v. Scott*, 49 C.M.R. 321, 324 (N.M.C.R. 1974) (noting that a sentence rehearing is a possible solution to the lack of a verbatim record of the presentencing portion of the trial).

the record of trial.[43] However, responsibility for a lost exhibit does not always lie entirely with the Government.[44] All parties, including the military judge, trial counsel, defense counsel, and court reporter, "bear some responsibility for producing an accurate and complete record of proceedings...."[45]

The government was undoubtedly responsible for the loss of DE A following appellant's original court-martial. But what this Court should not ignore, however, is that 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. Had defense maintained some form of record or index of DE A the result in this case may have been different. The government's statutory obligation to prepare the record of trial does not absolve defense counsel of his common sense responsibility to know the contents of his own exhibit.

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[43] R.C.M. 1103(b)(1); *Seal*, 38 M.J. at 662.
[44] Hypothetically, an accused could deliberately destroy an exhibit or, a defense counsel could completely refuse to participate in reconstructing the record. Obviously in those cases the government should not be held responsible. The government is not in any way suggesting this is what happened in the case before this Court. The purpose of these examples is merely to show that the government is not absolutely responsible in every case.
[45] *United States v. Embry*, 60 M.J. 976, 979 n. 8 (Army Ct. Crim. App. 2005), citing *Seal*, 38 M.J. at 662.

Further, had appellant updated his OMPF, as it was his duty to do, all of his awards could have been reproduced.[46] While appellant may not be at fault for the loss of the exhibit, he bears at least some responsibility for the inability to reconstruct it. This should be a factor that weighs against the accused receiving a windfall non-verbatim sentence.

C. Appellant's ability to present "Good Soldier" evidence in other forms at the rehearing

At the sentence rehearing appellant had a renewed opportunity to present whatever "Good Soldier" evidence he wished to mitigate his crimes. Appellant could have presented new "Good Soldier" evidence not offered or introduced at the first hearing, or he could have attempted to reconstruct and reintroduce portions of DE A. For example, had he remembered their names, appellant could have contacted the colleges he attended to request new transcripts.[47] If he had any trouble obtaining them, he could have moved the trial court to order production under R.C.M. 701 and 703. Appellant could have obtained new character letters from the original authors, or different authors. He could have called any one from the laundry list of witnesses to discuss his military character and

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[46] *See* U.S. Army Human Resources Command Website, "Updating OMPF" *available at* https://www.hrc.army.mil/TAGD/Record%20Update%20and%20Maintenance (last accessed January 14, 2013).

[47] SJA 77 (RSH 27).

combat service, or at least sought to stipulate to their testimony as the government was willing to stipulate to nearly anything related to appellant's military character.[48] The defense opted not to do any of these, nor did they have the military judge read their sentencing case from the original trial.[49]

This is not a case where there is no substitute for the missing evidence, such as where a witness cannot remember her original testimony, or potentially exculpatory DNA evidence has been lost.[50] Appellant had the opportunity to present a new, meritorious sentencing case at his rehearing. That is his right; it is not a burden.

D. The military judge's ability to fashion meaningful relief for lost evidence

Appellant argues that a rehearing is inappropriate because "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

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[48] *See* SJA 3-6 (AE I, Defense Request for Witnesses, dated November 16, 2007, listing seven witnesses that could testify to appellant's good military character.).
[49] SJA 102-103 (RSH 68-69). Appellant also put on a Good Soldier defense on the merits.
[50] *See, e.g., United States v. Terry*, 66 M.J. 514 (A.F. Ct. Crim. App. 2008) (applying R.C.M. 703(f)(2) to lost evidence); *United States v. Madigan*, 2005 WL 486364 (A.F. Ct. Crim. App. 2005), *aff'd*, 63 M.J. 118 (C.A.A.F. 2006).

obligation to construct the record."[51] Aside from the fact that appellant is under no obligation to reconstruct or reintroduce DE A at the rehearing, his argument fails because to the extent the loss of DE A infringes on appellant's right to present his evidence of choice, the military judge remedied that through RCM 701 and 703.

