27 September 2019

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

| | | |
|---|---|---|
| UNITED STATES,<br>*Appellee*, | ) | FINAL BRIEF ON BEHALF OF THE UNITED STATES |
| v. | ) | |
| | ) | Crim. App. No. 39323 |
| Airman First Class (E-3),<br>JORDAN R. MULLER, USAF,<br>*Appellant.* | ) | USCA Dkt. No. 19-0230/AF |

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

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

## ISSUES PRESENTED

**I.**

**WHETHER RULE 15.5 OF THE AIR FORCE COURT OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE IS INVALID BECAUSE IT CONFLICTS WITH THE UNIFORM CODE OF MILITARY JUSTICE, THIS COURT'S PRECEDENT, THE JOINT COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE, THE RECENTLY UPDATED JOINT RULES OF APPELLATE PROCEDURE, AND THE PRIOR AND CURRENT APPELLATE RULES OF THE OTHER SERVICE COURTS OF CRIMINAL APPEALS?**

**II.**

**WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO RAISE ISSUES ON APPEAL WHEN IT DENIED HIS TIMELY REQUEST TO FILE A SUPPLEMENTAL BRIEF ON ISSUES ARISING DURING REMAND PROCEEDINGS?**

## III.

**WHETHER A COURT OF CRIMINAL APPEALS MUST REQUIRE CERTIFICATES OF CORRECTION TO BE ACCOMPLISHED, VICE ACCEPTING DOCUMENTS VIA A MOTION TO ATTACH, WHEN IT FINDS A RECORD OF TRIAL TO BE INCOMPLETE DUE TO A MISSING EXHIBIT?**

## STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (hereinafter "AFCCA") reviewed this case pursuant to Article 66, UCMJ, 10 U.S.C. § 866(c) (2016). (JA at 1-2.) This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

## STATEMENT OF THE CASE

Appellant's statement of the case is generally accepted.

## STATEMENT OF FACTS

*AFCCA's Remand to Correct the Record*

On 16 May 2018, Appellant submitted the case to AFCCA "on its merits with no specific assignments of error." (JA at 5.) On 12 September 2018, AFCCA discovered that Prosecution Exhibit 7, Appellant's sole enlisted performance report, was not contained in the record of trial and ordered the parties to show good cause as to why it should not remand the record for correction pursuant to R.C.M. 1104(d). (JA at 7.) To remedy the error, on 26 September 2018, the United States

answered AFCCA's order and filed a corresponding motion to attach the missing exhibit with an accompanying declaration from trial counsel that confirmed the exhibit's authenticity. (JA at 8-20.) Appellant did not oppose the motion to attach. (JA at 21.) However, on 5 October 2018, AFCCA denied the motion to attach and remanded the case "for correction of the record in accordance with Rule for Courts-Martial 1104(d)." (JA at 22.)

On 2 November 2018, Appellant moved AFCCA to attach a memorandum from the convening authority to the military judge. (JA at 29-33.) The memorandum stated as follows:

> By appellate court order, I direct you to prepare a Certificate of Correction that identifies Prosecution Exhibit 7, described in the exhibit List as an "Enlisted Performance Report, dated 10 November 2014 to 9 July 2016" and it's inclusion in the record of trial. You are to verify that this exhibit is what you reviewed as the military judge in U.S. v. Muller.

(JA at 33.) On 9 November 2018, the United States opposed Appellant's motion to attach on the basis of relevance. (Opposition to Appellant's Motion to Attach, 9 November 2018.) On 30 November 2018, AFCCA denied Appellant's 2 November 2018 motion to attach the convening authority's memorandum. (Id. at 1; JA at 57.)

The military judge accomplished a certificate of correction pursuant to R.C.M. 1104(d). (JA at 47.) In the certificate, the military judge confirmed that he

had reviewed the transcript and the missing exhibit before determining it should be attached to the record of trial. (Id.) Prior to issuing the certificate of correction, the military judge ensured that "[a]ll parties were given notice of [the] correction and [were] permitted to examine and respond prior to the authentication of this Certificate of Correction pursuant to RCM 1104(d)(2)." (Id.)

On 26 November 2018, the United States filed an out of time motion[1] to attach the missing exhibit to the record of trial, the accompanying certificate of correction that was accomplished by the military judge, and proof of receipt to the parties and Appellant. (JA at 43-51.) On 28 November 2018, Appellant opposed the United States' motion to attach the certificate. (JA at 52-54.) On 30 November 2018, AFCCA granted the motion, which attached the certificate and exhibit to the record of trial. (JA at 56.)

*Appellant's Post-Remand Filings*

Subsequently, on 6 December 2018, Appellant moved for leave to file a supplemental assignment of errors (hereinafter AOEs) to raise the following issues:

> 1) WHETHER THE CONVENING AUTHORITY ENGAGED IN UNLAWFUL COMMAND INFLUENCE WHEN HE DIRECTED THE MILITARY JUDGE TO VERIFY THAT A DOCUMENT PURPORTING TO BE

[1] The United States originally filed the same motion to attach on 21 November 2018; however, after realizing the motion was out of time in accordance with the lower court's rules, it refiled the motion on 26 November 2018 to properly designate it out of time. AFCCA then, on 30 November 2018, granted the 26 November 2018 motion and denied the 21 November 2018 motion. (JA at 56.)

> PROSECUTION EXHIBIT 7, WHICH WAS MISSING FROM THE RECORD OF TRIAL, WAS THE SAME PROSECUTION EXHIBIT 7 THAT THE MILITARY JUDGE REVIEWED AT TRIAL;
>
> and
>
> (2) WHETHER THE GOVERNMENT'S DELAY IN PROCESSING THE CERTIFICATE OF CORRECTION WARRANTS SENTENCE RELIEF.

(JA at 58-85). In support of his first supplemental AOE, on 6 December 2018, Appellant moved AFCCA to attach the convening authority's memorandum where he directed the military judge as follows: "You are to verify that this exhibit is what you reviewed as the military judge in U.S. v. Muller." (JA at 86-90.)[2] Appellant asserted that the memorandum was relevant to show unlawful command influence and unreasonable post-trial delay. (JA at 86.) In support of his second AOE, on 10 December 2018, Appellant filed another motion to attach a declaration wherein he personally alleged he had suffered prejudice as a result of post-trial delays. (JA at 91-95.) The United States did not oppose Appellant's motion for leave to file supplemental AOEs nor the two post-remand motions to attach. On 21 December 2018, AFCCA denied both of Appellant's motions to attach and the motion for leave to file supplemental AOEs, and issued its opinion that affirmed the findings and sentence. (JA at 1-2, 96-98.) At the time it issued its opinion,

[2] AFCCA had previously denied Appellant's request to attach the same document on 30 November 2018. (JA at 29-33, 57.)

460 days had elapsed from when Appellant's case was originally docketed with AFCCA.

On 9 January 2019, Appellant moved the lower court to reconsider, with a suggestion for en banc consideration, its denial of his motion for leave to file supplemental AOEs and his two motions to attach, and the per curiam decision. (JA at 99-110.) The United States replied in opposition on 16 January 2019. (JA at 111-15.) On 28 January 2019, AFCCA denied Appellant's motion for reconsideration. (JA at 116-17.) In its written order, AFCCA indicated that the panel that decided Appellant's case voted "3-0 against panel reconsideration" and "[n]o judge requested a vote to determine whether the court should consider the opinion en banc." (JA at 116.)

## SUMMARY OF THE ARGUMENT

The lower court's rules of practice and procedure are not invalid because they do not contradict the Joint Rules or the rules of the other service courts. Even if this Court finds that AFCCA's rules are invalid, the lower court's rejection of Appellant's post-remand filings were rejected on the basis of relevance and ripeness. Therefore, the lower court properly rejected Appellant's motion for leave to file supplemental AOEs and 6 December 2018 and 10 December 2018 motions to attach that purported to support his AOEs.

Should this Court find the lower court should have granted Appellant's post-remand motions and consider the supplemental AOEs, it should still find no corrective action is necessary because the documents Appellant moved to attach did not, on their face, factually support the supplemental AOEs. Accordingly, this Court should find that there was no violation of Appellant's due process appellate rights and deny Appellant's claims under Issues I and II.

Notwithstanding this Court's resolution of Issues I and II, it should also address Issue III because it is justiciable controversy between the parties and does not invite an advisory opinion. In so doing, this Court should conclude that motions to supplement records with missing exhibits are an appropriate means to correct a record and aid in the goal of expediting appellate review, especially here, where it was not contrary to the interests of the parties. Accordingly, this Court should hold that certificates of correction are not always required in cases where the record is found to be incomplete due to a missing exhibit.

## ARGUMENT

### I.

### RULE 15.5 OF THE LOWER COURT'S RULES OF PRACTICE AND PROCEDURE THAT EXISTED AT THE TIME APPELLANT FILED HIS MOTION FOR LEAVE TO FILE SUPPLEMENTAL ASSIGNMENT OF ERRORS AND SUPPLEMENTAL ASSIGNMENT OF ERRORS DID NOT VIOLATE HIS DUE PROCESS RIGHTS.

#### *Standard of Review*

Whether a court's rule of practice and procedure is valid is a question of law reviewed de novo. *See generally* United States v. Gilley, 59 M.J. 245 (C.A.A.F. 2004).

#### *Law & Analysis*

Rule 15.5 of AFCCA's Rules of Practice and Procedure (hereinafter "AFCCA's Rules") was valid and did not violate the congressional intent of Article 66(f), UCMJ, 10 U.S.C. § 866(f) (2016). Article 66(f) set forth the requirement to establish joint rules for the Courts of Criminal Appeals (hereinafter "CCAs"): "The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Criminal Appeals." Rule 15(b) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure (hereinafter

the "Joint Rules") stated, in pertinent part: "Any brief for an accused shall be filed within 60 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General." (JA at 121.) AFCCA Rule 15.5 stated:

> Supplemental filings must be submitted by motion for leave to file. If the motion is granted, the opposing party may file a response within 30 days. When a case returned by the Court to TJAG for remand to the convening authority for anything other than a rehearing is again before the Court and appellate counsel previously filed an initial brief and assignment(s) of error, appellate defense counsel shall within 10 calendar days of re-docketing either request leave to file a supplemental pleading under Rule 23 or inform this Court that the appellant does not wish to file additional pleadings.

(JA at 122.)

This Court has previously resolved a question of whether a CCA's rule was in harmony with Rule 15(b) of the Joint Rules[3] in Gilley, 59 M.J. 245. In Gilley, the CCA, by its own rule, required the parties to present any filings to the court within seven days after remand. Id. at 246. This requirement contradicted the timeline of 60 days set out in Rule 15(b) of the Joint Rules. Id. at 246-47. After recognizing the conflict, this Court concluded that Article 66(f) does not permit a CCA to create "its own exclusive filing deadline which varies from the general

[3] The relevant part of Joint Rule 15(b) that was applicable to the appellant in Gilley remained unchanged at the time Appellant's case was decided by AFCCA.

filing deadline put forth in [the Joint Rules'] Rule 15(b)." Id. at 247. As a result, this Court held that the CCA's seven day rule was invalid. Id. However, notwithstanding the invalidity of the CCA's rule, this Court observed that the appellant had failed to identify "any prejudice resulting from the application of [the CCA's rule] to his case." Id. at 248. Consequently, this Court denied any relief and affirmed the decision of the CCA. Id.

Here, AFCCA Rule 15.5 does not violate Article 66(f) because it is not in conflict with Rule 15(b) of the Joint Rules. AFCCA Rule 15.5 required that the appellate defense counsel request leave to file a supplemental pleading within 10 days of re-docketing. (JA at 122.) It did not require that actual supplemental filings be filed before the 60 day deadline as prescribed by the Joint Rules. Rather, Rule 15.5 only required that an appellant give notice to the court of intent to file a brief. This requirement allows appellate review to occur more efficiently because if the appellant does not intend to do additional briefing the court may move to fulfill its duty to timely dispose of cases. United States v. Moreno, 63 M.J. 129, 137 (C.A.A.F. 2006) ("Ultimately the timely management and disposition of cases docketed at the [CCAs] is a responsibility of the [CCAs].") Moreover, the rule did not preclude appellate defense counsel from later filing supplemental filings pursuant to AFCCA Rule 15.6. (JA at 122 ("Any filing that is submitted out of time … shall indicate good cause for the out-of-time filing.")) Therefore, AFCCA

Rule 15.5 was not invalid, but a proper method for AFCCA to exercise "institutional vigilance" to expedite the processing of appellate cases. Id. (quoting citation omitted).

Nevertheless, the question of whether the time restrictions of AFCCA Rule 15.5 are valid is not the actual question before this Court. Simply put, Appellant has not shown that AFCCA Rule 15.5 was the reason for his post-remand motions to be denied. In fact, the record reveals otherwise. Whether AFCCA followed its own 10-day rule or the Joint Rule's 60-day rule, Appellant filed his motion within the time required under both rules as he contends—within eight days after AFCCA granted the motion to attach the certificate of correction, which was when he was notified the record had been returned to the court. (App. Br. at 8.) It stands to reason that AFCCA's rejection of Appellant's pleading did not rely on the timeliness of his filing. Thus, AFCCA Rule 15.5 was not invalidly applied in Appellant's case.

Appellant has also not shown that the other reasons upon which Appellant contends AFCCA Rule 15.5 to be unlawful actually caused his post-remand motions to be rejected. (App. Br. at 26-27.) Appellant contends that AFCCA Rule 15.5 was unlawful for several reasons: (1) the rule pertained to external entities (the parties) vice internal entities (court staff); (2) its 10-day deadline conflicted with Joint Rule 15(b)'s 60 days; (3) its 10-day notification requirement conflicted

with Joint Rule 15(b)'s 60-day filing deadline; (4) its requirement that an initial brief be filed to submit a post-remand brief was a prohibition that conflicted with the Joint Rules; and (5) it conflicted with the rules of the other CCAs.[4] (App. Br. at 26-29.) In addition, Appellant argues that AFCCA Rule 15.5 was unlawful because, when read with AFCCA Rule 23 and 23.3(o), required supplemental filings "to be filed contemporaneously with motions for leave to file." (App. Br. at 25 n.7.) However, as shown above, the lower court did not reject Appellant's filings for these reasons.

