

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S,) BRIEF ON BEHALF OF APPELLEE
Appellee)
)
) Crim.App. Dkt. No. 20081102
v.)
) **USCA Dkt. No. 13-0573/AR**
)
Sergeant First Class (E-7))
CALVIN J. DAVENPORT,)
United States Army,)
Appellant)

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WHETHER THE OMISSION OF TESTIMONY FROM A TRIAL TRANSCRIPT RENDERS THE TRANSCRIPT NON-VERBATIM AND THEREFORE SUBJECT TO THE REMEDY IN R.C.M. 1103(f)(1) WHERE THE WITNESS'S TESTIMONY IS ONLY RELEVANT TO AN OFFENSE OF WHICH APPELLANT HAS BEEN ACQUITTED; OR WHETHER SUCH OMISSION SHOULD BE ADDRESSED UNDER R.C.M. 1103 (b) (2) (A) (REQUIREMENT FOR A COMPLETE RECORD) AND THUS TESTED FOR WHETHER THE PRESUMPTION OF PREJUDICE HAS BEEN REBUTTED. SEE UNITED STATES V. GASKINS, 72 M.J. 225 (C.A.A.F. 2013); UNITED STATES V. HENRY, 53 M.J. 108 (C.A.A.F. 2000).

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Sergeant First Class (E-7))
CALVIN J. DAVENPORT,)
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Appellant)

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

Granted Issue

WHETHER THE OMISSION OF TESTIMONY FROM A TRIAL TRANSCRIPT RENDERS THE TRANSCRIPT NON-VERBATIM AND THEREFORE SUBJECT TO THE REMEDY IN R.C.M. 1103(f) (1) WHERE THE WITNESS'S TESTIMONY IS ONLY RELEVANT TO AN OFFENSE OF WHICH APPELLANT HAS BEEN ACQUITTED; OR WHETHER SUCH OMISSION SHOULD BE ADDRESSED UNDER R.C.M. 1103 (b) (2) (A) (REQUIREMENT FOR A COMPLETE RECORD) AND THUS TESTED FOR WHETHER THE PRESUMPTION OF PREJUDICE HAS BEEN REBUTTED. SEE UNITED STATES V. GASKINS, 72 M.J. 225 (C.A.A.F. 2013); UNITED STATES V. HENRY, 53 M.J. 108 (C.A.A.F. 2000).

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, 10 U.S.C. §866(b) [hereinafter UCMJ].¹ The statutory basis for this Honorable Court's jurisdiction is

¹ UCMJ, Art. 66(b), 10 U.S.C. §866(b); Joint Appendix (JA) at 1-19.

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

Statement of the Case

A military judge, sitting as a general court-martial, convicted appellant, contrary to his pleas, of four specifications of conspiracy, seven specifications of extortion, and two specifications of bribery in violation of Articles 81, 127, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 927, 934 (2006) (hereinafter, UCMJ).³ Appellant was sentenced to reduction to the grade of E-1, confinement for two years, and a bad-conduct discharge.⁴ At action, the convening authority approved the sentence as adjudged except for the period of confinement, approving only one year of confinement.⁵

On October 31, 2011, the U.S. Army Court of Appeals ordered return of this case for a hearing pursuant to *United States v. DuBay*.⁶ On December 28, 2011, appellant filed a Motion for a Stay of Proceedings with this Court.⁷ On January 5, 2012, appellant filed a Petition for Extraordinary Relief in the

² UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

³ JA at 37-42. Appellant plead guilty to Specification 2 of Charge III by exceptions and substitutions; however, the military judge found appellant guilty to the specification as drafted.

⁴ JA at 43.

⁵ JA at 44.

⁶ JA at 129-31; *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

⁷ JA at 132.

Nature of a Writ of Prohibition with this Court.⁸ On January 17, 2012, this Court summarily denied the petition for extraordinary relief.⁹

On April 2, 2012, the *DuBay* hearing was conducted, and on April 3, 2012, the military judge rendered his findings of fact,¹⁰ which the Army court ultimately adopted as their own.¹¹

Thereafter, on April 18, 2013, the Army Court issued its decision.¹² The Army Court set aside appellant's convictions for Specifications 1 and 2 of Charge II (Extortion) and Specifications 1 and 2 of Charge III (Bribery), and amended the findings as to Specifications 1 and 2 of Charge I (Conspiracy).¹³ The Army Court reassessed the sentence, and approved only so much of the sentence as provided for reduction to the grade of E-1, confinement for 10 months, and a bad-conduct discharge.¹⁴

⁸ JA at 138.

