THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

BRIAN D. ANDES
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0673
USCAAF No. 35885

VINCENT T. SHULER
Major, Judge Advocate
Chief
Defense Appellate Division
USCAAF No. 35215

PETER KAGELEIRY, Jr.
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF No. 35031

KEVIN BOYLE
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF No. 35966

INDEX

Page

Granted Issue Presented 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 HENRY, 53 M.J. 108 (C.A.A.F. 2000). 1,7

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Case Law

Court of Appeals for the Armed Forces

Court of Criminal Appeals

Statutes

Uniform Code of Military Justice

Manual for Courts-Martial, United States, 1998 Edition

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

Issue Presented

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 Army Court of Criminal Appeals [hereinafter Army Court] had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (2012) [hereinafter UCMJ]. This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

Statement of the Case

On October 13, and December 8-11, 2008, a military judge sitting as a general court-martial convicted Sergeant First Class (SFC) Calvin J. Davenport, contrary to his pleas, of conspiracy (four specifications), extortion (seven specifications), and bribery (two specifications) in violation of Articles 81, 127, and 134, UCMJ, 10 U.S.C. §§ 881, 927, 934 (2006). Sergeant First Class Davenport pled guilty by exceptions and substitutions to one of the specifications of bribery, but was convicted of the specification by exceptions and substitutions other than those to which SFC Davenport pled guilty. The military judge sentenced SFC Davenport to reduction to the grade of E-1, confinement for two years, and a bad-conduct discharge. The convening authority approved only one year of confinement, but otherwise approved the adjudged sentence.

October 31, 2011, the Army Court ordered that SFC Davenport's case be returned to the Army Judge Advocate General for a hearing pursuant to *DuBay*. (JA-129). On December 28, 2011, SFC Davenport filed a Motion for a Stay of Proceedings. (JA-132). On January 5, 2012, SFC Davenport filed a Petition for Extraordinary Relief in the Nature of a Writ of Prohibition with this Court. (JA-138). On April 2, 2012, the *DuBay* hearing in this case was conducted. (JA-169).

On April 18, 2013, the Army Court set aside and dismissed the findings of guilty to Specifications 1 and 2 of Charge II (extortion) and Specifications 1 and 2 of Charge III (bribery). (JA-001). Further, the Army Court affirmed amended language to Specifications 1 and 2 of Charge I (conspiracy). (JA-001). 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. (JA-001).

On January 16, 2014, this Honorable Court granted SFC Davenport's petition for review. In accordance with Rule 30 of this Court's Rules of Practice and Procedure, appellate defense counsel filed a Motion for Extension of Time to File Final Brief and Joint Appendix on February 18, 2014. The motion was granted to February 28, 2014.

Summary of Argument

The Army court ordered a *DuBay* hearing in a misguided attempt to recreate testimony that occurred in a court-martial that took place over three years ago. Sergeant First Class Davenport has already served a period of confinement beyond that which is authorized for a court-martial with a non-verbatim and incomplete record. In *Gaskins v. Hoffman*, this Court ruled that it was "inappropriate" for the Army Court to order a *DuBay* hearing to reconstruct a "good soldier book" that was missing

from the record, and granted a writ of prohibition on the exact same issue as in SFC Davenport's case. 69 M.J. 452, 452 (C.A.A.F. 2010). As inappropriate as that remedy was in *Gaskins*, it is even more inappropriate in this case where the record of trial is missing the merits testimony of at least one witness and potentially other evidence.

Statement of Facts

Sergeant First Class Davenport's record of trial does not provide any record of the testimony of at least one witness, Sergeant (SGT) Michael Smith, and perhaps additional witnesses, which deprives SFC Davenport and the appellate courts of a substantially complete and verbatim transcript. The court was called to order at 1534 on December 9, 2008. (JA-045). Thereafter, several witnesses testified. Sergeant Smith was called to testify as a government witness. (JA-079). The record reflects that Sergeant Smith "was sworn, and testified . . . ." (JA-080). Immediately thereafter, without any record of the substance of SGT Smith's testimony, the record reflects that the court was called to order at 1717 and that all parties present when the court recessed were again present. (JA-080). Absent is the testimony of SGT Smith and any other matters or testimony during this 103 minutes of unrecorded record. The closing argument of trial defense counsel further confirms that SGT Smith testified. (JA-118).