Instead, AFCCA denied his post-remand motions on other grounds. Specifically, the lower court properly denied Appellant's motions to attach for a lack of relevance.[5] And as Appellant recognizes, AFCCA's updated rules no longer present this concern. (App. Br. at 21; JA at 150.) Therefore, it is not necessary for this Court to address Issue I.

Even if Rule 15.5 is found to be invalid, it did not result in material prejudice warranting relief from this Court. As discussed below under Issue II, the lower court's denial of his post-remand motions were not based on AFCCA Rule 15.5, but on other considerations that this Court can review and dispose of without

[4] Of note, the fifth reason is also a basis for the amicus brief. (Am.Cur. Br. at 3-4.)
[5] Denial of the motions on this ground is discussed in detail under Issue II below

remand. Accordingly, this Court should deny Appellant's request for a remand and affirm the findings and sentence.

## II.

## THE LOWER COURT PROPERLY DENIED APPELLANT'S MOTIONS TO ATTACH DOCUMENTS AND REQUEST TO FILE A SUPPLEMENTAL BRIEF, AND DID NOT DEPRIVE HIM OF HIS DUE PROCESS RIGHT TO RAISE ISSUES ON APPEAL.

### *Standard of Review*

Whether an appellant has been afforded adequate appellate review under Article 66, UCMJ, 10 U.S.C. § 866, is a question of law reviewed de novo. *See generally* United States v. Roach, 66 M.J. 410 (C.A.A.F. 2008); United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006).

This Court reviews a CCAs decision to deny a party's motion to supplement the record for an abuse of discretion. United States v. Brooks, 49 M.J. 64, 70 (C.A.A.F. 1998) ("One of the questions involved in this case is whether the court below abused its discretion by rejecting the document.")

### *Law & Analysis*

Appellant's due process right to raise issues on appeal was not violated. The lower court properly denied Appellant's two motions to attach and his motion for leave to file supplemental AOEs. These denials do not equate to a wholesale denial of Appellant's right to adequate appellate review.

A. AFCCA did not Err when it Denied Both Appellant's Motions to Attach the Convening Authority's Memorandum and the Corresponding Supplemental AOE.

Although this Court does not have fact-finding authority, it may review whether a CCA's decision to deny a motion to supplement the record was proper. United States v. Brock, 46 M.J. 11, 13 (C.A.A.F. 1997). In Brock, the appellant motioned the CCA to admit the promulgating order of his co-actor's court-martial to show his sentence was inappropriately severe when compared to the alleged "closely related" case. Id. at 12. The CCA denied the appellant's motion and, in its opinion, denied the appellant's claim on the basis that it had "no evidence before [it] on which to make a comparison of sentences between appellant and [his co-actor]." Id. at 13 (quoting citation omitted).

On Brock's appeal, this Court concluded that "the door was closed to appellant from the start because the court below refused to admit the evidence relating to [the co-actor]'s sentence even though there was evidence in the record of appellant's involvement with [him]." Id. The Court then observed that it did "not have fact-finding powers, but [it] [does] have the power to determine, as a matter of law, whether the court below was obligated to consider evidence relevant to the exercise of its fact-finding powers." Id. As a result, under the specific circumstances present in Brock, this Court held that the CCA erred in not granting the motion to attach the evidence and then considering the evidence to determine

whether the appellant's case was closely related to his [co-actor]'s and "whether the sentences were highly disparate." Id.

Here, this Court should find AFCCA did not abuse its discretion when it denied Appellant's two attempts to attach the convening authority's memorandum to the record of trial. The 2 November 2018 and 6 December 2018 motions to attach the memorandum did not comply with the requirement in AFCCA Rule 23.3(b)[6] that the attachment be relevant to the case. Likewise, the attachment did not comply with this Court's rule that courts must determine the relevancy[7] of a document before permitting its inclusion in the record. United States v. Shotter, 30 C.M.R. 283, 285 (C.M.A. 1961) ("Documents should not be included in a record of trial unless they are competent and relevant to the issues involved.") The convening authority's memorandum was not relevant because it did not support an allegation of unlawful command influence (UCI) on its face. The language used by the convening authority was not ambiguous: "You are to verify that this exhibit is what you reviewed as the military judge in U.S. v. Muller." (JA at 33.) The plain meaning of the convening authority's memorandum instructed the military judge to independently verify whether the exhibit was the one presented at trial.

---

[6] AFCCA Rule 23.3(b) requires the moving party to provide "a statement as to [the document's] relevance to the case." (JA at 124.)

[7] Under Mil. R. Evid. 401, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

Absent an applicable statutory definition to guide it, this Court has considered the "plain meaning" and the "common and approved usage" to define a term. United States v. Kuemmerle, 67 M.J. 141, 143 (CAAF 2009) (citing and quoting United States v. McCollum, 58 M.J. 323, 340 (C.A.A.F. 2003) ("words should be given their common and approved usage") (other citations omitted)). Common definitions of "to verify" are "to establish the truth, accuracy, or reality of,"[8] and "to make certain or prove that something is true or accurate."[9] Here, the convening authority's use of the word "verify," by its plain meaning, meant that he was ordering the military judge to independently establish the accuracy of whether the missing exhibit was the same one that was admitted at trial. In short, the most reasonable interpretation of the word does not support a claim of actual or apparent UCI.[10] It had no "tendency" to make Appellant's UCI claim "more probable."

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[8] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/verify?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited 24 September 2019).

[9] Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/verify (last visited 24 September 2019).

[10] Allegations of unlawful command influence are reviewed for both actual and apparent unlawful command influence. United States v. Boyce, 76 M.J. 242, 247 (C.A.A.F. 2017). "[I]n order for a claim of actual unlawful command influence to prevail, an accused must meet the burden of demonstrating: (a) facts, which if true, constitute unlawful command influence; (b) the court-martial proceedings were unfair to the accused . . . and (c) the unlawful command influence was the cause of that unfairness." Boyce, 76 M.J. at 247 (quoting United States v. Lewis, 63 M.J. 405, 413 (C.A.A.F. 2006)).

Mil. R. Evid. 401. Thus, the document was facially irrelevant, pursuant to AFCCA Rule 23.3(b), to prove UCI had occurred, and the motion to attach and the motion to file the corresponding supplemental AOE, were properly denied. This Court should be satisfied that AFCCA denied the motions to attach the convening authority's memorandum based on relevance due to the lower court's receipt and consideration of the United States' objection based upon those same grounds. (*See* Opposition to Appellant's Motion to Attach, 9 November 2018.)

This Court has similarly rejected motions to supplement the record where the documents in question were not relevant to matters brought before it. *See* United States v. Graner, 69 M.J. 104, 105 n.1 (C.A.A.F. 2010) (denying motions to attach documents after determining "none of the documents that either party seeks to submit into the record are necessary to resolve the issues of this case"); United States v. Berry, 61 M.J. 91, 96 n.3 (C.A.A.F. 2005) (denying the appellant's motion to attach evidence because the Court's review was limited to "what was known to [the military judge] at the time of trial"); United States v. Lynn, 54 M.J. 202, 204 n.7 (C.A.A.F. 2000) (denying the appellant's motion to attach evidence because the evidence was "insufficient to raise a question of fact" relevant to the issue on appeal). Here, the convening authority's memorandum was likewise irrelevant because it did not support the supplemental UCI AOE. Appellant's case is unlike Brock where the lower court refused to consider evidence obviously

relevant to the issue raised. The convening authority's language in the memorandum was irrelevant on its face, and AFCCA was not required to consider the irrelevant evidence. Brock, 11 M.J. at 13. Accordingly, the supplemental AOE alleging UCI lacked a factual basis and was properly rejected by AFCCA when it denied Appellant's motion for leave to file supplemental AOEs.

B. AFCCA did not Err in Denying the Second Supplemental AOE.

With regard to Appellant's second supplemental AOE, Appellant requested the CCA to grant sentencing relief under Moreno, 63 M.J. 129, and United States v. Tardif, 57 M.J. 219, 224 (C.A.A.F. 2002). (JA 65-68; App. Br. at 37.)

The lower court properly denied to attach Appellant's declaration because it did not establish prejudice warranting relief. The declaration generally alleged an inability to obtain employment and a hold on his Veterans Affairs claim status due to his appeal preventing the issuance of a DD Form 214. (JA at 95.) Appellant did not provide additional documentation from the U.S. Department of Veterans Affairs or potential employers in support of his claims made in the declaration. This Court has found that such unsubstantiated declarations are irrelevant because they failed to establish any prejudice resulting from post-trial delay. United States v. Allende, 66 M.J. 142, 145 (C.A.A.F. 2008) ("Appellant has not provided documentation from potential employers regarding their employment practices, nor has he otherwise demonstrated a valid reason for failing to do so. In that context,

we conclude that the assumed error was harmless beyond a reasonable doubt and note that Appellant has failed to present any substantiated evidence to the contrary.") (citation omitted). Therefore, AFCCA did not err when it declined to attach Appellant's declaration to the record of trial.

With regard to Appellant's request for relief under Moreno, the claim was not ripe and the lower court properly exercised its judicial discretion in denying his motion for leave to file the second supplemental AOE. Appellant's case was docketed with AFCCA on 18 September 2017. On 21 December 2018, the lower court rendered its decision, which occurred 460 days, or 15 months and 4 days, after docketing. (JA at 1.) This falls well short of the 18-month deadline set by Moreno, 63 M.J. at 135. And given the delay was not "facially unreasonable, the full due process analysis [was not] triggered." Id. at 136 (citation omitted). It then follows that Appellant's declaration that was requested to be attached on 10 December 2018, was not relevant to a ripe, reviewable claim and likewise did not comply with the relevance requirement of Rule 23.3(b). Simply put, Appellant's second supplemental AOE that alleged post-trial delay lacked a factual basis to warrant relief under Moreno. Therefore, the lower court did not err when it denied the motion for leave to file the supplemental AOE.

Further, AFCCA did not err when it denied Appellant's second supplemental AOE that was brought under Tardif because it was already required to review the

record for unreasonable delay and did so. In Tardif, this Court required the CCAs to determine whether "unexplained and unreasonable post-trial delays" affect what sentence "should be approved" during their review of a case under Article 66(c). 57 M.J. at 224. Here, the record demonstrates that AFCCA considered the delays in this case and determined, despite any delays, that "on the basis of the entire record," Appellant's sentence "should be approved." Tardif, 57 M.J. at 223 (citing Article 66(c), UCMJ, 10 U.S.C. § 866(c)).

First, AFCCA is presumed to have been aware of its statutory duty to review for potential relief under Tardif. United States v. Schweitzer, 68 M.J. 133, 139 (C.A.A.F. 1992) ("In the absence of evidence to the contrary, judges of the Courts of Criminal Appeals are presumed to know the law and to follow it.") (citation omitted); United States v. Grostefon, 12 M.J. 431, 437 n.14 (C.M.A. 1982) (concluding a question under Article 66(c) "must inevitably have been considered by the [lower court] in the performance of its statutory duties under Article 66."). The record contains no contrary evidence to rebut this presumption. Rather, the record demonstrates AFCCA properly conducted its Article 66(c) review. As the granting authority, AFCCA was undoubtedly aware of the two enlargements of time granted requested by the United States. But despite the two delays, AFCCA found that "[t]he approved findings and sentence are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred." (JA at 1-2.)

If relief were warranted by any delays, the lower court was required to grant it pursuant to Tardif. It did not. Therefore, it follows that AFCCA found no delay warranting sentencing relief.

Finally, Appellant's reliance on United States v. Mitchell, 20 M.J. 350 (C.M.A. 1985), to draw a parallel to his case is misplaced. (App. Br. at 35-38.) Mitchell involved an appellant's submission of errors as contemplated by United States v. Grostefon, which this Court requires CCAs to, "at a minimum, acknowledge that it has considered those issues enumerated by the accused and its disposition of them." 12 M.J. 431, 436 (C.M.A. 1982). Additionally, this Court clarified further that "in no case will the issues submitted by the accused be ignored without evidence of the accused's concurrence in that decision." Id. at 437. Here, the CCA was not required to grant Appellant's motion to file supplemental AOEs and state that it had "considered [the supplemental AOEs] and its disposition of them" as the CCA was required to in Mitchell because the AOEs were not Grostefon claims. Rather, the supplemental AOEs were submitted by Appellant's appellate defense counsel, which permitted the lower court to reject them based on an insufficient factual basis necessary to support a legal claim of error. *See* Graner, 69 M.J. at 105 n.1; Berry, 61 M.J. at 96 n.3; Lynn, 54 M.J. at 204 n.7. Therefore, AFCCA was not required to accept the supplemental AOEs, review them, and acknowledge that it had done so as Appellant contends.

In sum, the lower court's decisions did not preclude Appellant from timely raising supplemental errors. Rather, as discussed above, its denials of Appellant's motions were very likely based on a failure to demonstrate relevance as required by Rule 23.3(b) and Shotter, 30 C.M.R. at 285. And even if there were error, AFCCA correctly found that none were materially prejudicial to Appellant's substantial rights after conducting a full review of the record of trial as required by Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a) and 866(c) (2016). (JA at 1-2.) Thus, this Court should find Appellant's post-remand motions were properly denied and affirm the findings and sentence.

C. Even if this Court finds in Appellant's favor under Issues I or II, Appellant is still not entitled to have his case remanded.