When a record is incomplete because of a lost exhibit, and the case is remanded for a rehearing under RCM 1103(f)(2), then that same lost exhibit becomes "unavailable evidence" at the rehearing.[52] "In the event evidence of apparently exculpatory value is lost or destroyed and the accused has been unable to obtain comparable evidence, then the trial judge may fashion such remedies as are appropriate to protect the fundamental rights of the accused."[53]

That is exactly what the military judge did here. The military judge correctly determined a remedy was appropriate for the government's inability to produce DE A, and she severely limited the government's sentencing case as a result. 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

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[51] AB at 19, 21.
[52] *See* R.C.M. 701(g)(3) and 703(f)(2).
[53] *United States v. Kern*, 22 M.J. 49, 52 (C.M.A. 1986); *United States v. Manuel*, 43 M.J. 282, 288 (C.A.A.F. 1995) (R.C.M. 703(f)(2) provides a judge discretion to fashion remedies for lost evidence).

other case remanded for a new sentence rehearing because of government error. If appellant chose to recreate or reproduce DE A, any burden associated with this recreation or reproduction is offset by the military judge's remedy, his ability to compel documents under Article 46, and the government's willingness to stipulate to the contents of DE A. Consequently, any burden shifting in this case was adequately addressed by the military judge.

Moreover, the military judge's remedy was appropriate and not an abuse of discretion for two reasons. First, as noted appellant could have introduced "Good Soldier" evidence in other forms, or attempted to recreate much of his original "Good Soldier" book. Limiting the maximum punishment to a non-verbatim sentence, or prohibiting any government sentencing case, would have been excessive and disproportionate.[54]

Second, the judge's decision was appropriate in light of the parties' actions at the rehearing. The government attempted to diligently assist the defense in presenting "Good Soldier" evidence. For example, the government used its subpoena power to locate certain documents (e.g., appellant's Marine Corps OMPF) identified by the defense as part of DE A, which appellant

[54] DE A did not comprise defense's entire sentencing case at the original trial. As such, the government should not have been completely barred from presenting sentencing evidence.

could not himself obtain.[55] The military judge also took note of the fact that the government was willing to make generous stipulations as to the contents of DE A.[56]

The government's actions should be compared with that of appellant, and the apparent lack of importance of the evidence at issue. For example, appellant did not move to compel production of any documents he had trouble obtaining.[57] Further, appellant was curiously unable to provide the names of all the colleges he attended.[58] Either appellant was intentionally being obstructionist, or the colleges were not important enough for him to remember their names.

Additionally, to the extent appellant's OMPF (PE 9) was not up-to-date and did not include all of his awards,[59] responsibility for that error falls on appellant, not the government. Soldiers are responsible for updating their individual OMPF.[60] The military judge made that point with

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[55] SJA 78-80 (RSH 40-42). The Government also obtained appellant's high school transcripts but appellant maintained those were not part of DE A. SJA 78, 92 (RSH 40, 54).
[56] JA 6 (RSH 37); *Gaskins II*, 2011 WL 498371 at *1 (Sims, J. concurring part and dissenting in part).
[57] SJA 76-77) (RSH 26-27) (appellant discussing difficulty obtaining transcripts).
[58] SJA 76 (RSH 27).
[59] JA 13-14 (RSH 82-83).
[60] *See* U.S. Army Human Resources Command Website, "Updating OMPF" *available at* https://www.hrc.army.mil/TAGD/Record%20Update%20and%20Maintenance (last accessed January 14, 2013).

respect to omissions on appellant's Enlisted Record Brief (ERB).[61] The same reasoning applies to appellant's OMPF. This is a case where the military judge could and did craft a remedy to ensure a full and fair sentence rehearing.