⁹ *In re Calvin J. Davenport*, Misc. No. 12-8010/AR (C.A.A.F. Jan 17, 2012) (summary disposition). Appellant spends a considerable portion of his brief arguing that the Army Court's remand of this case to a *Dubay* hearing was improper. However, based on this Court's denial of his original petition for extraordinary relief, and the exclusion of that question in the Granted Issue, this is an irrelevant point to these proceedings.

¹⁰ JA at 166.

¹¹ JA at 7. In this memorandum opinion, the Army court set aside and dismissed the findings of guilty as to Specification 1 and 2 of Charge II (extortion) and Specifications 1 and 2 of Charge III (bribery), due to issues unrelated to the omissions in the record.¹¹ The Army court affirmed the remaining findings of guilty and affirmed only so much of the sentence as provided for a bad-conduct discharge, confinement for ten months, and reduction to the grade of E-1.

¹² JA at 1-19.

¹³ JA at 18-19.

¹⁴ JA at 19.

Appellant filed his petition for review with this Court on August 26, 2013. This Court granted review on January 16, 2014.

Statement of Facts

There is no question that SGT Michael Smith's testimony was not transcribed or included within the final transcript. The laptop used by the court reporter, containing both the audio recording and her notes was reimaged upon redeployment from Iraq to Fort Carson, Colorado, rendering it impossible to recover the recording.¹⁵

The point of actual omission in the transcript begins where the record indicates that SGT Michael Smith "was sworn, and testified as follows..."¹⁶ Rather than including the substance of SGT Smith's testimony, the next entry states that the court was called to order at 1717 hours and that "all parties present when the court recessed were again present."¹⁷

Based on the missing portion of the transcript, the Army court ordered a *DuBay* hearing to resolve four discrete issues: (i) The substance and extent of SGT Michael Smith's testimony on December 9, 2008; (ii) whether any additional witnesses testified during the period of time covered by the omission in the record of trial; (iii) whether the military judge made any

¹⁵ JA 248-49,

¹⁶ JA at 80. The court was called to order at 1534 on December 9, 2008. (JA at 45). The testimony of six witnesses is recorded verbatim. (JA at 45-79) (MAJ Jason Tucker, SSG James Young, SGT Joseph Edwards, SGT Aaron Raiser, 1SG Richardson, and Emebet Mekonen Adamo).

¹⁷ JA at 80.

rulings affecting the rights of appellant at trial during the period of time covered by the omission in the record of trial; and (iv) the basis for and the duration of the recess called by the military judge which concluded, as reflected on the record of trial, at 1717, December 9, 2008.¹⁸

The military trial judge testified at the *DuBay* hearing. He explained his habit of note-taking on the bench.¹⁹ “[T]he only notes I’m taking are things that are important that I’m really focused in either on the elements . . . or his offense . . . or a witness’s credibility.”²⁰ The trial judge’s notes from the Davenport trial were attached as an exhibit to the *DuBay* hearing.²¹

Substantively, the trial judge recalled that SGT Smith testified under a limited direct examination, some cross, and some re-direct.²² The trial judge estimated that SGT Smith’s testimony lasted less than 10 minutes.²³ The trial judge was “very certain” that SGT Smith’s testimony was not relevant to any charge but the money laundering specifications, of which appellant was found not guilty.²⁴

¹⁸ JA at 129-131.

¹⁹ JA at 214-17.

²⁰ JA at 214.

²¹ JA at 306-307.

²² JA at 211-216.

²³ JA at 229.

²⁴ JA at 220-222, 229-230.

The trial judge confirmed that no other issue of substance, including any meaningful objections or rulings, occurred during the time period that is omitted from the record.²⁵ Following his standard routine, he would have taken notes reflecting any issue or objection affecting appellant's rights.²⁶

The lead trial counsel corroborated that SGT Smith did not spend much time on the stand, he was not a prime witness, and only had information relevant to the charges of money laundering.²⁷ In addition, the trial counsel (who was also the lead trial counsel in the co-conspirator cases) confirmed that SGT Smith did not testify in those other cases because he only had knowledge concerning the money laundering charges against appellant.²⁸

Neither the trial judge, the court reporter, or any other witness could recall any other issue of substance occurring during the period of omission, including any objection, ruling, or other testimony.²⁹

Based on the above testimony, the *DuBay* judge made the following findings of fact:

(i) The substance and extent of Sergeant Michael Smith's testimony on 9 December 2008.