Should this Court determine the lower court erred when it denied Appellant's post-remand motions, he has not suffered prejudice warranting relief from this Court. Regardless of this Court's resolution of Issues I or II, it has the statutory authority to review the claims set out therein before determining whether remand is necessary. Grostefon, 12 M.J. at 437 n.14 ("The [legal] nature of the issues raised initially by accused and his counsel is such that we find no occasion in this case to remand to the Court of Military Review, which has the fact-finding powers that we lack.") In fact, it should do so in the interests of judicial economy. *See* United States v. Hargrove, 51 M.J. 408, 409 n.1 (C.A.A.F. 1999) (determining that it would address issues not originally granted "in the interests of justice and

judicial economy"). Additionally, Appellant's case is not one where "proper appellate review is impossible." United States v. Abrams, 50 M.J. 361, 364 (C.A.A.F. 1999) (concluding it could not review the military judge's denial of a motion to compel records for a lack of relevance because the records reviewed by the military judge were not attached to the record of trial and therefore it had "no records to review"). Rather, here, the record allows this Court to review the issues of law that were asserted by Appellant and determine that they "do not require [] corrective action." Grostefon, 12 M.J. at 437.

First, with respect to Appellant's supplemental AOE claiming UCI, this Court may resolve the claim based on a review of the convening authority's memorandum. (JA at 90.) Even assuming the motion to attach were admitted,[11] Appellant's legal claim of UCI fails. As discussed above, the only reasonable interpretation of the convening authority's use of the word "verify" did not support an allegation of UCI. Simply put, Appellant failed in his burden to demonstrate "facts, which if true, constitute unlawful command influence." Boyce, 76 M.J. at 247. Alternatively, the United States has rebutted the allegation by showing beyond a reasonable doubt that the common understanding of the word "verify"

[11] Should this Court conclude it cannot assume arguendo that the convening authority's memorandum (JA at 90) had been admitted to determine prejudice, the United States respectfully requests this Court reverse the lower court's decision to deny the motion to attach (JA at 97) and address Appellant's supplemental AOE claiming UCI as it similarly did in Grostefon, 12 M.J. 437, 437 n.14.

defeats Appellant's claim of actual or apparent UCI. United States v. Salyer, 72 M.J. 415, 423 (C.A.A.F. 2013) (observing that the government may effectively rebut an allegation of UCI by showing "beyond a reasonable doubt that: (1) the predicate facts do not exist."). Thus, Appellant's legal claim, "a matter within [this Court's] purview," should be considered and rejected without remand to the lower court. Grostefon, 12 M.J. at 437 n.14.

Second, this Court may also review the merits of Appellant's second supplemental AOE, which requested sentence relief due to alleged post-trial delay, and determine remand is unnecessary. Appellant requested relief from his sentence to confinement for two reasons. (JA at 68.) Both fail to raise colorable legal claims warranting relief. As previously discussed, the first ground failed to prove a due process claim of post-trial delay because the CCA completed review of his case before the 18-month deadline set by this Court in Moreno, 63 M.J. at 135.

This Court should also find remand unnecessary because the record would not support a colorable claim warranting relief under Tardif. Here, the delay in completing the certificate of correction amounted to 22 days total. (JA at 21-22, 43-51.)[12] AFCCA initially provided the United States 30 days to return the record

[12] 22 days had elapsed between 4 November 2018, the deadline set to return the record of trial to AFCCA, and 26 November 2018, when the United States moved the lower court to attach the certificate of correction to the record of trial. (JA at 21-22, 43-51.)

of trial after remanding for a certificate of correction. (JA at 21-22.) This timeline is identical to the requirement for the government to docket a case with a CCA after action within 30 days, which is necessary to avoid a presumption of unreasonable delay. Moreno, 63 M.J. at 142. However, the steps necessary to accomplish each task are very different. This Court has identified the simple task of transmitting a record of trial to be docketed at a CCA as "routine, nondiscretionary, [and] ministerial." United States v. Simon, 64 M.J. 205, 208 (C.A.A.F. 2006). In contrast, the procedure for a certificate of correction is a more detailed task that requires coordination and the mailing of documents, which inevitably requires time. Once a court issues an order for a certificate of correction, the record of trial must be returned to the convening authority, who then corresponds with the military judge to complete a certificate of correction for the missing portion of the record. R.C.M. 1104(d)(1)-(2). After the military judge has authenticated the missing portion under R.C.M. 1104(a), subsequent coordination is required between the trial and defense counsel before the certificate of correction may be completed. R.C.M. 1104(d)(3). And after the certificate of correction is accomplished, it must be sent to the accused with proof of receipt before it may be transmitted back to the remanding court. R.C.M. 1104(d)(3). These steps, which are not "routine, nondiscretionary, [or] ministerial" and rely on the schedules of many individuals, will frequently require more than the 30 days

Moreno affords the government to docket a case with a CCA after action. Based on these considerations, it was not unreasonable under Tardif for the United States to require 22 additional days to return the record of trial and the certificate of correction to AFCCA. In short, the 22-day delay was not "unreasonable" [13] under the circumstances of Appellant's case. United States v. Toohey, 63 M.J. 353, 362 (C.A.A.F. 2006) ("The essential inquiry remains appropriateness in light of all circumstances.") Therefore, Appellant's due process appellate rights were not violated because the lower court did not err when it denied Appellant's motion for leave to file the second supplemental AOE and the motion to attach Appellant's declaration.

Alternatively, as the authority who acted on all requests for enlargements of time, AFCCA was aware of any delays in this case and "must inevitably have been considered by the [lower court] in the performance of its statutory duties under Article 66." Grostefon, 12 M.J. at 437 n.14. "In the absence of evidence to the contrary," even if this Court finds that the lower court should have granted the supplemental AOEs, it should still uphold the presumption that AFCCA understood its duty to consider post-trial delays pursuant to Tardif. Schweitzer, 68

[13] Both of the United States' requests for enlargements of time were not "unexplained" as shown by the justifications therein. (JA at 23-24, 43-44.) Therefore, Appellant's Tardif claim centers on whether the delays were "unreasonable."

M.J. at 139; *cf.* United States v. Baier, 60 M.J. 382, 385 (C.A.A.F. 2005) (declining to uphold the presumption where the CCA recited the incorrect standard for its sentence appropriateness review). Finally, because he has already served his sentence to confinement, Appellant's request to AFCCA to reduce his sentence to confinement was inappropriate because "it would [have] afford[ed] him no meaning relief." United States v. Rodriguez-Rivera, 63 M.J. 372, 386 (C.A.A.F. 2006); *see also* United States v. Pflueger, 65 M.J. 127, 130 (C.A.A.F. 2007) (observing that relief granted under Tardif must be "meaningful"). Accordingly, remand is unnecessary in Appellant's case.

WHEREFORE, the United States respectfully requests this Honorable Court to deny Appellant's request to remand his case, and affirm the findings and sentence.

## III.

## A CERTIFICATE OF CORRECTION WAS NOT LEGALLY REQUIRED TO CORRECT APPELLANT'S RECORD OF TRIAL.

### *Standard of Review*

When interpreting Rules for Courts-Martial, this Court applies ordinary rules of statutory construction. United States v. Reese, 76 M.J. 297, 301 (C.A.A.F. 2017) (citations omitted).

### *Law & Analysis*

A. Issue III does not Invite this Court to Give an Unwarranted Advisory Opinion.

"An advisory opinion is an opinion issued by a court on a matter that does not involve a justiciable case or controversy between adverse parties." United States v. Chisolm, 59 M.J. 151, 152 (C.A.A.F. 2003) (citation omitted). This Court's predecessor defined advisory opinions in United States v. Clay to be those that do not result "'in a material alteration of the situation for the accused or for the Government.'" 10 M.J. 269, 269 (C.M.A. 1981) (per curiam) (quoting United States v. McIvor, 44 C.M.R. 210, 212 (1972)). In Clay, the Court found that "a resolution of the certified issue would have no effect on the findings and sentence which were affirmed by the [lower court]." Id.

Here, answering Issue III would not constitute an advisory opinion. Appellant's second supplemental AOE argued he was entitled to sentence relief

due to alleged excessive post-trial delay. (JA at 58.) Thus, the United States' justifiable attempt to correct the record through its motion to attach, vice a certificate of correction, is a factor to be considered under a speedy appellate review analysis set out in Moreno, 63 M.J. at 135 (adopting the factor "the reasons for the delay" set out in Barker v. Wingo, 407 U.S. 514, 530 (1972)). As discussed in Issue II, this is an issue that this Court may address to resolve this case.[14] *See* Grostefon, 12 M.J. at 437 n.14. In addition, "[t]he briefs demonstrate that this is a question 'presented in an adversary context.'" United States v. Russett, 40 M.J. 184, 186 (C.A.A.F. 1994) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)). And answering Issue III is material to the outcome in Appellant's case because its determination would affect whether the sentence in his case should be reassessed. Therefore, the Court should answer Issue III.

The decision in United States v. Wilson, 73 M.J. 404, 405 (C.A.A.F. 2014), is instructive on whether answering Issue III would result in an advisory opinion. In Wilson, this Court disagreed with the appellant's assertion that answering the certified issue would constitute an advisory opinion. There, the lower court held that Article 12, UCMJ, 10 U.S.C. § 812 (2012), applied to confinement with foreign nationals in a civilian confinement facility in the United States, but denied

[14] Should this Court remand the case to lower court to consider Appellant's second supplemental AOE, resolution of Issue III would also be material to AFCCA's analysis of Moreno's factors test.

relief because the appellant had not been confined in violation of that statutory provision. Id. The question concerning Article 12's applicability within the United States was then certified to this Court. Id. The resolution of the Article 12 issue did not directly alter the position of the appellant or the government because Article 12 was not violated since the appellant had been confined alone. Id. Nevertheless, this Court found there was "a justiciable case and controversy before [it]" because "the applicability of Article 12 to [the appellant] [was] interwoven with the resolution of his complaints about confinement conditions." As a result, this Court answered the certified question by agreeing with the lower court and affirmed. Id. at 406.

Here, the same reasoning in Wilson is applicable. The fact that the United States' attempt to correct the record through its motion to attach was a proper method to correct the record is a factor to be considered under a speedy appellate review analysis. Moreno, 63 M.J. at 135 (adopting the factor "the reasons for the delay" set out in Barker v. Wingo, 407 U.S. 514, 530 (1972)). By answering Issue III this Court would neither "rule on a moot question nor render an advisory opinion in this case." United States v. Katso, 77 M.J. 247, 251 n.4 (C.A.A.F. 2018) (citations omitted). Rather, it would answer a justiciable case and controversy because the question of whether certificates of correction are always

required "is interwoven with the resolution of [Appellant]'s complaint[]" alleging excessive post-trial delay. Therefore, this Court should address the issue.

Even if this Court does find that answering Issue III would constitute an advisory opinion, there are still sound reasons to do so.[15] As discussed in more detail below, this Court and the CCAs are not in agreement on whether R.C.M. 1104 requires certificates of correction in every instance where a record is found to be incomplete due to a missing record. Answering Issue III in the negative would promote the interests of justice and judicial economy to assist in the timely disposition of cases. Moreno, 63 M.J. at 137 (recognizing "the need for prompt disposition of disciplinary matters" in the military). This is especially so when an

[15] First, as an initial matter, this Court is not absolutely prohibited from issuing an advisory opinion. Chisolm, 59 M.J. at 152 (recognizing that Article III courts "may not issue advisory opinions," whereas Article I courts "generally adhere" to this prohibition although it is not absolute) (citations omitted). Second, while this Court has generally been reluctant to issue advisory opinions, "it has not refused to answer certified questions which would not or did not alter the position of the parties." Russett, 40 M.J. at 185-86 (citing United States v. Martin, 20 MJ 227 (CMA 1985) (certified issue concerning presentencing evidence where the Court of Military Review had found the sentence appropriate notwithstanding the error, upon reassessment); United States v. Wheaton, 18 MJ 159 (CMA 1984) (certified issue concerning admissibility of nonjudicial punishment); United States v. Kuehl, 11 MJ 126 (CMA 1981) (certified issue concerning admissibility of summary court-martial conviction)); *see also* United States v. Williams, 41 M.J. 134, 135 n.2 (C.M.A. 1994) ("Although the Judge Advocate General has not certified for this Court's review the holding of the Court of Military Review … this Court may rule on the issue.") Third, this Court has recognized that "[a]s a supervisory court for the military criminal justice system, it is important for this Court to answer certified questions where decisions of this Court are being misinterpreted by appellate counsel and intermediate appellate courts." Id. at 186.

appellant prefers the more expedient option of a government motion to attach to correct the record or has no objection thereto, as was the case here. (JA at 95; *see* App. Br. at 46 n.12).

Moreover, regardless of this Court's resolution of this issue, it will provide clear direction to CCAs on a matter that has not been settled by this Court. Such direction is preferred where there is obvious disagreement between this Court and AFCCA's interpretation of R.C.M. 1104(d) in Appellant's case. Similarly, the lower court's interpretation also conflicts with that of the other CCAs. *See* United States v. Clifft, 77 M.J. 712, 717 (C.G. Ct. Crim. App. 2018), *pet. denied*, 78 M.J. 55 (C.A.A.F. 2018) ("A certificate of correction is thus 'permissive in nature, merely one method of correcting a record, not the exclusive means.'") (quoting citation omitted); United States v. Mosley, 35 M.J. 693, 695 (N.M. Ct. Crim. App. 1992) ("R.C.M. 1104(d) … provides that the record may be returned to the convening authority [to correct a record]. We believe a [CCA] has discretion to accept certificates of correction and affidavits.") (first emphasis in original); United States v. Culverhouse, 2014 CCA LEXIS 447, at *6-7 (Army Ct. Crim. App. 2014) [16] (finding the grant of the government's motion to attach a missing defense exhibit made the record of trial complete and "rendered moot" the

[16] Appendix A at 1. The unpublished opinions cited to herein are located in an attachment to this brief in Appendix A as required by Rule 24(f)(1)(B) of this Court's Rules of Practice and Procedure.

appellant's claim that "the incomplete exhibit amounted to a substantial omission" from the record of trial). Further, the need for consistency on this question is evident when comparing AFCCA's interpretation of R.C.M. 1104(d) in this case with that of its other panels that arrived at the opposite result. *See* United States v. Small, 2018 CCA LEXIS 121 *8-9 (A.F. Ct. Crim. App. 2018)[17] (concluding Appellant's objection that the record was incomplete due to the omission of the military judge's ruling was cured through the government's motion to attach); United States v. Wood, 2016 CCA LEXIS 565 *1 (A.F. Ct. Crim. App. 2016)[18] (holding the appellant's request to remand for a missing prosecution exhibit was rendered moot by acceptance of the government's motion to attach); United States v. Escobar, 2016 CCA LEXIS 199 *31 n.23 (A.F. Ct. Crim. App. 2016)[19] (holding the appellant's request to remand for seven missing prosecution exhibits were rendered moot when the government provided the exhibits to the CCA); United States v. Hudgins, 2014 CCA LEXIS 227, *48-49 (A.F. Ct. Crim. App. 2014)[20] (denying relief for an "incomplete record" after granting the government's motion to attach where trial counsel's affidavit "satisfactorily" authenticated the missing document). Accordingly, there is good cause for this Court to address Issue III.