What transpired in the 103 minutes between 1534 and 1717 is only partially known. At least seven witnesses were called, sworn and testified. However, only the testimony of six of those witnesses is in the record. Additionally, the military judge may have ruled on objections and admitted evidence during SGT Smith's testimony. Without a record of trial, this Court cannot know what occurred. At a minimum, the testimony of SGT Smith was presented and a recess was called during this period. However, there is no record of the substance of SGT Smith's testimony.

Since this Court cannot know what transpired from the time SGT Smith was called as a witness and the recess at 1717, the record of trial is neither verbatim nor complete. This glaring omission calls into question the validity of the entire record which was authenticated by the military judge with "no errata."[1] (JA-124).

On October 31, 2011, in a misguided attempt to recreate substantially verbatim testimony and fill in any other incomplete portions of the record, the Army Court ordered a *Dubay* hearing to determine four facts from the original trial as follows: (1) the substance and extent of SGT Michael Smith's

[1] The military judge appears to have submitted errata by making changes to an electronic copy of the transcript. However, it is unclear what changes the military judge suggested and whether the court reporter that transcribed the record accepted those changes. (JA-126).

testimony on December 9, 2008; *citing United States v. Eichenlaub*, 11 M.J. 239, 240-241 (C.M.A. 1981)("Finally, we place some reliance on the fact that the summarization of this brief segment of the proceedings was the product of the effort by all trial participants involved the court reporter, both counsel and the military judge without the slightest hint anywhere in the record that there was any disagreement in any of these quarters as to the accuracy and completeness of the summarization"); (2) whether any additional witnesses testified during the period of time covered by the omission in the record of trial; (3) 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; and (4) the basis for and the duration of the recess called by the military judge which concluded on the record at 1717, December 9, 2008. (JA-129).

At the *DuBay* hearing held on April 2, 2012, more than three years after the omission, the government, in an attempt to address the four issues specified by the Army Court, called five witnesses who were present at the original trial. These witnesses were Lieutenant Colonent (Ret.) Edward J. O'Brien (the military judge), Sergeant First Class Angel Sims (the court reporter), Major Andre LeBlanc (the trial counsel), Captain

Robert Hooper (the assistance trial counsel), and Sergeant Michael Smith. All five witnesses testified telephonically.

Additional facts necessary for disposition of the issue presented are set forth below.

Issue Presented

> 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).

Law

Article 54(c)(1), UCMJ, requires that "[a] complete record of the proceedings and testimony shall be prepared—(A) in each general court-martial case in which the sentence adjudged includes . . . a discharge . . . ." Likewise, Article 19, UCMJ, provides that "[a] bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made . . . ."

A substantial omission from the record of trial renders it incomplete. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000). An "omission from the record of the word-for-word

account of [a] portion of the proceedings" may render the record both "nonverbatim and incomplete." *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981). "Whether an omission from a record of trial is 'substantial' is a question of law that we review de novo." *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000).

1. Verbatim Transcripts.

Rule for Courts-Martial [hereinafter R.C.M.] 1103(b)(2)(B) instructs that when an adjudged sentence exceeds the limitations set forth in Article 19, UCMJ, "the record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting . . . ." "Inclusion of the substance of a portion of the record of proceedings dealing with material matter is not a verbatim transcript of the record." *United States v. Sturdivant*, 1 M.J. 256 (CMA 1976). When a verbatim transcript cannot be prepared:

> [T]he convening authority may:
> (1) Approve 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, may not be approved . . . .

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

2. Complete Record of Trial.

Whether a record of trial is complete is a question of law reviewed de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). The right to a complete record of trial is a

"fundamental statutory right" under Articles 19 and 54(c)(1), UCMJ. *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981). The impact of an incomplete record of trial manifests in at least two ways. First, an incomplete record impacts the convening authority's clemency decision. *See* R.C.M. 1105, 1106. Second, when a record is not complete, the ability of counsel to raise appropriate assignments of error is negated, the service court is prevented from conducting a proper appellate review, and this Court is precluded from conducting a legal sufficiency review. *See* UCMJ Articles 66, 67.