²⁵ JA at 231-32.

²⁶ JA at 232-33.

²⁷ JA at 256-257.

²⁸ JA at 261.

²⁹ JA at 167-68.

Sergeant Smith did testify at trial, consisting of direct examination, cross, and a re-direct examination.³⁰ This testimony mostly related to the money laundering charges of Additional Charge IV, of which appellant was found not guilty.³¹

(ii) Whether any additional witness testified during the period of time covered by the omission in the record.

No additional witnesses testified during this period of time.³²

iii) Whether the military judge made any rulings affecting the rights of appellant at trial during the period of time covered by the omission in the record of trial.

There is no evidence to suggest that any of the trial judge's rulings on defense objections adversely affected the appellant's rights at trial.³³

(iv) The basis for and duration of the recess.

The purpose of the recess was to allow trial counsel, who were considering resting their case, to assess the evidence which had been presented, as discussed following SGT Smith's testimony.³⁴ The recess lasted no more than thirty minutes.³⁵

Adopting these findings as their own, the Army court properly determined that the omission from the record of trial "only related to the two money laundering specifications of

³⁰ JA at 166.

³¹ JA at 166.

³² JA at 167.

³³ JA at 167.

³⁴ JA at 168

³⁵ JA at 168.

which appellant was acquitted."³⁶ Pursuant to *United States v. Nelson*,³⁷ this Court held "the totality of the omissions in this record becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." Accordingly, we find the record in appellant's case is both substantially verbatim and complete for appellate review purposes."³⁸

GRANTED ISSUE AND ARGUMENT

WHETHER THE OMISSION OF TESTIMONY FROM A TRIAL TRANSCRIPT RENDERS THE TRANSCRIPT NON-VERBATIM AND THEREFORE SUBJECT TO THE REMEDY IN R.C.M. 1103(f) (1) WHERE THE WITNESS'S TESTIMONY IS ONLY RELEVANT TO AN OFFENSE OF WHICH APPELLANT HAS BEEN ACQUITTED; OR WHETHER SUCH OMISSION SHOULD BE ADDRESSED UNDER R.C.M. 1103 (b) (2) (A) (REQUIREMENT FOR A COMPLETE RECORD) AND THUS TESTED FOR WHETHER THE PRESUMPTION OF PREJUDICE HAS BEEN REBUTTED. SEE UNITED STATES V. GASKINS, 72 M.J. 225 (C.A.A.F. 2013); UNITED STATES V. HENRY, 53 M.J. 108 (C.A.A.F. 2000).

Standard of Review

Whether a record is verbatim is a question of law that is reviewed *de novo*.³⁹ However, findings of fact at a *DuBay* hearing "will not be overturned unless they are clearly erroneous or unsupported by the record."⁴⁰

³⁶ JA at 7.

³⁷ *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953).

³⁸ JA at 7.

³⁹ *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

⁴⁰ *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007).

This case presents an interesting question concerning the appropriate standard of review in cases where an appellant fails to raise the issue of an incomplete or non-verbatim record until review by the Court of Criminal Appeals under Article 66, UCMJ. In this case, appellant failed to raise the issue concerning the missing portion of the transcript until his initial brief was filed with the Army Court.

In general, the "plain error" rule under Article 59(a) and Mil. R. Evid. 103(d) places the burden on an appellant to show that: (1) there is error; (2) it is plain or obvious; and (3) it materially prejudiced a substantial right.⁴¹ However, in the context of reviewing claims of incomplete records under Article 54, UCMJ, this Court has stated that where there is a "substantial omission" (thus rendering the record "incomplete") a presumption of prejudice applies which the government must rebut.⁴² Tracing back the history of this presumption of prejudice in incomplete record cases, it apparently derives from the Court of Military Appeals' decision in *United States v. Bielecki*.⁴³ There, the Court summarily concluded, without citation to any relevant law or authority, that in order to "determine whether harm occurred" in the circumstance of a

⁴¹ UCMJ, art. 59(a); Mil. R. Evid. 103(d); *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998); *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000).