[17] Appendix A at 6.
[18] Appendix A at 17.
[19] Appendix A at 19.
[20] Appendix A at 36.

B. The Lower Court was not Required to Order a Certificate of Correction in Appellant's Case.

The Court should find that R.C.M. 1104(d) does not unconditionally require certificates of correction to be accomplished, vice accepting documents via a motion to attach, when a CCA finds a record of trial to be incomplete due to a missing exhibit.

The analysis begins by reviewing the plain language of R.C.M. 1104(d). *See* United States v. Lewis, 65 M.J. 85, 88 (C.A.A.F. 2007) ("Statutory construction begins with a look at the plain language of a rule.") (citation omitted). The rule provides that "An authenticated record of trial believed to be incomplete or defective may be returned to the military judge or summary court-martial for a certificate of correction." R.C.M. 1104(d)(2) (emphasis added). It is well settled that the use of the word "may" is meant to convey that the instruction that follows is permissive rather than mandatory. *See* United States v. Rodgers, 461 U.S. 677, 706, (1983) ("The word 'may,' when used in a statute, usually implies some degree of discretion."); United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016) ("'May' is a permissive term"); United States v. Moss, 73 M.J. 64, 68 (C.A.A.F. 2014) ("Ordinarily, 'may' is a permissive rather than a mandatory term.") (citing Rodgers, 461 U.S. at 706); 10 U.S.C. § 101(f)(2) (2016) ("'may' is used in a permissive sense"). In addition, the common use and understanding of the word

"may" indicates that it was meant in the permissive sense.[21] The conclusion to be made based on the use of the word "may" is that a certificate of correction is not the only method to correct a record. Put another way, the decision to issue a certificate of correction is within the discretion of a CCA and not always required to correct a record of trial when a missing exhibit is discovered.

Here, the lower court abused its discretion in denying the United States' motion to attach Appellant's enlisted performance report (JA at 15-22). *See* Brooks, 49 M.J. at 70 (observing the question of whether a CCA properly rejected a document is reviewed for an abuse of discretion). AFCCA's determination that R.C.M. 1104(d) was the only means of correcting the record was an incorrect view of the law that made its decision an abuse of discretion. United States v. Erikson, 76 M.J. 231, 234 (C.A.A.F. 2017) ("A military judge abuses his discretion if … his conclusions of law are incorrect."). As discussed, R.C.M. 1104(d) does not absolutely require a certificate of correction in every case where an exhibit is missing. That is especially the case here, where: (1) Appellant did not oppose the attachment of the enlisted performance report (JA at 21; App. Br. at 45 n.12); (2) the enlisted performance report was easily authenticated by matching its description in the transcript (JA at 18); and (3) it was authenticated by trial

[21] Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/may (last visited 24 September 2019) ("have permission to").

counsel, who is authorized under R.C.M. 1104(a)(2)(B) to complete a certificate of correction if the military judge is unavailable. And as Appellant himself recognizes, accepting motions to attach "could expedite the appellate review process and thus benefit certain appellants." (App. Br. at 46.) Such a benefit could have been properly afforded here where Appellant did not oppose the motion to attach and later expressed his desire to have had speedy appellate review. (JA at 67-68.) Therefore, based upon its incorrect reading of R.C.M. 1104(d) and the circumstances presented here, AFCCA's decision to deny the United States' motion to attach and remand the case was an abuse of discretion.

There are also practical considerations that weigh in favor of answering Issue III in the negative. The lower court's abuse of discretion gave rise to the issues now before this Court. Had it not abused its discretion, the issues raised by Appellant would have been moot. Further, in total, nearly three months elapsed[22] between the lower court's show cause order and its attachment of the missing exhibit to the record. Requiring a certificate of correction in every case where there is a missing exhibit results in unnecessary delays that could, in most cases, be remedied with a motion to attach. Especially where, here, Appellant had an opportunity to review the document and did not object to its attachment, and its

[22] To be clear, the United States does not concede that any period of delay due to the certificate of correction was unreasonable or prejudiced Appellant under this Court's decision in Moreno, 63 M.J. 129.

authenticity was attested to by trial counsel, someone who is empowered under the rules to accomplish certificates of correction. R.C.M. 1104(d)(3); R.C.M. 1104(a)(2)(B).

Answering Issue III in the negative will expedite administrative post-trial processing by empowering CCAs to exercise the "institutional vigilance" necessary to effect the "timely management and disposition of cases." Moreno, 63 M.J. at 137 (citation omitted). And here, the lower court's acceptance of the motion to attach the exhibit would have done so and avoided delays. Admittedly, there may be cases where a missing exhibit cannot be obviously linked to its description on the record and the formal process of ordering a certificate of correction is necessary. There will also be cases where the opposing party objects to the accuracy or authenticity of the document being presented to correct the record. However, neither of these circumstances are present in the instant case. Appellant's sole enlisted performance report was authenticated by trial counsel and matched to its description in the transcript. (JA at 18.) In addition, Appellant did not oppose the authenticity of the exhibit the United States moved to attach. (JA at 21; App. Br. at 45 n.12.) Nevertheless, the lower court denied the motion to attach as a matter of course by citing R.C.M. 1104(d) as the only means to correct a record of trial. (JA at 21.) But under the circumstances of this case, AFCCA's

decision unnecessarily contributed to the additional delay in the processing of Appellant's appeal.[23]

Indeed, this Court has recognized that the government may properly correct a record of trial through a motion to attach. *See* United States v. Dooley, 61 M.J. 258, 259 n.9 (C.A.A.F. 2005) ("We note that the military judge's order was originally missing page four when it was filed with the Navy-Marine Corps CCA as Appellate Exhibit XVI. On January 26, 2005, appellate government counsel filed a Motion to Attach with the CCA correcting the error."). Further, the Court itself has a history of accepting motions to attach to correct records. Wuterich v. Jones, 70 M.J. 35 (C.A.A.F. 2011) ("Appellant's motion to attach additional pages of the record is granted."); United States v. Reohrig, 65 M.J. 280 (C.A.A.F. 2007) ("Appellee's … motion to submit missing prosecution exhibit [is] granted."); United States v. Pineda, 54 M.J. 298, 299 n.1 (C.A.A.F. 2001) (noting the lower court's decision to make the convening authority's affidavit part of the record properly clarified whether the appellant's bad-conduct discharge was approved in the action); United States v. Perez, 7 M.J. 38 (C.M.A. 1979) ("[W]e allowed the government's Motion to Attach Documents to the Record of Trial"). There is no

[23] While the promulgation of AFCCA's decision was undoubtedly delayed by its denial of the motion to attach, the United States does not concede that the delay amounted to "excessive post-trial delay" as contemplated by Moreno, 63 M.J. 129, since it was processed with the required 18-month timeframe.

reason to disturb these precedents or the precedents of the CCAs that do not interpret R.C.M. 1104(d) to make certificates of correction mandatory and there are compelling policy reasons to continue to permit motions to attach as a method to correct an incomplete or defective record. The most obvious of which is to prevent unnecessary delays by allowing the courts to correct a record via a motion to attach when there is no disagreement between the parties. Therefore, this Court should answer Issue III in the negative in the interests of justice and judicial economy by expediting the correction of records where appropriate.

WHEREFORE, the United States respectfully requests this Honorable Court hold that a certificate of correction is not required by R.C.M. 1104(d)[24] in every instance a CCA finds a record to be incomplete due to a missing exhibit.

[24] The 2019 edition of the Manual for Courts-Martial, United States, has re-codified R.C.M. 1104(d) in R.C.M. 1112(d).

## CONCLUSION

**WHEREFORE**, the United States respectfully requests this Honorable Court deny Appellant's claim as to Issues I and II, hold that a certificate of correction is not required in every case where the record is incomplete or defective due to a missing exhibit, and affirm the findings and sentence.

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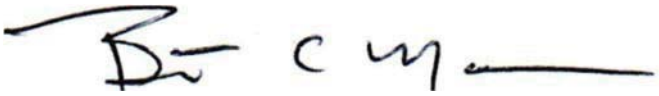

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## CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and counsel for the amicus curiae on 27 September 2019.

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## COMPLIANCE WITH RULE 24(d)

1. This answer complies with the type-volume limitation of Rule 24(c) because:

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2. This brief complies with the typeface and type style requirements of Rule 37 because:

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/s/_____

PETER F. KELLETT, Capt, USAF

Attorney for USAF, Government Trial and Appellate Counsel Division

Dated: 27 September 2019

# APPENDIX A

# United States v. Culverhouse

United States Army Court of Criminal Appeals

June 30, 2014, Decided

ARMY 20120233

**Reporter**
2014 CCA LEXIS 447 *

UNITED STATES, Appellee v. Specialist DAVID C. CULVERHOUSE, United States Army, Appellant

**Notice:** NOT FOR PUBLICATION

**Prior History: [*1]** Seventh U.S. Army Joint Multinational Training Command. Wendy Daknis, Military Judge. Lieutenant Colonel David E. Mendelson, Staff Judge Advocate (pretrial). Major John L. Kiel, Jr., Acting Staff Judge Advocate (recommendation). Lieutenant Colonel David E. Mendelson, Staff Judge Advocate (addendum).

## Core Terms

convening, defense counsel, omission, matters, sentence, missing, court-martial, military, former wife, clemency

## Case Summary

**Overview**
HOLDINGS: [1]-Assuming arguendo that the incomplete exhibit amounted to a substantial omission from the servicemember's record of trial under R.C.M. 1103(b)(2)(B), Manual Courts-Martial, that issue was rendered moot by the production and attachment of a copy of the DVD to the record; [2]-Government's failure to provide the DVD exhibit to the convening authority prior to his approval of the findings and sentence in the member's court-martial did not mandate a return of the record for a new review and action because defense counsel did not protest the staff judge advocates's effort to move the case forward without it and did not bring the matter to the attention of the convening authority in his R.C.M. 1105 and 1106, Manual Courts-Martial, clemency matters.

**Outcome**
Findings of guilty and sentence affirmed.

## LexisNexis® Headnotes

Evidence > Inferences & Presumptions > Presumptions

Military & Veterans Law > ... > Courts Martial > Sentences > Confinement

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Trial Procedures > General Overview

Military & Veterans Law > ... > Courts Martial > Sentences > Punitive Discharge

***HN1***[] **Inferences & Presumptions,**

**Presumptions**

A question of whether a record of trial is incomplete is one that presents a question of law that an appellate court reviews de novo. Records of trial that are not substantially verbatim or are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of 6 months. R.C.M. 1103(b)(2)(B), Manual Courts-Martial. A substantial omission renders the record of trial incomplete and raises a presumption of prejudice. But insubstantial omissions do not raise a presumption of prejudice or affect that record's characterization as a complete one.

Military & Veterans Law > Military Justice > Counsel

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

***HN2***[] **Military Justice, Counsel**

If defense counsel does not make a timely comment on an omission in a staff judge advocate's recommendation, an error is waived unless it is prejudicial under plain error analysis.

**Counsel:** For Appellant: Lieutenant Colonel Jonathan F. Potter, JA; Captain A. Jason Nef, JA; Captain Robert N. Michaels, JA (on brief).

For Appellee: Colonel John P. Carrell, JA; Lieutenant Colonel James L. Varley, JA; Major Kenneth W. Borgnino, JA; Captain Chad M. Fisher, JA (on brief).

**Judges:** Before COOK, CAMPANELLA, and HAIGHT, Appellate Military Judges. Senior Judge COOK and Judge CAMPANELLA concur.

**Opinion by:** HAIGHT

## Opinion

SUMMARY DISPOSITION

HAIGHT, Judge:

A military judge sitting as a general court-martial convicted appellant, in accordance with his pleas, of two specifications of failure to report, two specifications of failure to obey a lawful order, and one specification of larceny of property of some value, in violation of Articles 86, 92, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, 121 [hereinafter UCMJ]. Moreover, the military judge convicted appellant, contrary to his pleas, of three additional specifications of larceny **[*2]** of property of some value. The military judge sentenced appellant to a bad-conduct discharge, confinement for ten months, forfeiture of all pay and allowances, and to be reduced to the grade of E-1. The convening authority approved the adjudged sentence and credited appellant with twenty-five days of confinement credit.

This case is before us for review under Article 66, UCMJ. Appellant raises two assignments of error to this court, one of which merits discussion but no relief.

**BACKGROUND**

During presentencing defense counsel admitted as Defense Exhibit I (DE-I), a "Good Soldier Book" in extenuation and mitigation. This exhibit included various letters, photographs, awards, and citations highlighting different accomplishments and relationships as well as challenges and adversity in appellant's life. Among these matters was a digital versatile disc (DVD) that contained a slideshow set to music depicting appellant and his former wife. Defense counsel explained this exhibit "demonstrates to the court how in love [appellant] was with his [former wife], how well they worked together then, and then shows the effect of her

leaving him . . . how it affected him."[1]

At the conclusion of appellant's court-martial in March 2012, the military judge permitted appellant's trial defense team to retain some of the photographs and documents from his Good Soldier Book and then substitute copies into the record of trial so the originals could be returned to appellant. Specifically, after trial, the noncommissioned officer in charge (NCOIC) of the Trial Defense Service (TDS) office asked for the DVD in order to make copies and send the original back to appellant's mother. Erroneously, he sent the original DVD back to appellant's mother without making copies. In a memorandum completed in June 2012, the NCOIC further explained that multiple efforts to retrieve the DVD from appellant's mother had failed. Seven weeks later the acting staff judge advocate completed his post-trial recommendation (SJAR) to the convening authority without any mention of the missing DVD.