Argument

1. The record remains both non-verbatim and incomplete.

The Army Court noted that "[a]ppellant contends that this omission is a substantial error that raises a presumption of prejudice." (JA-084) *citing United States v. Gray*, 7 M.J. 296, 297 (C.M.A. 1979). Rather than deciding if there was merit to SFC Davenport's contention, the Army Court further explained that "[u]nless the government rebuts the presumption, an incomplete record cannot support a sentence that includes a punitive discharge or confinement in excess of six months." (JA-130) *citing* 7 M.J. 296, 298. Given that the transcript was missing all of the testimony from SGT Smith, the Army Court's use of the phrase "incomplete record" appears to relate to both an omission from the record in the form of missing verbatim

transcription of his testimony and potentially other matters rendering the record incomplete.

2. The omission of testimony from a trial transcript renders the transcript non-verbatim where the Army Court attempted to recreate the omitted testimony almost three years after sentence and the parties do not agree to the "accuracy and completeness" of the recreated portion.

The Army Court ordered a *Dubay* hearing to attempt to determine four facts from the original trial. (JA-129). Despite this attempt, there remains a substantial omission from the record of trial that creates a presumption of prejudice the government cannot overcome. These omissions and the government's failure to overcome them are explained as follows:

a. The substance and extent of SGT Michael Smith's testimony on December 9, 2008.

The Army Court, citing *United States v. Eichenlaub*, 11 M.J. 239, 240-41 (C.M.A. 1981), ordered the *DuBay* hearing to address four issues. (JA-129). First, the substance and extent of SGT Michael Smith's testimony on December 9, 2008. (JA-129). In order to effectuate its goal of giving the government a chance to amend its mistake, the Army Court stretched the rationale in *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981). In *Eichenlaub*, the government was able to overcome the presumption of prejudice associated with a nonverbatim or incomplete record of the proceedings. The record lacked only the military judge's sentence announcement, clemency recommendation, and the effect the sentence would have on the pre-trial agreement. *Id.* at 240.

This Court found that the government overcame its burden because a "summarization meticulously details what matters were discussed." *Id.* at 241.

The Army Court's reliance on *Eichenlaub* is significantly misplaced. First, the Army Court cites the above block-quote as justification for allowing the *DuBay* military judge to recreate SGT Smith's testimony by looking to anyone that witnessed it over three years prior. (JA-130). It is not clear from the *Eichenlaub* opinion when, precisely, the "reconstruction" took place. However, the opinion suggests that it was some time prior to convening authority action. *See Eichenlaub*, 11 M.J. at 240. Thus, whatever the gap in time was between court-martial and action in *Eichenlaub*, it certainly was not three years. Thus, the Army Court's reliance on the fact that the *Eichenlaub* trial participants were able to recollect part of the trial is grossly misplaced.

More importantly, the nature of the omission in *Eichenlaub* was significantly different than the missing testimony here. In *Eichenlaub*, there was non-verbatim testimony pertaining to the military judge's rationale for the sentence he was about to impose. *Id.* at 240. The court reporter noted that non-verbatim testimony was "reconstructed from notes and recollections of the military judge, trial counsel, defense counsel, and the court reporter." *Id.* The *Eichenlaub* court explained that although

the lack of a word-for-word account was a substantial omission, the government was able to rebut the presumption flowing from that omission because—"[a]t [that] stage of the trial, where *testimony* and *legal rulings* [were] *not* involved, the substance, rather than the exact words uttered by the judge, was critical to the accused's rights." *Id.* at 240-41 (emphasis added). Clearly, *Eichenlaub* heavily relied on the fact that the omission there did *not* involve *testimony*.

A military judge explaining his rationale for a particular sentence is a wholly different situation than a merits witness. While "exact words" might not have mattered in summarizing a military judge's explanation for a sentence, the same cannot be said for a merits witness, or rulings of the military judge. *Id.* at 241. "Exact words" could be the difference between guilt or innocence on a specification, and the attempt to recreate those exact words three years after the fact were futile.