⁴² *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000).

⁴³ *United States v. Bielecki*, 45 C.M.R. 224, 227 (C.M.A. 1972).

missing portion of a transcript, "this Court applied a rebuttable presumption of prejudice."⁴⁴ This principle has thereafter been cited continuously without discussion as to its origin or efficacy.

Both Article 59(a), UCMJ, and recent case law call into question the summary conclusion that a presumption of prejudice should apply in these circumstances. As this Court made clear in *Powell*, military courts are generally bound by the "plain error" principles in Article 59(a), UCMJ:

while Courts of Criminal Appeals are not constrained from taking notice of otherwise forfeited errors, they are constrained by Article 59(a), because they may not reverse unless the error "materially prejudices the substantial rights of the accused." Articles 59(a) and 66(c) serve to bracket their authority. Article 59(a) constrains their authority to reverse; Article 66(c) constrains their authority to affirm.⁴⁵

"An error is treated as inherently prejudicial, without the need for a further showing of prejudice, only if it amounts to a 'structural defect[] in the constitution of a trial.'"⁴⁶ As this Court discussed in *United States v. Hutchins*,⁴⁷ where errors do not affect substantial constitutional rights and are not structural, presumptions of prejudice are inappropriate and the standard plain error analysis under Article 59(a), UCMJ, should

⁴⁴ *United States v. Bielecki*, 45 C.M.R. at 227.

⁴⁵ *United States v. Powell*, 49 M.J. at 464.

⁴⁶ *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007).

⁴⁷ 69 M.J. 282 (C.A.A.F. 2011).

apply.⁴⁸ Aside from these, only jurisdictional issues will preclude an appropriate review for prejudice.⁴⁹

No Court has ever held that violations of Article 54, UCMJ, are structural errors.⁵⁰ Further, any error involves only statutory, not constitutional, rights.⁵¹

While this Court stated in *United States v. Henry*⁵² that "[t]he requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived,"⁵³ such statement was an overstatement of the applicable law. *Henry* relied on only two cases: *United States v. Gray*,⁵⁴ which did not state that the issue is one of "jurisdictional proportion"; and *United States v. Whitney*,⁵⁵

⁴⁸ *United States v. Hutchins*, 69 M.J. at 291-92; see also *Rose v. Clark*, 478 U.S. 570, 577-78 (1986); *Johnson v. United States*, 520 U.S. 461, 466 (1997).

⁴⁹ *McCoy v. United States*, 266 F.3d 1245 (11th Cir. 2001).

⁵⁰ That the government is allowed to rebut the presumption of prejudice establishes that it is not in fact structural error. See *United States v. Nelson*, 13 C.M.R. 38, 42-43 (C.M.A. 1953); see also *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) ("by implication, the possibility was left open that under some circumstances the existence of prejudice can be disproved by the Government and a sentence sustained which includes a punitive discharge.").

⁵¹ See *United States v. McCullah*, 11 M.J. 234, 236 (C.M.A. 1981) ("the Constitution does not require a verbatim record of a criminal trial.").

⁵² *United States v. Henry*, 53 M.J. 108 (C.A.A.F. 2000).

⁵³ *United States v. Henry*, 53 M.J. at 110.

⁵⁴ *United States v. Gray*, 7 M.J. 296 (C.M.A. 1979).

⁵⁵ *United States v. Whitney*, 48 C.M.R. 519 (1974).

which did, but was based solely on the jurisdictional nature of Article 19, UCMJ.⁵⁶

To be sure, Article 19, UCMJ, applicable only to Special Courts-Martial, imposes a jurisdictional requirement for a "complete record of the proceedings and testimony."⁵⁷ However, Article 18, UCMJ, applicable to General Courts-Martial, imposes no such jurisdictional limitation.⁵⁸ In addition, Article 54, UCMJ, which requires "a complete record of the proceedings and testimony," and R.C.M. 1103, which requires a "verbatim transcript," similarly do not have jurisdictional limitations.⁵⁹ Consequently, *Henry's* conclusion that this is an error of "jurisdictional proportion" is correct insofar as it relates to cases arising under Article 19, UCMJ, but is inapplicable to General Court-Martial cases such as this arising under Article 18, UCMJ.