Approximately five weeks later, defense **[*4]** counsel submitted clemency matters to the convening authority—pursuant to Rule for Courts-Martial [hereinafter R.C.M.] 1105—omitting any reference to the DVD or how appellant's relationship with his former wife affected his behavior. Instead, defense counsel[2] focused narrowly on claims the government did not disclose potentially exculpatory information before appellant's trial, and that the military judge committed errors relating to the admission of specific evidence during the court-martial.

On appeal, appellate defense counsel asserted that the missing DVD amounted to a "substantial omission" from the record, thereby precluding this court from affirming a punitive discharge "or any other punishment that exceeds that which could be imposed by a special court-martial." The government responded by filing a motion requesting this court issue a subpoena to appellant's mother to compel production of the missing DVD.

This court then directed the government to answer whether the missing DVD was "relevant to and necessary to the disposition of appellant's case on appeal" and if the government "concede[d] the **[*5]** missing DVD [was] a substantial omission from the record of trial." The government responded by arguing the DVD would "contribute to [its] response in a positive way" but did not concede its absence was a substantial omission from the record. It also renewed its request that this court compel production of the DVD from appellant's mother. Appellate defense counsel answered that even if the DVD was produced, "a more fundamental issue is that there is no evidence that the convening authority was ever able to view the exhibit when determining what action to take in the case."

On 20 September 2013, this court issued a Subpoena Duces Tecum, ordering appellant's mother to deliver the missing DVD to the court within five weeks. On 21 October 2013, the DVD was secured from appellant's mother by an agent from the U.S. Army Criminal Investigative Command, and a copy of the disc was forwarded to government appellate counsel. The government subsequently filed a brief asserting that the production of the DVD completed the record of trial and that a new convening authority action was unnecessary because there was no "colorable showing of prejudice." This court granted the government's motion to attach **[*6]** a copy of the disc to the record of trial on 4 December 2013.

## LAW AND DISCUSSION

***HN1***[↑] The question of "whether the record of trial is incomplete, is one that presents a question of law" that this court reviews *de novo*. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000). "Records of trial that are not substantially verbatim

[1] Appellant's mother testified during **[*3]** presentencing and explained appellant was "devastated" after his wife left him. In his unsworn statement, appellant explained that he and his former wife "started having problems" after his return from a deployment to Afghanistan, and she "ended up leaving [him]."

[2] The same defense counsel that represented appellant at trial also submitted appellant's clemency matters.

or are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of 6 months." *Id*. at 111 (citing R.C.M. 1103(b)(2)(B)). "A substantial omission renders a record of trial incomplete and raises a presumption of prejudice . . . . [But] insubstantial omissions . . . do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id*. However, here, assuming *arguendo* the incomplete exhibit amounted to a substantial omission from appellant's record of trial, that issue has been rendered moot by the production and attachment of a copy of the DVD to the record.

Nonetheless, we are left to address the corollary issue of whether the government's failure to provide this exhibit to the convening authority prior to his approval of the findings and sentence in appellant's court-martial mandates a return of the record for a new review and action. We conclude it does not.

Here, it appears the **[*7]** TDS office was responsible for the initial loss of accountability of the DVD contained in DE-I. Though we question the wisdom of proceeding with the SJAR without an express waiver of this issue, defense counsel did not protest the SJA's effort to move the case forward without it nor did he bring this matter to the attention of the convening authority in his R.C.M. 1105 clemency matters.[3] Instead, as noted above, defense counsel focused on other concerns that presumably he and appellant deemed more compelling than the missing DVD.

Notwithstanding the above and more importantly, a careful review of all the extenuation and mitigation evidence offered and admitted during appellant's presentencing case reveals how insignificant this issue was relative to other matters upon which the defense focused. **[*8]** First, the DVD and a few other photographs of appellant and his wife amounted to only two of twenty-four items listed in the "table of contents" of his Good Soldier Book. Other items included letters of support from noncommissioned officers, a NATO Medal citation from Afghanistan, and dozens of pictures of appellant and his family, including his younger brother who suffers from cerebral palsy. Secondly, in addition to the Good Soldier Book, numerous other exhibits were admitted, including 145 pages of appellant's medical records reflecting various physical and emotional maladies, as well as Army medical and substance abuse regulations suggesting his command had inadequately addressed his needs. Lastly, although appellant's unsworn statement, his mother's testimony, and defense counsel's presentencing argument each briefly touched on appellant's failed marriage, all of these ultimately focused more on his relationship with his younger brother and the Army's failure to sufficiently address his physical and mental health problems.

In order for appellant to obtain relief under these circumstances, he must make a "colorable showing of possible prejudice" resulting from the omission of mitigating **[*9]** evidence that should have been considered by the convening authority before taking action on his case. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000) (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998)); *see also United States v. Scalo*, 60 M.J. 435 (C.A.A.F. 2005) (***HN2***[↑] "If defense counsel does not make a timely comment on an omission in the SJA's recommendation, the error is waived unless it is prejudicial under plain error analysis."). Here, appellant does not meet this burden. He was convicted of multiple offenses at a general court-martial and his adjudged sentence to confinement was actually lower than the sentence cap agreed to by the convening authority. It was appellant's own defense team that created the initial problem by failing to copy the DVD as promised, and his defense counsel did not even comment on its absence in the R.C.M. 1105/1106 submission.

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[3] Though not dispositive, it is worth noting that R.C.M. 1107(b)(3)(A) enumerates matters the convening authority "*shall* consider" before taking action, while 1107(b)(3)(B) alludes to additional matters the convening authority "*may* consider" before taking action. (emphasis added). Among the items included in R.C.M. 1107(b)(3)(A) are "any matters submitted by the accused under R.C.M. 1105." On the other hand, the "record of trial" falls under 1107(b)(3)(B).

Further, while appellant elected not to highlight his failed marriage in his clemency submission, it was still referenced in various other matters in the record of trial available to the convening authority.[4] Under the totality of the circumstances, we find the insubstantial omission of the DVD from the record available to the convening authority created no prejudice to appellant's opportunity for clemency.

## CONCLUSION

On consideration of the entire record and submissions of the parties, we hold the findings of guilty and the sentence as approved by the convening authority are correct in law and fact. Accordingly, the findings of guilty and the sentence are AFFIRMED.

Senior Judge COOK and Judge CAMPANELLA concur.

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End of Document

[4] In fact, the government initially objected to the DVD as merely cumulative **[*10]** with other admitted evidence showing appellant's one-time affection for and closeness with his former wife.

# United States v. Small

United States Air Force Court of Criminal Appeals

March 6, 2018, Decided

No. ACM S32426

**Reporter**
2018 CCA LEXIS 121 *

UNITED STATES, Appellee v. Paul N. SMALL, Staff Sergeant (E-5), U.S. Air Force, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Review denied by United States v. Small, 2018 CAAF LEXIS 313 (C.A.A.F., May 31, 2018)

**Prior History:** **[*1]** Appeal from the United States Air Force Trial Judiciary. Military Judge: Francisco Mendez. Approved sentence: Bad-conduct discharge, reduction to E-3, and a reprimand. Sentence adjudged 26 May 2016 by SpCM convened at Joint Base Andrews, Maryland.

## Core Terms

military, convening, sentence, pretrial, court-martial, pretrial restraint, post-trial, punitive, specification, adjudged, instructions, trial defense counsel, first sergeant, contends, bad conduct discharge, severe punishment, bad-conduct, proceedings, reduction, benefits, rights, violation of article, second-term, enlistment, indicates, terminate, offenses, alcohol, missing, travel

## Case Summary

**Overview**
HOLDINGS: [1]-A servicemember who was charged with absenting himself from his place of duty, failure to go to his place of duty, dereliction of duty, making a false official statement, drunk driving, wrongful appropriation of nonmilitary property, disorderly conduct, and incapacitation for the performance of his duties, in violation of UCMJ arts. 86, 92, 107, 111, 121, and 134, 10 U.S.C.S. §§ 886, 892, 907, 911, 921, and 934, was not subjected to unlawful pretrial restraint in violation of UCMJ art. 13, 10 U.S.C.S. § 813, when he was restricted to a dormitory on base until the conclusion of his trial so his command could monitor his conduct and wellbeing; [2]-The military judge did not err during the servicemember's trial when he crafted an instruction for the panel which addressed a question the panel asked about the effect of a bad-conduct discharge.

**Outcome**
The court affirmed the findings and sentence but directed the publication of a corrected court-martial order which corrected an error that appeared in the original order.

## LexisNexis® Headnotes

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Types of Courts-Martial > Special Courts-Martial

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN1***[] **Judicial Review, Courts of Criminal Appeals**

A complete record of the proceedings and testimony shall be prepared in each special court-martial where the adjudged sentence includes, inter alia, a bad-conduct discharge. Unif. Code Mil. Justice art. 54, 10 U.S.C.S. § 854. A complete record of trial includes all appellate exhibits, or an adequate substitute with the permission of the military judge. R.C.M. 1103(b)(2)(D)(v) and (c)(1), Manual Courts-Martial. However, neither Article 54 nor R.C.M. 1103 limits the discretion of a court of criminal appeals to remedy an error in compiling a complete record. The proper completion of posttrial processing and whether an omission from a record of trial is substantial are questions of law the United States Air Force Court of Criminal Appeals reviews de novo.

Military & Veterans Law > ... > Courts Martial > Sentences > Credits

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Unlawful Restraint

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN2***[] **Sentences, Credits**

The United States Air Force Court of Criminal Appeals reviews de novo the question of whether an appellant is entitled to confinement credit for a violation of Unif. Code Mil. Justice art. 13, 10 U.S.C.S. § 813. Article 13 prohibits two things: (1) the imposition of punishment prior to trial; and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure an accused's presence for trial.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

***HN3***[] **Apprehension & Restraint of Civilians & Military Personnel, Restrictions**

R.C.M. 304(a), Manual Courts-Martial ("MCM") identifies various forms of pretrial restraint that may lawfully be imposed on a servicemember's liberty before and during disposition of court-martial offenses. One authorized form of pretrial restraint is restriction in lieu of arrest by oral or written orders directing a person to remain within specified limits. R.C.M. 304(a)(2), MCM. Any commissioned officer may order the pretrial restraint of an enlisted member, and a commanding officer may delegate such authority to noncommissioned officers within the officer's command. R.C.M. 304(b)(2) and (3), MCM. Such restraint may be ordered when there is probable cause—that is, a reasonable belief—that an offense triable by court-martial has been committed, that the person restrained committed it, and that the restraint ordered is required by the circumstances. R.C.M. 304(c), MCM. Pretrial restraint other than confinement is imposed by notifying a member orally or in writing of the restraint and its terms and limits. R.C.M. 304(d), MCM. Pretrial restraint lasts until the person is released by someone authorized to impose the restraint, a sentence is adjudged, an accused is acquitted of all charges, or all charges are dismissed. R.C.M. 304(g), MCM.

Military & Veterans Law > Military Justice > Nonjudicial Punishments

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

***HN4***[] **Military Justice, Nonjudicial Punishments**

Notwithstanding the availability of restriction as a nonjudicial punishment under Unif. Code Mil. Justice art. 15, 10 U.S.C.S. § 815, R.C.M. 304, Manual Courts-Martial ("MCM") plainly authorizes nonpunitive use of restriction as a form of pretrial restraint. R.C.M. 304(f), MCM.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

***HN5***[] **Apprehension & Restraint of Civilians & Military Personnel, Restrictions**

Lawful pretrial restriction requires, inter alia, probable cause, that is, a reasonable belief on the part of the individual imposing the restriction that the restraint ordered is required by the circumstances.

Military & Veterans Law > Military Justice > Apprehension & Restraint of Civilians & Military Personnel > Restrictions

***HN6***[] **Apprehension & Restraint of Civilians & Military Personnel, Restrictions**

R.C.M. 304(g), Manual Courts-Martial provides that pretrial restriction imposed under R.C.M. 304 shall terminate when a sentence imposed by a court-martial is adjudged.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Instructions

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Judicial Discretion

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN7***[] **Plain Error, Definition of Plain Error**

Whether a court-martial panel was properly instructed is a question of law the United States Air Force Court of Criminal Appeals reviews de novo. Failure to object to an instruction given or omitted waives the objection absent plain error. R.C.M. 920(f), Manual Courts-Martial. Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights. A military judge has substantial discretion in deciding whether to give an instruction to court members. A military judge is required to tailor instructions to the evidence and issues present in a particular case.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Criminal Law & Procedure > ... > Reviewability > Waiver > Triggers of Waivers

***HN8***[] **Plain Error, Definition of Plain Error**

"Forfeiture" is the failure to timely assert a right, whereas "waiver" is the intentional relinquishment of a known right. Appellate courts will review forfeited issues for plain error, but waiver extinguishes an appellant's right to raise an issue on

appeal.

**Counsel:** For Appellant: Major Kevin R. Cayton, USAF; Major Jarett F. Merk, USAF.

For Appellee: Lieutenant Colonel Joseph J. Kubler, USAF; Lieutenant Colonel G. Matt Osborn, USAF; Major Mary Ellen Payne, USAF; Major Meredith L. Steer, USAF; Gerald R. Bruce, Esquire.

**Judges:** Before JOHNSON, MINK, and DENNIS, Appellate Military Judges. Senior Judge JOHNSON delivered the opinion of the court, in which Judge MINK and Judge DENNIS joined.