Further, when asked by the military judge at the *DuBay* hearing if the testimony of SGT Smith related to any other charges besides that of money laundering to which SFC Davenport was found not guilty, the lead trial counsel, MAJ LeBlanc stated, "Sir, I really don't think so." (JA-262-263). As confident as this might sound, it does not guarantee that SGT Smith did not testify to more.

Although it is unclear what took place on the record of trial after SGT Smith was called to testify, at the very least, it is clear that SGT Smith's testimony is missing. Apparently recognizing the unreasonableness of using "slightly informed conjecture" to determine "missing testimony and assure [itself] that no other material evidence was introduced or rulings made" during this substantial omission from the record, the Army Court misrelied on *United States v. Eichenlaub*, 11 M.J. 239, 240-241 (C.M.A. 1981). (JA-130).

Finally, in *Eichenlaub*, the re-creation of a "brief segment of the proceedings was the product of the effort by all trial participants involved the court reporter, both counsel and the military judge without the slightest hint anywhere in the record that there was any disagreement in any of these quarters as to the accuracy and completeness of the summarization." 11 M.J. 239, 240-241 (C.M.A. 1981). Unlike *Eichenlaub*, the parties here not only disagree with the accuracy and completeness of the recreated portion of the record of trial, but appellate defense counsel as well as counsel at the *DuBay* continue to oppose the Army Court's effort to use the *DuBay* proceeding as a means to fill in this missing portion of the record of trial. (JA-191, JA-204-JA-207, JA-292, JA-295-JA-303). Additionally, here, one of the trial defense counsel at the original proceeding was excused by SFC Davenport and did not partake in the *DuBay*

proceedings at all, and defense did not present any evidence at the hearing. (JA-197).

Missing testimony amounts to a substantial omission when it is "related directly to the sufficiency of the Government's evidence on the merits." *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982). Here, SGT Smith's testimony, or lack thereof, and whatever other testimony and evidence was presented by the government during the unaccounted for portion of the record of trial, is absolutely directly related to the sufficiency of the government's evidence on the merits. Sergeant Smith was a *government* witness. In fact, the Army Court's order acknowledges the relationship between the missing testimony and the government's evidence:

> Our review of the record of trial in its current state suggests that Sergeant Smith's testimony related to certain money laundering specifications for which appellant was acquitted by the military judge. Other evidence in the record established that Sergeant Smith worked with an AAFES concessionaire at FOB Rustimayah, Iraq and was responsible for executing wire transfers of funds for Soldiers. Nonetheless, this is only slightly informed conjecture and there is a remedy that adequately may reconstruct the missing testimony and assure us that no other material evidence was introduced or rulings made.

(JA-130).

The Army Court appears confident that if the record "suggests" that the missing testimony pertained to

specifications for which SFC Davenoport was acquitted, the omission of that testimony did not relate directly to the sufficiency of the Government's evidence on the merits and, therefore, could not prejudice SFC Davenport. Whether SFC Davenport was acquitted of the specifications for which SGT Smith testified to or not, SGT Smith was called as a witness for the Government and, as such, his testimony relates to the sufficiency of the Government's evidence on the merits. Further, given the consistent defense opposition to the proceedings, there is no way for this Court to be confident that "no other material evidence was introduced or rulings made." (JA-130). As such, the record is both nonverbatim and incomplete.

The testimony ultimately presented at the *DuBay* hearing was only slightly more informed than the conjecture of the Army Court as it was presented three and one half years after the trial. Further, the evidence presented did not relate to the underlying facts of the case, but only to what SGT Smith remembers testifying to and what the remaining four witnesses, two of whom prosecuted the original case, remember witnessing over a 103 minute time period during a three day trial with at least twenty-eight government witnesses.

Despite the foregoing, the Army Court adopted the *DuBay* military judge's findings in order to first determine that

despite the government's inability to "adequately reconstruct the exact testimony of SGT [Smith]," it is clear that SGT Smith's testimony was on the merits and only related to the two money laundering specifications of which SFC Davenport was acquitted. (JA-007). The Army Court then found the "record in [SFC Davenport's] case is both substantially verbatim and complete for appellate review purposes." (JA-007)(citing *United States v. Nelson*, 3 U.S.C.M.A. 482, 487, 13 C.M.R. 38, 43 (1953) (settling the issue of whether a court reporter's use of the word "inaudible" to describe "a word or phrase" in a record of trial made the record of trial incomplete)).