E. The seriousness of the offenses, and the windfall to appellant if given a non-verbatim sentence.

The last factor this Court should consider in determining the appropriate remedy, a rehearing or non-verbatim sentence, is the seriousness of appellant's offenses and the potential windfall to appellant from the non-verbatim sentence. The government has been unable to find, and appellant has not cited, any case where a sentence to confinement was so drastically reduced for an incomplete record. In terms of the relative seriousness of this error, this Court has "upheld substantial sentences reassessed on the basis of those findings of guilt which remained after setting aside findings of guilt blemished by errors more serious than omission of an exhibit from the record of trial."[62]

The two cases appellant relies on to argue a non-verbatim sentence is appropriate, *Seal*[63] and *Stoffer*,[64] are not factually analogous except to say that sentencing exhibits were lost in

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[61] JA 16 (RSH 87) ("I understand your objection, but the ERB is a military document which Soldiers are required to maintain.").
[62] *McCullah*, 11 M.J. at 237.
[63] 38 M.J. 659 (A.C.M.R. 1993).
[64] 53 M.J. 26 (C.A.A.F. 2000).

those cases as well. In *Seal*, the appellant was sentenced at general court-martial to dismissal, confinement for 9 months, and forfeiture of $660.00 pay per month for 9 months.[65] In *Stoffer*, the appellant was sentenced at special court-martial to a BCD, confinement for 75 days, reduction to the lowest enlisted grade, and forfeiture of $550.00 per month for two months. This Court's remedy in *Stoffer*, approving a non-verbatim record sentence, did nothing more than vacate the punitive discharge leaving the rest of the appellant's sentence intact. Even that decision was not unanimous.[66]

Appellant was convicted of extremely serious offenses and was appropriately sentenced to a severe term of confinement. The fact that a single defense exhibit was lost, which 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, should not dispel the justice rendered in this case. The windfall reduction in sentence is a factor that weighs heavily, if not conclusively, against approving a non-verbatim record sentence.

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[65] *Seal*, 38 M.J. at 661.
[66] *United States v. Stoffer*, 53 M.J. 26, 28-29 (C.A.A.F. 2000) (Sullivan, J. concurring in part and dissenting in part).

F. Appellant's Record is Now Complete

Finally, appellant argues that, to this day, his record of trial is still incomplete because DE A has not been produced.[67] This argument is nonsensical and has already been rejected by at least one Court of Criminal Appeals.[68] The record of trial for appellant's first sentencing hearing was incomplete because DE A was missing. That was prejudicial error, and appellant received relief in the form of a new sentencing hearing. The record of trial for his new sentence hearing is complete, and can lawfully support the sentence he received. By 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.[69]

In sum, appellant was victorious in *Gaskins II* and successfully established material prejudice due to the loss of DE A. As a remedy, the Army Court set aside his original sentence and returned his case for a new sentencing hearing. At this wholly new hearing appellant received a judicially crafted

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[67] AB at 21-22.
[68] *United States v. Kyle*, 1993 WL 76296 at *1 (A.F.C.M.R. 1993) ("[Appellant] would have us believe that the record remains incomplete because the missing documents were not produced at the rehearing and that, therefore, the maximum punishment should have been limited to that consistent with a summarized record.").
[69] *See* R.C.M. 810.

remedy for the government's failure to produce DE A, and was free to submit any and all relevant evidence in extenuation and mitigation. This made appellant whole.

Other than his unsworn statement, appellant chose not to present evidence on his behalf instead relying on the argument that he continued to be prejudiced by the loss of DE A and that a rehearing was an inappropriate remedy. Any prejudice appellant suffered at his new sentencing hearing from a lack of "Good Soldier" evidence is borne solely out of his own volitional decision to not even attempt to present such evidence. The Army Court exercised lawful authority in setting aside appellant's sentence and remanding the case to the convening authority for a rehearing on sentence, and such a ruling was appropriate under the facts and circumstances of this case.

## ISSUE 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.

## Additional Facts

A. Carnal Knowledge and Indecent Act with TS:

In February 2007 appellant was assigned to the NATO School in Latina, Italy. TS's father, Sergeant First Class (SFC) Joseph Starn, was assigned as appellant's sponsor to help appellant acclimate to the new assignment and the community.[70]

On February 24, 2007, Technical Sergeant (TSGT) Dan Daley, a friend of SFC Starn, had a party at his house. At the party was appellant, the entire Starn family (SFC Starn, his wife Jennifer Starn, and TS), and the Anthony family (SSG Marla Anthony, her husband Terry, and their two daughters Paige and Trinity).[71] At the time, TS was a 12 year old female, and in sixth grade.[72]