**Opinion by:** JOHNSON

## Opinion

JOHNSON, Senior Judge:

A military judge found Appellant guilty, in accordance with his pleas, of two specifications of absenting himself from his place of duty, two specifications of failure to go to his place of duty, one specification of dereliction of duty, one specification of making a false official statement, one specification of drunk driving, one specification of wrongful appropriation of nonmilitary property of a value of under $500.00 on divers occasions, one specification of disorderly conduct, and one specification **[*2]** of incapacitation for the performance of his duties due to previous overindulgence in alcohol or drugs, in violation of Articles 86, 92, 107, 111, 121, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 886, 892, 907, 911, 921, 934.[1] A special court-martial composed of officer members sentenced Appellant to a bad-conduct discharge, reduction to the grade of E-2, restriction to Joint Base Andrews, Maryland for two months, and a reprimand. The convening authority approved only the bad-conduct discharge, reduction to the grade of E-3, and reprimand.

Appellant's assignments of error enumerate the following issues for our consideration on appeal: (1) Whether Appellant was subjected to unlawful pretrial and post-trial restraint in violation of Article 13, UCMJ, 10 U.S.C. § 813, Rule for Courts-Martial (R.C.M.) 304, and his constitutional rights, and whether the record of trial is complete; (2) Whether the court-martial promulgating order (CMO) contains an incorrect summary of the charges;[2] and (3) Whether the military judge provided an improper sentencing instruction to the court members. We find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

### I. Background

Appellant served effectively in the emergency **[*3]** management career field until an acrimonious and protracted divorce led to financial and emotional difficulties that culminated in a series of finance-, alcohol-, and absence-related offenses. From March 2015 until August 2015, Appellant repeatedly misused his Government Travel Card (GTC), apparently to pay for routine personal expenses. When Appellant's first sergeant later questioned him about these transactions, Appellant falsely claimed he had not seen his GTC since he last traveled for temporary duty in the spring of 2015.

In August 2015, Appellant was stopped by a civilian police officer while driving under the influence of alcohol. Although initially cooperative, Appellant became noncompliant, struggled briefly

[1] The wrongful appropriation was a lesser-included offense of a specification alleging larceny of nonmilitary property of a value of under $500.00 on divers occasions in violation of Article 121, UCMJ, to which Appellant pleaded not guilty. The Government declined to proceed on the greater charge of larceny, and the military judge entered a finding of not guilty as to that offense.

[2] Appellant notes the CMO misidentifies the location from which Appellant absented himself as alleged in Specification 1 of the Additional Charge as "building 2565" vice "building 3465," as charged, and contends a new CMO is required. The Government concurs, as do we. We direct corrective action in our decretal paragraph, and the issue requires no further discussion.

with the officer, and was placed in handcuffs. Appellant then spat on the hood of the officer's car.

In September 2015, Appellant reported for duty—specifically, to attend an Alcohol and Drug Abuse Prevention and Treatment Program appointment—under the influence of alcohol. Appellant's first sergeant took him first to security forces and then to the medical group to have his blood drawn. The first sergeant then took Appellant to Appellant's work area and told him to remain **[*4]** there pending further instructions. However, shortly thereafter Appellant departed his work center and walked several miles to his off-base residence, evading his superiors' efforts to find him. Appellant's command finally located him that evening at his residence.

On 15 January 2016, Appellant failed to report for duty, remaining at his residence and refusing to answer the door for a supervisor until the supervisor gained entry with the assistance of the apartment manager. After this incident, Appellant's first sergeant, with authority delegated by Appellant's commander, issued Appellant a written order restricting him to Joint Base Andrews. Specifically, the order restricted Appellant to a particular dormitory room on the base until the conclusion of his pending court-martial. The order included a number of exceptions, including: performing official duties; going to the dining facility for a meal; going to the base exchange or commissary; going to the base fitness center; obtaining medical care, including dental and mental health services; meeting with his defense counsel; attending religious services on base or meeting with a chaplain; and meeting with the inspector general. The **[*5]** order further provided that other travel required approval from the first sergeant. The stated reasons for the order were "concern for [Appellant's] wellbeing" and "concern that [he] may engage in further criminal misconduct, to include the failure to appear at [his] trial." The restriction was to last "until the conclusion of [Appellant's] pending trial" unless Appellant was notified it was lifted or extended.

On both 11 and 12 February 2016, Appellant failed to report on time for his fitness assessment. Nevertheless, he was permitted to travel to New York for emergency leave from 8 to 24 March 2016 related to the terminal illness and funeral of his mother. Appellant returned from this leave on time and without incident and remained under the restriction until his court-martial 23-26 May 2016.

The Defense filed a pretrial motion for appropriate relief requesting the military judge grant some unspecified amount of credit against Appellant's sentence because of the pretrial restriction. The Government opposed the motion. The military judge issued a written ruling denying the motion on 23 May 2016, the first day of Appellant's trial. The military judge concluded that the imposition of **[*6]** the restriction, contrary to the Defense's argument, was not a violation of Appellant's rights to due process, nor did it constitute illegal pretrial punishment, nor was Appellant entitled to administrative credit against his sentence for restriction short of physical restraint.

At trial, after accepting Appellant's pleas but before seating the court members, the military judge explored with the Defense whether Appellant had been subjected to illegal pretrial punishment forbidden by Article 13, UCMJ. Trial defense counsel affirmed that Appellant had not been so punished. Appellant agreed.

On 31 May 2016, five days after the conclusion of Appellant's court-martial, trial defense counsel sent the convening authority a "Request for Speedy Post-trial Processing & Termination of Unlawful Post-trial restraint, and to Defer Reduction in Rank." Therein, trial defense counsel asserted, *inter alia*, that Appellant was being unlawfully restricted to base pursuant to the adjudged sentence because that punishment had not yet been approved by the convening authority. Therefore, Appellant requested day-for-day administrative credit for each day of restriction beginning 26 May 2016, the date his trial **[*7]** ended, through 31 May 2016, the date of his request, as well as two-for-one credit for any

further days of restriction on or after 1 June 2016 until convening authority action. On 3 June 2016, the convening authority denied the request for relief from unlawful post-trial restraint. The convening authority found Appellant "was not unlawfully restrained after the trial and there is no basis for this request."[3]

On 27 July 2016, pursuant to R.C.M. 1105, the Defense submitted matters for the convening authority's consideration prior to taking action on the results of Appellant's court-martial. Trial defense counsel requested, *inter alia*, that Appellant "be given six days of credit for the restriction to his dorm room imposed by [Appellant's] unit subsequent to the sentence." However, trial defense counsel acknowledged the convening authority's "predecessor in command disagreed with my assertion that [Appellant] was restricted to his dorm room for six days after his trial . . . ." Ultimately, the convening authority disapproved the entirety of Appellant's adjudged restriction to base for 60 days, and approved a reduction in rank to E-3 rather than E-2 "due to the member's good duty performance while **[*8]** awaiting trial."

## II. Discussion

### A. Pretrial and Post-Trial Restraint

Appellant's first assignment of error incorporates three distinct issues, which we address in turn: the completeness of the record; unlawful pretrial restraint; and unlawful post-trial restraint.

### 1. Completeness of the Record

#### *a. Additional Background*

The military judge directed that his written ruling on the Defense's motion for appropriate relief seeking sentence credit for Appellant's pretrial restraint would be marked as Appellate Exhibit XIV. However, this 23 May 2016 ruling was missing from the original record of trial. Instead, a duplicate copy of the military judge's 14 March 2016 ruling on a request for continuance (also inserted as Appellate Exhibit VII) was marked and inserted as Appellate Exhibit XIV.

On 22 September 2017, the Government moved to attach a copy of the military judge's 23 May 2016 ruling to the record of trial. This court granted the motion on 2 October 2017.

#### *b. Law*

***HN1***[] A complete record of the proceedings and testimony shall be prepared in each special court-martial where the adjudged sentence includes, *inter alia*, a bad-conduct discharge. Article 54, UCMJ, 10 U.S.C. § 854. A complete record of trial includes all appellate **[*9]** exhibits, or an adequate substitute with the permission of the military judge. R.C.M. 1103(b)(2)(D)(v), (c)(1); *United States v. Gaskins*, 72 M.J. 225, 230 (C.A.A.F. 2013). However, neither Article 54, UCMJ, nor R.C.M. 1103 limits the discretion of a court of criminal appeals to "remedy an error in compiling a complete record." *Gaskins*, 72 M.J. at 230. The proper completion of post-trial processing and whether an omission from a record of trial is substantial are questions of law we review de novo. *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000); *United States v. LeBlanc*, 74 M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (citations omitted).

#### *c. Analysis*

Because the missing ruling has now been attached to the record of trial, the record includes all exhibits and is no longer incomplete. However, Appellant contends he remains unfairly prejudiced by the error and his bad-conduct discharge should be set aside. We disagree.

[3] The convening authority also denied Appellant's request for deferment of his reduction in rank.

First, Appellant argues that, because Appellate Exhibit XIV was missing from the record of trial when the convening authority took action, the convening authority was denied the opportunity to consider the entire record in accordance with R.C.M. 1107(b)(3)(B). Appellant acknowledges, however, that the convening authority is not *required* to consider the record of trial, much less every appellate exhibit therein. Moreover, both the Defense motion for appropriate relief and the Government response were included in the record of trial, **[*10]** and the transcript of the proceedings makes clear the military judge denied the motion. Therefore, the substance of Appellant's motion, the Government response, and the fact that the military judge denied the motion were all available to the convening authority. Furthermore, in contrast to Appellant's alleged *post*-trial restriction, the Defense clemency submission to the convening authority did not challenge the lawfulness of his pretrial restriction, which was the subject of the missing ruling. Appellant fails to explain how either his clemency submission or the convening authority's action might have been any different had the erroneous omission of the military judge's ruling not occurred.

Second, Appellant argues that the delay in adding the military judge's ruling to the record unfairly limited the time available to the Defense to review, research, and analyze the ruling to prepare his appeal. Appellant contends this placed him at a disadvantage with respect to the Government, which was responsible for creating a complete record. The court received Appellant's reply brief on 4 October 2017, 12 days after the Government provided the missing exhibit. The ruling is only five pages **[*11]** long. Moreover, the Defense motion and Government response were included in the record and address the same evidence and issues. We are confident that Appellant has had an adequate opportunity to prepare the issue and that our ability to fully consider the issue has not been adversely affected. Accordingly, we deny Appellant's request to set aside the bad-conduct discharge on this basis.

**2. Pretrial Restraint**

**a. Law**

***HN2***[] We review de novo the question of whether an appellant is entitled to credit for a violation of Article 13, UCMJ. *United States v. Fischer*, 61 M.J. 415, 418 (C.A.A.F. 2005) (citing *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002)). "Article 13, UCMJ, prohibits two things: (1) the imposition of punishment prior to trial, and (2) conditions of arrest or pretrial confinement that are more rigorous than necessary to ensure the accused's presence for trial." *United States v. King*, 61 M.J. 225, 227 (C.A.A.F. 2005).

***HN3***[] R.C.M. 304(a) identifies various forms of pretrial restraint that may lawfully be imposed on a member's liberty before and during disposition of court-martial offenses. One authorized form of pretrial restraint is "restriction in lieu of arrest" by "oral or written orders directing the person to remain within specified limits." R.C.M. 304(a)(2). Any commissioned officer may order the pretrial restraint of an enlisted member, and a commanding officer may delegate **[*12]** such authority to noncommissioned officers within the officer's command. R.C.M. 304(b)(2)-(3). Such restraint may be ordered when there is probable cause—that is, a reasonable belief—that an offense triable by court-martial has been committed, that the person restrained committed it, and that the restraint ordered is required by the circumstances. R.C.M. 304(c). Pretrial restraint other than confinement is imposed by notifying the member orally or in writing of the restraint and its terms and limits. R.C.M. 304(d). Pretrial restraint lasts until the person is released by someone authorized to impose the restraint, a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed. R.C.M. 304(g).

**b. Analysis**

Appellant advances several theories as to why his pretrial restraint entitles him to sentence relief. We find none of them persuasive.

First, Appellant argues that his restriction to his quarters and certain other locations on base amounted to illegal pretrial punishment in violation of Article 13, UCMJ. He compares the terms of his restriction to the form of restriction that may be imposed on members as a result of nonjudicial punishment proceedings. *See* **[*13]** *Manual for Courts-Martial, United States* (2016 ed.), pt V, ¶ 5.c.(2). He further contends the excessive nature of the restriction indicates an intent to punish him. ***HN4***[] Notwithstanding the availability of restriction as a non-judicial punishment under Article 15, UCMJ, R.C.M. 304 plainly authorizes non-punitive use of restriction as a form of pretrial restraint. *See* R.C.M. 304(f) ("Pretrial restraint is not punishment . . . .") Furthermore, in light of Appellant's history of alcohol-related offenses, unauthorized absence from duty, and evasion of contact with his superiors while so absent, the first sergeant's testimony regarding the purpose of the restriction, as well as the terms and implementation of the restriction itself, we are satisfied Appellant's command did not intend it as a punishment, but as a necessary means to control Appellant's misbehavior and ensure his presence for duty. *See United States v. Palmiter*, 20 M.J. 90, 95 (C.M.A. 1985) ("[W]e must look to the intent behind the imposition of the condition to resolve the punishment inquiry.")

Second, Appellant contends the restriction failed to comply with R.C.M. 304 itself because it was not "required by the circumstances." R.C.M. 304(c)(3). As described above, ***HN5***[] lawful pretrial restriction requires, *inter alia*, probable cause, that is, a "reasonable belief" on the part of the individual **[*14]** imposing the restriction that the restraint ordered is required by the circumstances. *Id.* Based on the record before us, we are satisfied the first sergeant had such a reasonable belief. Appellant argues the fact that his 8-24 March 2016 release from restriction was unmarred by additional misconduct and the convening authority's approval of a reduction only to E-3 rather than E-2 in recognition of his "good duty performance while awaiting trial" indicate his restriction was unnecessary and excessive. However, the fact that Appellant's behavior from the imposition of the restraint until his trial was largely, although not entirely, free of additional misconduct does not prove the restriction was unnecessary. Rather, it suggests that these measures were effective in curbing his prior pattern of misconduct. Moreover, that his first sergeant temporarily lifted the restriction to permit him to travel for family purposes underscores the absence of punitive intent and that the restriction was reasonably applied.