The Army Court misrelied on *Nelson* in ordering a *DuBay*. This Court in *Nelson* held that "[g]enerally speaking, if the record is sufficiently complete to permit reviewing agencies to determine with reasonable certainty the substance and sense of the question, answer, or argument, then prejudice is not present." *Id.* Here, an appellate court cannot determine with reasonable certainty whether or what questions, answers, or arguments were made during SFC Davenport's trial. At best, the evidence gathered during the *DuBay* hearing remains "slightly informed conjecture."

b. Any additional witnesses testified during the period of time covered by the omission in the record of trial.

The second issue the Army Court addressed in its order for *DuBay* hearing is whether any additional witnesses testified

during the period of time covered by the omission in the ROT. (JA-131). Based on the evidence presented at the *DuBay* hearing, this question remains unanswered. Lieutenant Colonel (Ret.) O'Brien testified that he does not recall why the recess was called. (JA-225). Further, as addressed above, it remains unclear who, if anyone, testified after SGT Smith or if any other evidence was presented after SGT Smith. At least according to SGT Smith, SPC Waldren testified after him although this is not evident anywhere else in the record. (JA-288). The assistant trial counsel, CPT Hooper, testified that he conducted the direct examination of "Mimi" after SGT Smith testified. (JA-267). Based on LTC (Ret.) O'Brien's notes, SGT Smith was a "no show" prior to "Mimi" testifying and followed by SGT Smith's testimony. (JA-306). As such, if the assistant trial counsel's recollection is correct, then (1) LTC (Ret.) O'Brien's notes are inaccurate and (2) the record of trial is missing more than just the testimony of SGT Smith.

c. Any rulings the military judge made affecting the rights of appellant at trial during the period of time covered by the omission in the record of trial?

The third issue the Army Court addressed in its order for the *DuBay* hearing is whether the military judge made any rulings affecting the rights of SFC Davenport at trial during the period of time covered by the omission in the record of trial. (JA-131). Here, LTC (Ret.) O'Brien is "certain that there were no

objections or motions or anything like that." (JA-219). However, he further testified that his notes are not verbatim, and he does not make notes on every objection. (JA-223). Additionally, at the time of SFC Davenport's trial, LTC (Ret.) O'Brien had presided over approximately 250 to 275 courts-martial. (JA-217). Given the quantity of courts-martial LTC (Ret.) O'Brien sat on by the time of SFC Davenport's trial and the passage of time between SFC Davenport's trial and the time of the *DuBay* hearing, LTC (Ret.) O'Brien's recollection of what happened during this particular court-martial is likely diluted by a significant number of memories from other courts-martial.

Further, LTC (Ret.) O'Brien's recollection of whether there were any objections during SGT Smith's testimony is contradicted by the court reporter's memory of what took place at the trial. Sergeant First Class Sims testified at the *DuBay* that "I remember there were several objections and when the information that was trying to be solicited [sic] didn't come out, then he was excused." (JA-239). There is nothing in the record to indicate what those objections were related to, which side made them, or whether they prejudiced SFC Davenport.

In addition to the discrepancy as to whether there were any objections, there are also discrepancies as to the number of transfers that SFC Davenport made to SGT Smith. Sergeant Smith recalled there being one transfer. (JA-276). The assistant

trial counsel, CPT Hooper, testified that there were "less than five times—four times" and further recalled Emebet ("Mimi") Mekonen Adamo testifying "directly after" SGT Smith. (JA-254 and JA-267). The record of trial has testimony from Emebet ("Mimi") Mekonen Adamo prior to SGT Smith from R. at 764 (JA-067) through R. at 776 (JA-079), but is devoid of any such testimony after SGT Smith. Additionally, LTC (Ret.) O'Brien took even less notes relating to "Mimi's" testimony, which spanned twelve pages of the record of trial, than he did for the testimony of SGT Smith. (JA-306 and JA-307).