At some point after dinner, TS, Paige and Trinity went upstairs to use TSGT Daley's computer, while the adults stayed downstairs to watch a movie.[73] After the girls were upstairs, appellant went upstairs to use the bathroom claiming that he had

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[70] SJA 19; 27-28; 31.
[71] SJA 20-21.
[72] SJA 26.
[73] SJA 22, 24.

diarrhea and an upset stomach.[74] While upstairs, appellant brought 12 year old TS into a spare bedroom, and put his hand down her pants.[75] TS didn't stop appellant because she liked him.[76] TS pulled up her shirt, unsnapped her bra, and appellant started "grabbing on [her] left boob and sucking on it."[77]

TS put her shirt down and appellant said that "he wanted to be inside [her] and wanted it wet."[78] After initially saying no, TS relented and said "fine."[79] TS unbuttoned and pulled down her pants.[80] Appellant tried to penetrate TS's vagina with his penis "two or three times" and "finally got in." Appellant "sat there for a few seconds and then pulled out" and "zipped his pants back up."[81]

B. Indecent Assault of SSG AD

In March 2007, appellant was reassigned from Latina to Naples, Italy pending investigation into his offenses with TS.[82] There he met SSG AD, a fellow NCO assigned to the unit. On March 17, 2007, SSG AD ran into appellant at the Navy Exchange

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[74] SJA 23, 25.
[75] SJA 32.
[76] SJA 33-34.
[77] SJA 34.
[78] SJA 34.
[79] SJA 34.
[80] SJA 36.
[81] SJA 37.
[82] SJA 39.

and invited him to her house so appellant could see the area and meet others in the community.[83]

Once there, SSG AD took appellant to see houses for rent in the area, and then went to a barbecue.[84] Towards the end of the evening, SSG AD offered appellant her spare bedroom since they both had drank alcohol and there had been a high rate of DUIs in the area.[85] As they walked back to SSG AD's house, appellant touched her on the waist and SSG AD told him to stop.[86] She told appellant she did not want "anything physical."[87]

After setting up appellant in the guestroom, SSG AD checked on appellant since he had a lot to drink.[88] SSG AD asked appellant if he was okay, and appellant touched her thigh and started moving his hand up.[89] SSG AD told him to "stop," but appellant continued to touch and put his finger in SSG AD's vagina.[90] SSG AD was in "shock." She pushed appellant away, but he penetrated SSG AD's vagina with his finger a second time.[91] SSG AD shoved appellant back more forcefully and left the room.[92]

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[83] SJA 39-40.
[84] SJA 43-44.
[85] SJA 42, 45.
[86] SJA 46.
[87] SJA 46-47.
[88] SJA 49.
[89] SJA 50, 52.
[90] SJA 52.
[91] SJA 54.
[92] SJA 54.

As a result of these two incidents, the government charged appellant with carnal knowledge (Article 120) and indecent acts (Article 134) against TS; and indecent assault (Article 134) against SSG AD. Neither of the Article 134 specifications alleged the terminal element.

**Standard of Review**

Whether a specification fails to state an offense is reviewed de novo.[93]

**Law and Argument**

A. Waiver

As a threshold matter, the government agrees with appellant that the Army Court erred by finding that failing to raise the *Fosler* issue at the rehearing waived the error.[94] The *Fosler* issue would have been outside the scope of the Army Court's remand, thus the military judge could not address it at the rehearing.[95] However, while appellant's delay in raising the *Fosler* issue does not amount to waiver, it should be considered circumstantial evidence of notice of the terminal elements.[96]

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[93] *United States v. Ballan*, 71 M.J. 28, 33 (C.A.A.F. 2012) (citations omitted).
[94] *Gaskins III*, 2012 WL 2887988 at *FN.
[95] *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); *see also* R.C.M. 907(b)(1).
[96] *United States v. Leos-Maldonado*, 302 F.3d 1061, 1065 (9th Cir. 2002), quoting *United States v. Lo*, 231 F.3d 471, 481 (9th Cir. 2000).