Based on the foregoing, it is clear that the "presumption of prejudice" summarily created in 1972 is the incorrect method for reviewing incomplete records of trial under Article 54, UCMJ. Because this case involves a General Court-Martial, thereby rendering any error "non-jurisdictional," this Court should apply the traditional plain error analysis under Article

⁵⁶ *United States v. Whitney*, 48 C.M.R. at 519-20.

⁵⁷ UCMJ, Art. 19.

⁵⁸ UCMJ, Art. 18; see also *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013).

⁵⁹ UCMJ, Art. 54(c); R.C.M. 1103.

59(a), UCMJ. To that end, as opposed to the "presumption of prejudice" which the government must rebut, the burden must be placed on appellant to affirmatively establish "material prejudice to a substantial right" based on any "substantial omission."

Law and Analysis

Article 54, UCMJ, requires that a complete record of the proceedings and testimony must be prepared for any general court-martial resulting in a punitive discharge.⁶⁰ Although Article 54, UCMJ, does not reference a "verbatim" requirement, R.C.M. 1103(2)(B) codifies the legislative history requiring a verbatim transcript.⁶¹

As this Court has recognized, "the lack of a verbatim transcript and an incomplete record are separate and distinct errors under the R.C.M."⁶² Consequently, Article 54, UCMJ, has two separate component requirements: (1) A complete "record"; and (2) A verbatim transcript.⁶³ Because the only thing missing from the record of trial in this case is a portion of the transcript, this case relates solely to the verbatim transcript requirement of Article 54, UCMJ, and R.C.M. 1103(b)(2).

⁶⁰ UCMJ, Art. 54.

⁶¹ *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982).

⁶² *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013) (*Gaskins II*).

⁶³ *Id.*

This court applies a three-part test to analyze claims that a record is incomplete: (1) Is the omission from the record substantial or insubstantial? (2) If the omission is substantial, has the government rebutted the presumption of prejudice to appellant?⁶⁴ (3) If the government fails to overcome the presumption of prejudice, what is the appropriate remedy?⁶⁵ Each of these will be addressed below.

1. The Transcript is Substantially Verbatim.

This Court has explained that “[i]nsubstantial omissions from a record of trial do not affect its characterization as a verbatim transcript.”⁶⁶ This is because this Court has interpreted Article 54, UCMJ to require only that a transcript be “substantially verbatim.”⁶⁷ Consequently, “[i]nsubstantial omissions’ should not prevent characterizing a record as “complete.”⁶⁸ To determine whether an omission is substantial,

⁶⁴ See discussion, *infra*, concerning the appropriate prejudice analysis.

⁶⁵ See, *United States v. Gaskins*, 69 M.J. 569 at 580 (C.A.A.F. 2010) (*Gaskins I*) (citing *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981)).

⁶⁶ *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (quoting *United States v. Donati*, 14 U.S.C.M.A. 235, 34 C.M.R. 15 (C.M.A. 1963); *United States v. Nelson*, 3 U.S.C.M.A. 482, 13 C.M.R. 38 (C.M.A. 1953)).

⁶⁷ *United States v. Lashley*, 14 M.J. at 8. This rule stems from the realization that literal compliance with a “word for word” requirement would be impossible. *Id.*

⁶⁸ *United States v. McCullah*, 11 M.J. at 237.

that omission should be evaluated based on its "qualitative or quantitative" nature.⁶⁹

The transcript in this case is "substantially verbatim" because "[t]he totality of the omissions in this record becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness."⁷⁰

The *DuBay* judge found that, other than the testimony of SGT Smith, nothing of substance occurred during the untranscribed portion of the trial.⁷¹ No additional witnesses testified, no substantive objections were made or ruled on, and only a brief 30 minute recess occurred to allow the government to consider whether to rest its case.⁷² Consequently, because the record makes clear that nothing of substance happened, the only remaining question here is whether SGT Smith's testimony should be considered a "substantial omission."

As found by the *DuBay* judge, SGT Smith's testimony related "to the money laundering charges contained in Additional Charge IV, of which the appellant was found not guilty."⁷³ As a result, it was found to have no relevance to appellant's ultimate conviction.⁷⁴ In fact, reviewing the record in its entirety, SGT Smith's testimony was referenced only once in argument by

⁶⁹ *United States v. Lashley*, 14 M.J. at 9.