Further, the trial counsel recalled that SGT Smith was reduced from Staff Sergeant (E-6) to Sergeant (E-5) due to an adulterous relationship. (JA-255). However, SGT Smith testified that he was reduced in rank for making a false official statement. (JA-285). Just because SGT Smith was called to testify regarding the wire transfer does not mean that his testimony was limited to only that. This is especially true in light of LTC (Ret.) O'Brien's notes from trial showing that there was a direct, a cross, and a redirect. (JA-306). Based on the above, there are clear reasons to question the reliability of anything these witnesses testified to from such a long time ago with so little to refresh their memory. It is simply impossible to recreate the portion of the record of trial that the government omitted.

d. The basis for and the duration of the recess.

Finally, the basis for and the duration of the recess called by the military judge which concluded on the record at 1717, is impossible to discern based on the testimony of the five government witnesses. (JA-131). Although LTC (Ret.) O'Brien had a vague recollection that it was a recess prior to the government resting its case, he is unable to recall anything to support that statement. (JA-218). Further, no one could answer whether any administrative matters were discussed leading into that recess, for example: there may have been an Article 39(a), UCMJ, session or a Rule for Courts-Martial 802 session. The burden is on the government to overcome the presumption of prejudice resulting from the omission here, and there is nothing in the record to indicate that SFC Davenport was not prejudiced.

3. In addition to being non-verbatim, this Court cannot determine beyond a reasonable doubt that the record is complete. As such, the presumption of prejudice has not been overcome and the omission should be addressed under R.C.M. 1103(b)(2)(A) (requirement for a complete record).

As this Court recently explained in *Gaskins*, "the lack of a verbatim transcript and an incomplete record are distinct errors under the R.C.M." 72 M.J. 225 at 230. "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice." *Id.* at 231, *citing Henry*, 53 M.J. at 111. "It is fitting that every inference be drawn against the [g]overnment with respect to the existence of prejudice because of an

omission." *McCullah*, 11 M.J. at 237. The Army Court's attempt to remedy the missing portion of the record with a *DuBay* hearing was insufficient to overcome the presumption of prejudice.

It is impossible to know what, if any, additional evidence was presented during the gap in the record of trial. As such, in addition to being non-verbatim, the record is incomplete and the government has not overcome the presumption of prejudice. In sum, the Army Court's order was a misguided attempt to allow the government to fix its mistake. If not for this Court's recent decision in *Gaskins*, perhaps this would not be so egregious. *Gaskins* made clear, however, that a *DuBay* is not a chance for the government to recreate evidence that it never should have lost in the first place. And, although the facts of this case are different than *Gaskins*, those differences should have made it even more clear that a *DuBay* would be insufficient in this case.

Unlike *Gaskins*, the missing portion of the record of trial rendering it incomplete pertains to the merits portion of trial and not one sentencing exhibit. Although there has been a *DuBay* hearing, the details of SGT Smith's testimony and whatever else took place during the omission remain unknown. This is significant because "without knowing the details of the evidence which has been omitted from the record of trial, an appellate court usually is unable to decide that the omission was not

prejudicial to an appellant." *Id.* A *DuBay* hearing over three years after the court-martial is insufficient to overcome the presumption of prejudice.

Additionally, just as this Court prohibited any attempt to recreate the sentencing exhibit in *Gaskins*, the Army Court should have been prohibited from attempting to recreate missing merits evidence. The same rationale this Court relied on to prohibit the government from recreating a missing exhibit in *Gaskins* are even more compelling here given the over three years that elapsed between the court-martial and the *DuBay* hearing and the fact that the missing evidence is merits testimony, rather than the sentencing exhibit missing in *Gaskins*.