B. Plain Error Test, Generally

It was clear error for the government to omit the terminal element from the indecent assault and indecent act specifications.[97] However, appellant did not object to the sufficiency of the specification at trial. Where there is no objection at trial, this Court reviews for plain error.[98] Under a plain error analysis, the appellant bears the burden to show the error is plain or obvious and resulted in material prejudice to appellant's substantial constitutional right to notice.[99] To assess prejudice, this Court looks to the record "to determine whether notice of the missing element is somewhere extant in the trial record," or whether the evidence on the missing element was "overwhelming" and "essentially uncontroverted."[100]

This is a distinct, two-part inquiry. The first part looks at whether there is anything in the record that puts appellant

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[97] *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011).
[98] *Ballan*, 71. M.J. at 34, *citing United States v. Cotton*, 535 U.S. 625, 631-32 (2002).
[99] *United States v. Humphries*, 71 M.J. 209, 215-16 (C.A.A.F. 2012); *see also Ballan*, 71 M.J. at 34, n.6 (quoting *Girouard*, 70 M.J. at 11).
[100] *Cotton*, 535 U.S. at 631-32. In *Humphries*, this Court omitted the "overwhelming" portion of the prejudice test. 71 M.J. at 216. The government submits that this is a critical omission, because the "uncontroverted" prong only looks to the defense's actions at trial. The "overwhelming" prong focuses on the strength of the government's case. *See, e.g.*, *United States v. Portes*, 505 F.3d 21, (1st Cir. 2007) (noting that the evidence regarding the drug quantity for which [appellant] was responsible was "overwhelming" and "essentially uncontroverted.").

on notice of the terminal element (e.g., a bill of particulars), or is there anything in the record that demonstrates appellant actually knew of the terminal element.[101] The second part of the prejudice test assumes appellant was not on notice, and looks at whether the evidence was so overwhelming and unchallenged that notice of the element would have made no difference.

C. Appellant was on Notice of the Terminal Element

There is no direct evidence in the trial record that indicates appellant was on notice of the terminal element. The circumstantial evidence of notice, however, is overwhelming. Appellant's delay in raising the *Fosler* issue is strong evidence that he was on notice of the terminal element. As the 9th Circuit noted in *Leos-Maldonado*:

> [A] late challenge suggests a purely tactical motivation and is needlessly wasteful because pleading defects can usually be readily cured through a superseding indictment before trial. Additionally, the fact of the delay tends to negate the possibility of prejudice in the preparation of the defense, because one can expect that the challenge would have come earlier were there any real confusion about the elements of the crime charged.[102]

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[101] *See, e.g.*, *United States v. McCullough*, 2012 WL 3316627 (Army Ct. Crim. App. 13 August 2012) (in a carnal knowledge case, during a 39(a) session defense counsel conceded that if accused had sexual intercourse with a 13 year-old girl that would be prejudicial to good order and discipline or service discrediting).

[102] 302 F.3d 1061, 1065 (9th Cir. 2002).

In *Leos-Maldonado*, the defense failed to challenge the indictment until its reply brief at the 9th Circuit.[103] Here, appellant's challenge came much later in the appellate process; he failed to challenge the specification until the second level of appellate review, and then only after the Army Court alerted him to the issue. Given that appellant had no objection to the military judge's findings instructions, which were given to defense in advance of instructing the members,[104] the only reasonable conclusion from this evidence is that appellant was fully aware of the terminal element.[105]

D. The evidence of the terminal element was overwhelming, essentially uncontroverted, and the defense's strategy would not have changed

In *United States v. Cotton*, the Supreme Court stated that an indictment was defective where it failed to allege a drug quantity that enhanced the statutory maximum sentence.[106] Like this case, *Cotton* is a case where the error at issue arose out of a new rule announced by case law, *Apprendi v. New Jersey*,[107] while *Cotton* was on appeal. Cotton did not object to the

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[103] *Id.*
[104] SJA 58.
[105] *See United States v. Santoro*, 46 M.J. 344, 346 (C.A.A.F. 1997). In *Santoro*, the appellant alleged the record was incomplete because, among other things, the charge sheet was missing. Relying on the presumption of competence and the providence inquiry, this Court found the government rebutted the presumption of prejudice from the omission.
[106] *Cotton*, 535 U.S. at 627.
[107] 530 U.S. 466 (2000).