⁷⁰ JA at 7 (citing *United States v. Nelson*, 13 C.M.R. at 43).

⁷¹ JA at 166-68.

⁷² JA at 168.

⁷³ JA at 166.

⁷⁴ JA at 167-68.

appellant's counsel, advocating for a finding of not guilty on the charges of money laundering.⁷⁵ His testimony was not referenced by the trial counsel during argument on findings, and was also never referenced by either party during the sentencing proceedings.

SGT Smith's limited involvement in this case was confirmed when the trial counsel testified at the *Dubay* hearing that SGT Smith did not even testify in the co-conspirator cases, as he had no knowledge of any charge outside of the money laundering charges specific to appellant.⁷⁶

Because the primary purpose of Article 54, UCMJ, is to provide full and complete appellate review, the omission of SGT Smith's testimony cannot be considered "substantial."⁷⁷ This Court, and every court, can conduct a complete review of appellant's convictions without reference to SGT Smith's testimony. As such, the omissions from the record contain no "fact of substance or materiality to a legal or factual issue."⁷⁸ As explained in *Nelson*, if the "transcript is sufficiently

⁷⁵ JA at 118-119.

⁷⁶ JA at 261.

⁷⁷ See, e.g., *United States v. Embry*, 60 M.J. 976, 980 (Army Ct. Crim. App. 2005) ("it is clear that the record must contain sufficient information for an appellate court to adequately review a military judge's rulings."); *United States v. Barron*, 52 M.J. 1, 6-7 (C.A.A.F. 1999) (failure to attach documents did not preclude "meaningful appellate review"); *United States v. Henry*, 53 M.J. 108, 111 fn.1 (C.A.A.F. 2000) (noting that "the absence of four similar exhibits is neither a substantial omission nor prejudicial to appellant's right to a full and fair review of his conviction.").

⁷⁸ *United States v. Nelson*, 13 C.M.R. at 43.

complete to present all material evidence bearing on all issues, minimal standards have been met"⁷⁹ With the omission being "so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness,"⁸⁰ the purpose and intent of Article 54's requirement for a complete record has been met here.

Finally, appellant incorrectly argues that the transcript is missing 103 minutes of testimony.⁸¹ He ignores the 45 pages of verbatim transcript, the time of calling, swearing, questioning, and releasing 7 witnesses on the stand to conclude that the missing testimony of SGT Smith and the following recess lasted the whole 103 minutes. To the contrary, the omission from the record likely encompasses only about 40 minutes, which includes the 30 minute recess.

The court was called to order at 1534, December 9, 2008.⁸² From this point in the record, seven witnesses (to include SGT Smith) were called to the stand, sworn, questioned, and released by the military judge.⁸³ Immediately after the court reporter's notation that SGT Smith was duly sworn, the record then indicates that the court was called to order at 1717, December

⁷⁹ *United States v. Nelson*, 13 C.M.R. 38, 42 (C.M.A. 1953).

⁸⁰ JA at 7.

⁸¹ Appellant's Brief (AB) at 4.

⁸² JA at 45.

⁸³ JA at 45-79) (the other six witnesses [whose testimony was transcribed verbatim] are: MAJ Jason Tucker, SSG James Young, SGT Joseph Edwards, SGT Aaron Raiser, 1SG Richardson, and Emebet Mekonen Adamo).

9, 2008.⁸⁴ The *DuBay* judge found that no other witnesses testified during the period omitted from the record, and that the recess, lasting no more than 30 minutes and taken after SGT Smith was released, was to allow the government to evaluate its case prior to resting.⁸⁵

After subtracting the 30 minute recess from the total 103 minutes, the average amount of time that each witness could have testified was just over 10 minutes. That SGT Smith's testimony was likely consistent with this amount of time is supported by the trial judge's testimony that SGT Smith likely only testified for 10 minutes, in addition to all parties agreeing that SGT Smith's testimony was "very short" in relation to the other witnesses.

Based on the foregoing, the actual omission in this record is both qualitatively and quantitatively insubstantial, affecting only those charges of which appellant was acquitted. The omission has no bearing on the verbatim nature of the transcript, and the record is complete for appellate purposes.

2. Assuming a Substantial Omission, There is No Prejudice.

"Generally speaking, if the record is sufficiently complete to permit reviewing agencies to determine with reasonable

⁸⁴ JA at 229.