Finally, Appellant appears to argue, as the Defense did in its pretrial motion, that the criteria for pretrial restriction under R.C.M. 304 are inadequate to protect Appellant's "basic due process **[*15]** rights guaranteed by the Fifth Amendment to the United States Constitution." Appellant contends the Rules for Courts-Martial provide no avenue to challenge his pretrial restriction before trial. The military judge rejected this argument, and so do we. First, we note Appellant's command correctly followed the procedures for implementing pretrial restriction in accordance with the rule. Second, as the military judge noted, Appellant might have resorted to Article 138, UCMJ, 10 U.S.C. § 938, to challenge his continued restriction if he felt it was unjustified.[4] Appellant cites no decision of this or any court that stands for the proposition that the pretrial restraint procedures established in R.C.M. 304 are unconstitutional, or even that such restriction short of physical restraint warrants credit against an accused's sentence. *Cf. United States v.*

[4] Article 138, UCMJ, provides any servicemember "who believes himself wronged by his commanding officer, and who, upon application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and shall take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon." 10 U.S.C. § 938.

*Rendon*, 58 M.J. 221, 224 (C.A.A.F. 2003) (finding the procedural protections and sentence credit provided for pretrial confinement in R.C.M. 305 inapplicable to lesser forms of restraint). Like the military judge, we decline to impose additional procedural requirements by "judicial fiat." Accordingly, we find Appellant is not entitled to relief as a result of his pretrial restriction.

### 3. Post-Trial Restraint

Appellant renews the claim he made to the convening authority after trial **[*16]** that his restriction was unlawfully continued after his court-martial. Appellant correctly notes that ***HN6***[] pretrial restriction imposed under R.C.M. 304 "shall terminate" when a sentence is adjudged. R.C.M. 304(g). However, Appellant has offered no evidence, apart from the bare assertion in post-trial memoranda from his trial defense counsel to the convening authority, that his pretrial restriction was actually continued post-trial. After receiving trial defense counsel's complaint, the convening authority determined there was no unlawful post-trial restriction. The restriction order plainly informs Appellant that the restriction ends upon the conclusion of his court-martial unless he is notified of its extension. On this record, we find Appellant has failed to demonstrate a factual basis for relief for unlawful post-trial punishment.

## B. Sentencing Instruction

### 1. Additional Background

During sentencing proceedings, the military judge instructed the court members with respect to the effect of a bad-conduct discharge as follows:

> You are advised that the stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused **[*17]** other advantages which are enjoyed by one whose discharge characterization indicates that he has served honorably. A punitive discharge will affect an accused's future with regard to his legal rights, economic opportunities, and social acceptability.
>
> This court may adjudge a bad conduct discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Air Force establishment. However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge that would terminate the accused's current term of service. A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct even though such bad conduct may not include the commission of serious offenses of a military or civil nature.

In the course of their deliberations on a sentence, the court members asked the military judge whether they could impose an under other than honorable conditions administrative discharge and whether Appellant's guilty plea would result in Appellant being a "convicted felon." The military judge answered these questions **[*18]** without objection by either party. The president of the court then indicated he had an additional question, which led to the following exchange:

> PRES [President of the Court]: Could you please clarify for us, Your Honor, the periods of service when you talked about the bad conduct discharge only applying to this period of service; does it only apply to this specific enlistment, which I think started in maybe 2011 . . . [o]r does it apply across his service with the United States Air Force since his first enlistment?
>
> MJ [Military Judge]: I'm going to read that specific one to you and then if you need additional clarification I may just have to recess to get my wording correctly for you.
>
> This court may adjudge a bad conduct discharge. Such a discharge deprives one of

substantially all benefits administered by the Department of Veterans Affairs and the Air Force establishment. I think this is the portion that the members are asking me about.
PRES: Yes, sir, I think so.
MJ: However, vested benefits from a prior period of honorable service are not forfeited by receipt of a bad conduct discharge that would terminate the accused's current term of service. Sir, does that answer your question?

PRES: **[*19]** No, that causes it.

The military judge then held an Article 39(a), UCMJ, session outside the presence of the court members. After a brief discussion with counsel for both sides, the military judge took a recess during which he composed the following proposed instruction:

> You are advised that the accused is a second-term Airman, however, no evidence is before you regarding the characterization of this prior discharge. You are further advised that the stigma of a punitive discharge is commonly recognized in our society and thus it is the most severe punishment this court may adjudge. In deciding [ ] on whether a punitive discharge is warranted in this case, your focus should be on whether the offense committed by this accused and all the other evidence, both mitigating and aggravating, warrant such severe punishment, not on other matters not properly before this court-martial.

The military judge asked counsel for both sides whether there were objections. Trial defense counsel responded:

> DC [Defense Counsel]: Your Honor, just in terms of the . . . the very beginning instruction there was just one thing that caught my attention. It was the phrase "second-term Airman" it maybe suggests a certain **[*20]** number of enlistments. Just maybe rephrase to "he is no longer serving out his first enlistment." And I don't know if that makes it awkward. I know the negatives here, we're all cautious about the negatives.
> MJ: Defense Counsel, instead of "you are advised," "as the evidence before you indicates the accused is a second-term Airman"?
> DC: That's fine, Your Honor.

The military judge proceeded to give the following instruction to the court members:

> As the evidence before you indicates the accused is a second-term Airman; however, no evidence is before you regarding the characterization of this prior discharge. You are further advised that the stigma of a punitive discharge is commonly recognized in our society and thus, it is the most severe punishment this court may adjudge. In deciding on whether a punitive discharge is warranted in this case, your focus should be on whether the offense committed by this accused and all the other evidence, both mitigating and aggravating warrant such severe punishment, not on other matters not properly before this court-martial.

The court members indicated they had no further questions. Counsel for both parties indicated they had no objections to the instructions, **[*21]** and the members returned to their deliberations.

**2. Law**

***HN7***[] Whether a panel was properly instructed is a question of law we review de novo. *United States v. McClour*, 76 M.J. 23, 25 (C.A.A.F. 2017) (citations omitted). "Failure to object to an instruction given or omitted waives the objection absent plain error." *United States v. Pope*, 69 M.J. 328, 333 (C.A.A.F. 2011) (citing R.C.M. 920(f)). "Plain error is established when: (1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007).

A military judge has substantial discretion in deciding whether to give an instruction to court members. *United States v. Maynulet*, 68 M.J. 374,

376 (C.A.A.F. 2010). A military judge is required to tailor instructions to the evidence and issues present in a particular case. *United States v. Staton*, 68 M.J. 569, 572 (A.F. Ct. Crim. App. 2009).

***HN8***[] Forfeiture is the failure to timely assert a right, whereas waiver is the intentional relinquishment of a known right. *Gladue*, 67 M.J. at 313. Appellate courts will review forfeited issues for plain error, but waiver extinguishes an appellant's right to raise an issue on appeal. *Id.* (citing *Harcrow*, 66 M.J. at 156).

### 3. Analysis

Appellant contends that the military judge's additional instruction that "the evidence before you indicates the accused is a second-term Airman" was plainly erroneous. In Appellant's view, this elaboration upon the standard punitive discharge instructions **[*22]** contained in the *Military Judge's Benchbook (Benchbook)*[5] in response to the president's question "present[ed] to the members that the defendant has already vested benefits," when in fact Appellant's specific post-service benefits were not predictable with any degree of accuracy and the entire topic of collateral consequences of the court-martial was not a proper subject for the members' consideration in deciding a sentence. The Government counters that Appellant waived this issue by trial defense counsel's failure to object to the instruction given, and that, in any event, the instruction was not erroneous.

Assuming *arguendo* that trial defense counsel's failure to object to the instruction provided to the members did not waive this issue, we find no plain error. We note the military judge provided the standard punitive discharge instructions from the *Benchbook*. When the members asked a question regarding the effect of a punitive discharge, the military judge repeated the relevant portion of those instructions. When that failed to satisfy the members, the military judge crafted an accurate further instruction tailored to the facts of the case. Moreover, it was consistent with his prior **[*23]** instructions, and it also advised the court members to focus on whether a punitive discharge was an appropriate punishment in this case based on the offenses and the evidence that was before them, "not on other matters not properly before this court-martial." That the military judge might properly have exercised his discretion to give a different instruction, or declined to provide further instructions at all, does not render the instruction he gave improper. We are not persuaded that the instruction given was clearly erroneous or that it materially prejudiced Appellant's substantial rights. *See Pope*, 69 M.J. at 333.

## III. Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.[6] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

End of Document

[5] Department of the Army Pamphlet 27-9, at 70-72 (10 Sep. 2014).

[6] As noted above, the CMO contains an error with respect to Specification 1 of the Additional Charge, where the CMO incorrectly lists "building 2565" rather than "building 3465" as the location from which Appellant absented himself. We direct the publication of a corrected CMO to remedy this error.

# United States v. Wood

United States Air Force Court of Criminal Appeals

September 22, 2016, Decided

ACM 38792

**Reporter**
2016 CCA LEXIS 565 *

UNITED STATES v. Airman DUSTIN B. WOOD United States Air Force

**Notice:** THIS OPINION IS ISSUED AS AN UNPUBLISHED OPINION AND, AS SUCH, DOES NOT SERVE AS PRECEDENT UNDER AFCCA RULE OF PRACTICE AND PROCEDURE 18.4.

**Subsequent History:** Review denied by United States v. Wood, 75 M.J. 483, 2016 CAAF LEXIS 914 (C.A.A.F., Nov. 14, 2016)

**Prior History:** **[*1]** Sentence adjudged 10 December 2014 by GCM convened at Shaw Air Force Base, South Carolina. Military Judge: Shaun S. Speranza (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 35 years, forfeiture of all pay and allowances, and reduction to E-1.

## Core Terms

words, Specification, military, sentence, armed forces, figures, missing, good order, incorrectly, substituted, discipline, reflecting, convening, omission, pleas

**Counsel:** For Appellant: Major Isaac C. Kennen.

For the United States: Colonel Laura. J. Megan-Posch; Captain Matthew L. Tusing; Gerald R. Bruce, Esquire.

**Judges:** Before DUBRISKE, HARDING, and C. BROWN Appellate Military Judges.

**Opinion by:** HARDING

## Opinion

OPINION OF THE COURT

HARDING, Judge:

Upon review of the original record of trial, this court noted that Prosecution Exhibit 17 was missing. In light of the missing sentencing exhibit, Appellant requested this court remand this case to the convening authority for the limited purpose of a rehearing as to sentence. The Government subsequently provided this exhibit by motion, which was accepted by this court and added to the record of trial. Accordingly, any issue concerning this omission has been rendered moot. *See United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982) (stating that the presumption of prejudice from substantial omissions may be overcome by the retrieval of the missing material).

We also note the Court-Martial Order (CMO) misstates the result of trial **[*2]** in two respects. First, the CMO incorrectly reflects Specification 1 of Charge II in that it includes the words: "was to the prejudice of good order and discipline in the armed forces and." Following arraignment, but

prior to Appellant's entry of pleas, the convening authority withdrew those words from Specification 1 of Charge II and the charge sheet was modified accordingly. Thereafter, Appellant only pled guilty to and was only found guilty of a specification of wrongful receipt of child pornography that was of a nature to bring discredit upon the armed forces under Article 134, UCMJ, 10 U.S.C. § 934—not to the prejudice of good order and discipline in the armed forces. We note this same error in the Report of Result of Trial Memorandum.

Second, the CMO incorrectly states the finding as to Specification 1 of Additional Charge I, specifically with regard to the excepted words and figures "on or about 16 March 2011" by reflecting a finding of Not Guilty for the same. The military judge found as follows for this specification and charge: "Of the Specification of Additional Charge I: Guilty, except the words and figures, 'on or about 16 March 2011,' substituting therefor the words and figures, '29 **[*3]** August 2011:' Of the substituted words: Guilty; Of Additional Charge I: Guilty." The military judge did not enter any finding as to the excepted language. Instead the military judge sua sponte dismissed those words concluding that since Appellant was not in an active duty status between 16 March 2011 and 29 August 2011, there was no personal jurisdiction over any offense for that period. We note this same error in the Report of Result of Trial Memorandum.

We order promulgation of a corrected CMO to accurately reflect Appellant's pleas and the military judge's findings as noted above.

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are **AFFIRMED**.

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# United States v. Escobar

United States Air Force Court of Criminal Appeals

March 24, 2016, Decided

ACM 38721

**Reporter**
2016 CCA LEXIS 199 *

UNITED STATES v. Airman Basic JOHNNY A. ESCOBAR, United States Air Force

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Review denied by United States v. Escobar, 2016 CAAF LEXIS 582 (C.A.A.F., July 18, 2016)

**Prior History: [*1]** Sentence adjudged 11 July 2014 by GCM convened at Ramstein Air Base, Germany. Military Judge: Christopher F. Leavey (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 4 years, and forfeiture of all pay and allowances.

United States v. Escobar, 73 M.J. 871, 2014 CCA LEXIS 682 (A.F.C.C.A., 2014)

## Core Terms

Specification, child pornography, military, sentencing, charges, images, trial counsel, distributing, multiplication, court-martial, exhibits, offenses, convening, convicted, guilty plea, post-trial, plain error, multiplicious, duplicative, possessing, comments, facially, indecent, factors, present case, discredit, pictures, website, pornographic image, sexual

## Case Summary

**Overview**

HOLDINGS: [1]-The servicemember's conviction for distribution of child pornography was not multiplicious because the conduct addressed by the production of child pornography and the possession of child pornography specifications at the servicemember's first court-martial was not "factually the same" as the conduct addressed by the distribution specification; [2]-The servicemember's convictions of distributing and possessing pornography of other children are not multiplicious because the six images the servicemember was alleged to have distributed were separate and distinct from any of those he was charged with possessing; [3]-The military judge did not abuse his discretion by failing to merge specifications for purposes of sentencing.