sufficiency of the indictment at trial. The Supreme Court found that the indictment error was not prejudicial where the evidence that went to the omitted element was "overwhelming" and "essentially uncontroverted."[108]

Here, like in *Cotton*, the evidence on the terminal elements, particularly regarding the service discrediting nature of appellant's crimes, was equally overwhelming.[109] Appellant's theory at trial on the indecent acts specification was *not* the following: that appellant had committed the acts alleged but no prejudice to good order and discipline or discredit to the armed forces arising out of those alleged acts. Instead, appellant's theory was that the accused did not commit the acts alleged and TS was lying.[110] Clearly, if the panel found that appellant committed the underlying acts alleged, they would have surely found that appellant's actions were service discrediting.[111]

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[108] *Cotton*, 535 U.S. at 633 (although *Cotton* was decided on the "fourth prong" of the *Olano* test, the analysis done by the Supreme Court amounted to a test for prejudice).
[109] Notably, defense counsel does not attack the legal sufficiency on the terminal element.
[110] SJA 15 (Defense voir dire of members); SJA 16 (defense opening statement); SJA 110-12 (defense closing) ("How can you prove something didn't happen? You deny it. You say it didn't happen. You plead not guilty.").
[111] *Cotton*, 535 U.S. at 633 ("Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base."); *see also Portes*, 505 F.3d at 26-27.

The same analysis applies to the indecent assault against SSG AD. Appellant's defense to this charge was mistake of fact, in that SSG AD's actions gave him the "wrong impression,"[112] and he mistakenly believed SSG AD had consented.[113] Having found that the misconduct occurred, and that this defense did not apply, the panel clearly would have found the acts service discrediting.

Molesting a 12 year old girl, and digitally penetrating a fellow non-commissioned officer without her consent, were obviously of a "nature" to bring discredit upon the armed forces. Like possession of child pornography, it is "intuitive" that these acts discredit those who do them, "as well as the institutions with which those persons are identified."[114] The fact that these crimes occurred in a foreign land only amplified the "overwhelming" nature of the evidence against appellant on that element.[115]

Because the evidence on the terminal is so overwhelming, there is no reasonable possibility that defense would have

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[112] SJA 65 ("[SSG AD's] testimony alone shows that she knew her actions had given [appellant] the wrong impression, had given him the misunderstanding...]).
[113] SJA 57, 64 (Mistake of Fact Instruction).
[114] *United States v. Medina*, 66 M.J. 21, 27 (C.A.A.F. 2008); *United States v. Phillips*, 70 M.J. 161 (C.A.A.F. 2012).
[115] *See, e.g., United States v. Burney*, 21 C.M.R. 98, 121 (C.M.A. 1956) (Noting that "the military is, in part, measured by their habits and behavior. If they are lawless and commit crimes against the public, discredit is brought on the service.").

changed their strategy.[116] This is not an adultery case like *Fosler* or *Humphries*, where appellant could legitimately pursue a theory that the conduct was not prejudicial to good order and discipline or service discrediting. No reasonable defense counsel would admit appellant actually sucked on a 12 year old girl's breast, kissed her on the mouth, and rubbed her vagina, but appellant should be acquitted because the conduct was not prejudicial to good order and discipline or service discrediting. The only reasonable defense to the indecent acts charge is that the conduct did not occur at all, which is exactly what the defense put forth.

There are two additional reasons, unique to this case, that prove appellant would not have changed his trial strategy. First, defense successfully argued that the indecent act specification and the carnal knowledge specification were an unreasonable multiplication of charges for sentencing because "they [] occur[ed] at the same time and place with the same parties....They are separated in time by a matter of moments."[117] That all the misconduct with TS occurred at the same time makes it even more unlikely, and unreasonable, for defense to pursue different theories on the Article 120 and Article 134 charges.

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[116] *See, e.g., United States v. Wilkins*, 71 M.J. 410, 414 (C.A.A.F. 2012) ("This strategy would not have changed had the specification properly alleged 'contact' instead of 'act.'").
[117] SJA 66.