⁸⁵ JA at 168.

certainty the substance . . . then prejudice is not present.”⁸⁶
This is because the primary purpose and intent of Article 54 is to ensure enough information is available in the record for complete appellate review.⁸⁷

Regardless of whether this Court applies a presumption of prejudice or correctly requires appellant to affirmatively establish material prejudice, the record makes clear that no prejudice to appellant can be found. In this case, because the omitted portion of the transcript relates solely to a charge for which the accused was acquitted, neither this Court nor any court is constrained in its ability to fully review appellant’s convictions and sentence. In that regard, this case is immediately distinguishable from those cases where the government failed to rebut the presumption of prejudice where the omissions were “substantial.” For example, in *Lashley*, the evidence related to testimony on the merits, but it was specific to the elements of an offense for which *Lashley* was found

⁸⁶ *United States v. Nelson*, 3 U.S.C.M.A. 482 at 487, 13 C.M.R. 38, 43 (1953).

⁸⁷ See, e.g., *United States v. Embry*, 60 M.J. 976, 980 (Army Ct. Crim. App. 2005) (“it is clear that the record must contain sufficient information for an appellate court to adequately review a military judge’s rulings.”); *United States v. Barron*, 52 M.J. 1, 6-7 (C.A.A.F. 1999) (failure to attach documents did not preclude “meaningful appellate review”); *United States v. Henry*, 53 M.J. 108, 111 fn.1 (C.A.A.F. 2000) (noting that “the absence of four similar exhibits is neither a substantial omission nor prejudicial to appellant’s right to a full and fair review of his conviction.”).

guilty.⁸⁸ More recently, *Gaskins* related to the loss of a sentencing exhibit, which prohibited the appellate courts from conducting its independent review of the sentence.⁸⁹

This case obviously presents a unique circumstance of first impression where the record makes clear that the omitted portion of the transcript relates solely to an offense for which the accused was acquitted. However, as this Court suggests in *Nelson*, even a substantial omission should be deemed harmless error when it has absolutely no relevance to the ultimate findings of guilt, and is not referenced or relied upon by appellant in sentencing or matters in clemency.

For the foregoing reasons, even assuming the omission is "substantial," and assuming this Court applies a presumption of prejudice, the government has rebutted that presumption because the omission does not impair appellate review in any manner.

3. Appellant Incorrectly Limits the Available Remedies.

Appellant incorrectly requests this Court to apply Article 19, UCMJ, and limit the sentence to the jurisdiction of a special court-martial.⁹⁰

⁸⁸ *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982).

⁸⁹ *United States v. Gaskins*, 72 M.J. 225 (C.A.A.F. 2013).

⁹⁰ AB at 7. Appellant references Art. 19, UCMJ, (jurisdiction of special courts-martial), which states "[a] bad-conduct discharge, confinement for more than six months... may not be adjudged unless a complete record of the proceedings and testimony has been made". (AB at 7, emphasis added). As noted by this Court in *U.S. v. Gaskins*, Article 18, UCMJ, which governs the jurisdiction of a general court-

Because, as opposed to *Gaskins*, this case deals exclusively with a non-verbatim transcript, the remedies under R.C.M. 1103(f) apply. This rule actually provides two discretionary remedies when a verbatim transcript cannot be prepared as required in R.C.M.(b)(2)(B) or (c)(1): (1) approval of only so much of the sentence that could be adjudged by 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, or (2) direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record.⁹¹

It is within the discretion of this court, under R.C.M. 1103(f)(1) and (2), and the express authorization of both R.C.M. 810 and Article 66, UCMJ, to order a rehearing. This satisfies both the plain language of the rules and allows the government to remedy any perception of prejudice to appellant.⁹²

A rehearing is undoubtedly the more appropriate remedy in this case, as opposed to the imposition of the sentence limitation under R.C.M. 1103(f)(1), because the record clearly supports all findings of guilt, not otherwise dismissed by the Army Court.

martial, places no such limitation on appropriate punishments due to an error under Art. 54(c)(1)(A). *Gaskins II*, 72 M.J. at 231.

⁹¹ R.C.M. 1103(f)(1) and (2).

⁹² See *Gaskins II*, 72 M.J. at 231.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

//s//
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//s//

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on March 31, 2014.

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