In *United States v. Lashley*, there was missing merits testimony. 14 M.J. 7 (C.M.A. 1982). But, in *Lashley*, there was an "unusual combination of factors present" that allowed the government to overcome the presumption of prejudice. *Id.* at 9. The missing testimony in *Lashley* was the re-direct examination of a handwriting expert in a forgery case. *Id.* at 7-8. Due to a recording equipment malfunction, this re-direct examination was missing from the record. *Id.* at 8. When the malfunction was brought to the defense counsel's attention during trial, he moved for a mistrial. *Id.* The military judge declined to rule on the motion and continued the examination using alternate equipment. *Id.* When the court-martial recessed for the

evening, the military judge directed the court reporter to prepare a transcript of the audible portions of the affected testimony. *Id.*

During the next day's Article 39(a), UCMJ, session, the military judge reviewed the partial transcript, which consisted of four pages in "fill-in-the-blank" format. *Id.* Furthermore, the trial counsel retained the list of questions the witness was asked in "substantially verbatim" form. *Id.* In addition to these aids, the witness was present to assist, and therefore the military judge denied the motion for mistrial and elected to reconstruct the record. *Id.* This effort took over two hours. *Id.* Citing to "the prompt and thorough remedial action taken, the assistance of the witness, and the availability of both the questions asked and the skeletal transcript," *Lashley* held that the reconstructed record was "substantially verbatim." *Id.* at 9.

The "unusual combination of factors" that *Lashley* relied on in finding that the government was able to overcome the presumption of prejudice are lacking here. Moreover, such "unusual" factors were not replicated at the *DuBay* hearing in SFC Davenport's case. In *Lashley*, the reconstruction occurred almost immediately after the testimony was discovered missing, and there were two documents that the judge was able to rely on in reconstructing the testimony. *Id.* Here, the *DuBay* judge

attempted to reconstruct testimony that occurred over three years prior with only the military judge's two pages of handwritten notes from trial. (JA-306 and JA-307). There was no list of questions from the government, no notes from the court reporter, and varying versions of what took place at trial.

It was only because of the "unusual combination of factors" that there was a substantially verbatim transcript in *Lashley*. *Id.* The *Lashley* court prefaced its finding by noting that "[n]ormally under these circumstances, we would have expected to find a reconstruction effort wanting." *Id.* Here, the "unusual" factors that were present in *Lashley* are missing. This Court should thus find the government's effort wanting.

In *United States v. Snethen*, the Air Force Court of Criminal Appeals examined an attempt at post-trial reconstruction of testimony that occurred approximately three months after the original testimony. 62 M.J. 579, 581 (A.F. Ct. Crim. App. 2005). The missing testimony in *Snethen* was that of a witness who testified during a suppression motion and arguments on that motion. *Id.* at 580. "[G]iven the importance of the lost testimony and arguments, the lengthy duration of the unrecorded portion of the trial, and the length of time between the trial and reconstruction efforts . . . ." the government could not overcome the presumption of prejudice created by the

substantial omission. *Id.* at 581. Thus, if a three-month delay was a significant factor in *Snethen*'s finding of prejudice, then certainly a three-year delay should lead this Court to find this *DuBay* hearing to be a futile attempt to create a substantially verbatim record.

Given that SGT Smith was a government witness who testified on the merits, this Court should find that the omission of his entire testimony—and whatever else occurred during the unrecorded gap in proceedings—renders the record of trial incomplete. *See Lashley*, 14 M.J. at 7. Further, for the reasons explained above, the government has failed to overcome the presumption of prejudice arising from such substantial omission.

Conclusion

WHEREFORE, SFC Davenport respectfully requests that this Honorable Court apply the remedy in R.C.M. 1103(f)(1) or, in the alternative, order a rehearing.

BRIAN D. ANDES
Captain, Judge Advocate
Appellate Defense Counsel
Defense Appellate Division
US Army Legal Services Agency
9275 Gunston Road
Fort Belvoir, Virginia 22060
(703)693-0673
USCAAF No. 35885

VINCENT T. SHULER
Major, Judge Advocate
Chief
Defense Appellate Division
USCAAF No. 35215

PETER KAGELEIRY, Jr.
Lieutenant Colonel, Judge Advocate
Deputy Chief
Defense Appellate Division
USCAAF No. 35031

KEVIN BOYLE
Colonel, Judge Advocate
Chief
Defense Appellate Division
USCAAF No. 35966

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Davenport, Crim. App. Dkt. No. 20081102 Dkt. No. 13-0573/AR, was delivered to the Court and Government Appellate Division on February 27, 2014.

MELINDA J. JOHNSON
Paralegal Specialist
Defense Appellate Division
(703) 693-0736