Second, appellant has vehemently maintained his innocence of all crimes, arguing the misconduct never occurred. In his unsworn statement during the sentence rehearing, and subsequently his personal letter to the convening authority, appellant repeatedly stated that he did not commit the underlying crimes.[118] He "did not have sex with [TS]" and he "did not have [sic] an assault on [SSG AD]."[119] This court should be convinced, beyond any doubt, that appellant's strategy at trial would have been exactly the same had the government pled the terminal element.

Appellant never even alleges how he would have tried this case differently. Based on the nature of the offenses, the overwhelming evidence on the terminal element, and appellant's belief in his innocence, this Court should find that appellant was not prejudiced by the failure to plead the terminal element. Because his case suffered no prejudice, appellant cannot satisfy his burden under the plain error test. Here, the real prejudice would be if this Court, despite the overwhelming evidence on the terminal element, were to set aside the conviction and sentence

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[118] SJA 104-107; SJA 70 (Appellant's Clemency Letter, page 1 ("I say accused of because I **did not** commit those crimes. I have been incarcerated for almost four years for something I did not do....")) (emphasis in original).
[119] SJA 104.

of a child molester because of an error not objected to at trial.[120]

E. Alternative Remedies

Assuming the Court finds appellant was prejudiced by the omission, for the indecent assault against SSG AD this Court can affirm the lesser included offense (LIO) of assault consummated by a battery under Article 128, which is necessarily included in the offense of indecent assault and was also plainly alleged on the charge sheet.[121]

The elements of indecent assault are:

(i) That the accused did bodily harm to SSG AD;

(ii) That the act was done with unlawful force or violence.

(iii) That SSG AD was not the wife of the accused;

(iv) That the accused's acts were done without the consent of SSG AD and against her will;

(v) The acts were done with the intent to gratify the sexual desires of the accused; and

(vi) That under the circumstances, the conduct of the accused was to the prejudice of good order and discipline or of a nature to bring discredit upon the armed forces.[122]

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[120] *Cotton*, 535 U.S. at 634.
[121] *United States v. Rauscher*, 71 M.J. 225 (C.A.A.F. 2012). At trial, the defense disclaimed any LIOs. SJA 55-56.
[122] SJA 62-63; *Manual for Courts-Martial, United States* (2012 ed.) [hereinafter MCM], Appendix 27, para. 63(b). This portion of the MCM specifically refers to para. 54 for a discussion of assault.

The elements of assault consummated by a battery are:

(i) That the accused did bodily harm to SSG AD; and

(ii) That the act was done with unlawful force or violence.[123]

The first two elements of these offenses are identical, and it is impossible to prove an indecent assault without first proving assault consummated by a battery.[124] "The specification clearly placed appellant on notice of that against which he had to defend," and this Court can be confident that appellant was tried only on charges presented in a specification.[125] Pursuant to Article 59(b), UCMJ, this Court is empowered to affirm "so much of the finding as includes a lesser included offense." The Court should exercise that power and affirm a finding of assault consummated by a battery under Article 128. Moreover, this Court can reassess and affirm appellant's sentence since the original military judge merged the indecent act and carnal knowledge specifications for sentencing, which reduced the max punishment from 32 to 25 years.[126]

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[123] MCM, pt. IV, para. 54(b)(2).
[124] *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010).
[125] *United States v. Rauscher*, 71 M.J. 225 (C.A.A.F. 2012), citing *Stirone v. United States*, 361 U.S. 212, 217 (1960).
[126] SJA 66-67; 69 (panel instruction). At the rehearing, the new military judge did not explicitly reiterate the merger of these charges on the record. However, she must have merged them given that she found the maximum sentence to be 25 years confinement. JA 12.

## Conclusion

The Government respectfully requests this Court affirm the Army Court's decision, and approve the findings and sentence in this case.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing brief on behalf of appellant was electronically filed with the Court to efiling@armfor.uscourts.gov on January 14, 2013, and contemporaneously served electronically on appellate defense counsel, Mr. William Cassara at bill@williamcassara.com.

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