**Outcome**
Findings and sentence affirmed.

## LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > Military Justice > Courts Martial > Sentences

***HN1***[] **Pretrial Proceedings, Charges & Specifications**

The appellate court reviews claims of multiplicity de novo. The appellate court reviews claims of unreasonable multiplication of charges for an abuse of discretion. In the context of multiplicity and unreasonable multiplication of charges, three concepts may arise: multiplicity for purposes of double jeopardy, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentencing.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Double Jeopardy

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

***HN2***[] **Procedural Due Process, Double Jeopardy**

Multiplicity in violation of the Double Jeopardy Clause of the Constitution occurs when a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct. Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. The United States Supreme Court has laid out a separate elements test for analyzing multiplicity issues: The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Accordingly, multiple convictions and punishments are permitted if the two charges each have at least one separate statutory element from each other.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

***HN3***[] **Pretrial Proceedings, Charges & Specifications**

Even if charged offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges to dismiss certain charges and specifications. R.C.M. 307(c)(4), Manual Courts-Martial summarizes this principle as follows: What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person. The principle provides that the Government may not needlessly pile on charges against an accused. The following are a non-exhaustive list of factors in determining whether unreasonable multiplication of charges has occurred: (1) Did the appellant object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

Military & Veterans Law > Military Justice > Courts Martial > Sentences

***HN4***[] **Courts Martial, Sentences**

Unlike multiplicity, where an offense found multiplicious for findings is necessarily multiplicious for sentencing, the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing. In a case

where the Quiroz factors indicate the unreasonable multiplication of charges principles affect sentencing more than findings, the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Pleas

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN5***[] **Trial Procedures, Pleas**

Where the appellant entered an unconditional plea and failed to raise a matter at trial, the appellant has forfeited this issue, and the appellate court tests for plain error. In a plain error analysis, the appellant has the burden of persuading the appellate court that there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right of the appellant.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN6***[] **Pretrial Proceedings, Charges & Specifications**

In the multiplicity context, the appellant may show plain error by showing that the specifications are facially duplicative, that is, factually the same. Whether two offenses are facially duplicative is a question of law that the appellate court will review de novo. Two offenses are not facially duplicative if each requires proof of a fact which the other does not. Rather than constituting a literal application of the elements test, determining whether two specifications are facially duplicative involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other. This analysis turns on both the factual conduct alleged in each specification and the providence inquiry conducted by the military judge at trial.

Criminal Law & Procedure > ... > Crimes Against Persons > Sex Crimes > Child Pornography

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Offenses > General Article

***HN7***[] **Sex Crimes, Child Pornography**

Receipt and possession of child pornography are not facially duplicative where the appellant received files on one medium and stored them on another.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

***HN8***[] **Pleas, Providence Inquiries**

When an appellant pleads guilty, the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence.

Military & Veterans Law > ... > Trial Procedures > Pleas > Providence Inquiries

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN9***[] **Pleas, Providence Inquiries**

Although the appellate court reviews questions of law from a guilty plea de novo, the appellate court reviews a military judge's acceptance of an accused's guilty plea for an abuse of discretion. In order to prevail on appeal, the appellant has the burden to demonstrate a substantial basis in law and fact for questioning the guilty plea. The mere possibility of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results. The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts. The appellate court examines the totality of the circumstances of the providence inquiry, including any stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's responses during the plea inquiry. Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial.

Military & Veterans Law > Military Offenses > Categories of Offenses > Service Discrediting Conduct

***HN10***[] **Categories of Offenses, Service Discrediting Conduct**

Conduct of a nature to bring discredit upon the armed forces is defined broadly to include that behavior which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Manual Courts-Martial pt. IV, para. 60(c)(3) (2012). Public knowledge of the appellant's misconduct is not necessary.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN11***[] **Trial Procedures, Opening Statements**

Improper argument involves a question of law that the appellate court reviews de novo. When the defense has objected at trial, the appellate court reviews alleged improper argument for prejudicial error. The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused. Where improper argument occurs during the sentencing portion of the trial, the appellate court determines whether or not it can be confident that the appellant was sentenced on the basis of the evidence alone. A three-part test has been identified for determining prejudice when trial counsel has engaged in improper argument: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. These factors have been utilized to review allegations of improper sentencing argument.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN12***[] **Trial Procedures, Opening Statements**

To the extent that trial defense counsel has failed to object to improper arguments at trial, the appellate court reviews for plain error. To establish plain error, the appellant must prove: (1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right. Error occurs when counsel fail to limit their arguments to

the evidence of record, as well as all reasonable inferences fairly derived from such evidence. Even within the context of the record, it is error for trial counsel to make arguments that unduly inflame the passions or prejudices of the court members. On the other hand, trial counsel is expected to zealously argue for an appropriate sentence, so long as the argument is fair and reasonably based on the evidence.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

***HN13*** **Trial Procedures, Opening Statements**

Arguments may be based on the evidence as well as reasonable inferences drawn therefrom.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Opening Statements

***HN14*** **Trial Procedures, Opening Statements**

Trial counsel may strike hard blows but they must be fair.

Military & Veterans Law > ... > Courts Martial > Judges > Challenges to Judges

***HN15*** **Judges, Challenges to Judges**

Military judges are presumed to know the law and to follow it absent clear evidence to the contrary.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN16*** **Judicial Review, Standards of Review**

The appellate court reviews de novo the appellant's claim that his due process rights were violated due to post-trial delay. Where the convening authority's action is not taken within 120 days of the end of trial, the appellate court applies a presumption of unreasonable delay. However, the Government can rebut the presumption by showing the delay was not unreasonable.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

***HN17*** **Judicial Review, Courts of Criminal Appeals**

Unif. Code Mil. Justice art. 66(c), 10 U.S.C.S. § 866(c), empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Unif. Code Mil. Justice art. 59(a), 10 U.S.C.S. § 859(a). The courts have identified a list of factors to consider in evaluating whether Unif. Code Mil. Justice art. 66(c), relief should be granted for post-trial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional neglect, harm to the appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether the court can provide any meaningful relief. Unif. Code Mil. Justice art. 66(c). No single factor is dispositive, and the appellate court may consider other factors as appropriate. Unif. Code Mil. Justice art. 66(c).

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

***HN18*** **Judicial Review, Courts of Criminal**

**Appeals**

The presumption of prejudice from substantial omissions may be overcome by the retrieval of the missing material.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

***HN19***[] **Judicial Review, Courts of Criminal Appeals**

The court reviews allegations of improper completion of post-trial processing de novo. If defense counsel does not make a timely comment on an error or omission in the Staff Judge Advocate's Recommendation, that error is waived unless it is prejudicial under a plain error analysis. To prevail under this analysis, the appellant must demonstrate three things: (1) there was an error; (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right.

Military & Veterans Law > Military Justice > Judicial Review > Courts of Criminal Appeals

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Staff Judge Advocate Recommendations

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Judge Advocate Review

***HN20***[] **Judicial Review, Courts of Criminal Appeals**

Because of the highly discretionary nature of the convening authority's clemency power, the threshold for showing post-trial prejudice is low. Only a colorable showing of possible prejudice is necessary. Nevertheless, an error in the Staff Judge Advocate's Recommendation does not result in an automatic return by the appellate court of the case to the convening authority. Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the Staff Judge Advocate's or corrective action by the convening authority.

**Counsel:** For Appellant: Captain Michael A. Schrama.

For United States: Major Mary Ellen Payne; Captain Tyler B. Musselman; and Gerald R. Bruce, Esquire.

**Judges:** Before ALLRED, TELLER, and ZIMMERMAN, Appellate Military Judges.

**Opinion by:** ALLRED

## Opinion

OPINION OF THE COURT

ALLRED, Chief Judge:

Appellant was tried at a general court-martial composed of military judge alone. In accordance with his pleas, he was found guilty of 2 specifications of distributing child pornography, 2 specifications of viewing child pornography, 1 specification of possessing child pornography, 12 specifications of communicating indecent language, and 1 specification of behavior of a nature to bring discredit upon the armed forces in violation of

Article 134, UCMJ, 10 U.S.C. § 934. Appellant was found not guilty of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920. The adjudged and approved sentence was a dishonorable discharge, confinement for four years, and forfeiture of all pay and allowances.[1]

On appeal, Appellant contends: (1) the military judge erred by failing to dismiss a specification that was multiplicious with offenses for which he was convicted at a previous court-martial; (2) two specifications of which he stands convicted in his present court-martial are multiplicious; (3) the military judged abused his discretion by failing to merge thirteen specifications for sentencing purposes; (4) his conviction of one specification is legally insufficient;[2] (5) sentencing argument of Government trial counsel was improper; (6) a delay in post-trial processing warrants sentence relief; and (7) the Staff Judge Advocate's Recommendation (SJAR) and the action of the convening authority relied upon an incomplete record and were thus defective. We disagree and affirm **[*3]** the findings and sentence.[3]

*Background*

The case now before us is Appellant's second trial by general court-martial. At his first trial, Appellant was convicted, pursuant to his pleas, of a number of offenses involving child sex abuse and child pornography;[4] and his approved sentence included a dishonorable discharge, confinement for 20 years, forfeiture of all pay and allowances, and reduction to E-1.[5] Other facts pertinent to this case are discussed below.

*I. Multiplicity and Unreasonable Multiplication of Charges*

Appellant's first three assignments of error involve multiplicity and unreasonable multiplication of charges.

***HN1***[] We review claims of multiplicity de novo. *United States v. Paxton*, 64 M.J. 484, 490 (C.A.A.F. 2007). We review claims of unreasonable multiplication of charges for an abuse of discretion. *United States v. Campbell*, 71 M.J. 19, 22 (C.A.A.F. 2012). In the context of multiplicity and unreasonable multiplication of charges, three concepts may arise: multiplicity for purposes of double jeopardy, unreasonable multiplication of charges as applied to findings, and unreasonable multiplication of charges as applied to sentencing.

***HN2***[] Multiplicity in violation of the Double Jeopardy Clause of the Constitution[6] occurs when "a court, contrary to the intent of Congress, imposes multiple convictions and punishments under different statutes for the same act or course of conduct." *United States v. Anderson*, 68 M.J.

[1] As noted by Government counsel, Appellate **[*2]** Exhibits XX and XXI pertaining to evidence offered under Mil. R. Evid. 412 were ordered sealed by the military judge, but were not sealed in the original record of trial. We have ordered them sealed and hereby order any copies of such exhibits to be destroyed. We order the convening authority, or his representative, to ensure the return and/or destruction of any copies of such exhibits that were provided to the Appellant or any victim.

[2] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

[3] The military judge failed to announce that the court was assembled. *See* Rule for Courts-Martial (R.C.M.) 911 ("The military judge shall announce the assembly of the court-martial."). Assembly of the court-martial is significant for a variety of reasons. S*ee* R.C.M. 911, Discussion. In the present case, however, we find that the military judge's omission had no substantive effect upon the proceedings and was thus harmless.

[4] Specifically, Appellant was convicted of two specifications of aggravated sexual contact with a child under 12 years of age, two specifications of indecent liberties with a child, one specification of indecent conduct with a child, one specification of producing child pornography, and one specification of possessing child pornography, **[*4]** in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934.

[5] This court's review of Appellant's first court-martial conviction is reported at *United States v. Escobar*, 73 M.J. 871 (A.F. Ct. Crim. App. 2014), *pet. denied*, 74 M.J. 260 (C.A.A.F. 2015).

[6] U.S. CONST. amend. V.

378, 385 (emphasis omitted) (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). Accordingly, an accused may not be convicted and punished for two offenses where one is necessarily included in the other, absent congressional intent to permit separate punishments. *See United States v. Teters*, 37 M.J. 370, 376 (C.M.A. 1993). The Supreme Court has laid out a separate elements test **[*5]** for analyzing multiplicity issues: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932). "Accordingly, multiple convictions and punishments are permitted . . . if the two charges each have at least one separate statutory element from each other." *United States v. Morita*, 73 M.J. 548, 564 (A.F. Ct. Crim. App. 2014).

***HN3***[] Even if charged offenses are not multiplicious, courts may apply the doctrine of unreasonable multiplication of charges to dismiss certain charges and specifications. Rule for Courts-Martial (R.C.M.) 307(c)(4) summarizes this principle as follows: "What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." The principle provides that the Government may not needlessly "pile on" charges against an accused. *United States v. Foster*, 40 M.J. 140, 144 n.4 (C.M.A. 1994). Our superior court has endorsed the following non-exhaustive list of factors in determining whether unreasonable multiplication of charges has occurred:

> (1) Did the [appellant] object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is **[*6]** each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and specifications [unreasonably] increase the appellant's punitive exposure?
>
> (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*United States v. Quiroz*, 55 M.J. 334, 338-39 (C.A.A.F. 2001) (citation and internal quotation marks omitted). ***HN4***[] "[U]nlike multiplicity—where an offense found multiplicious for findings is necessarily multiplicious for sentencing—the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing." *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). In a case where the *Quiroz* factors indicate the unreasonable multiplication of charges principles affect sentencing more than findings, "the nature of the harm requires a remedy that focuses more appropriately on punishment than on findings." *Quiroz*, 55 M.J. at 339.

### *A. Multiplicity—Convictions from Prior Court-Martial*

In his first assignment of error (AOE), Appellant alleges that Specification 1 of Charge II (distribution of child pornography) is multiplicious with offenses for which he was convicted at his first court-martial. ***HN5***[] Appellant, however, entered an unconditional **[*7]** plea and failed to raise this matter at trial.[7] Accordingly, Appellant

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[7] Prior to entering his unconditional **[*8]** guilty pleas in the present case, Appellant made a motion in which he argued that all of the specifications involving child pornography (Charge II, Specifications 1-4, and Additional Charge II and its Specification) should be dismissed on grounds that they were an unreasonable multiplication of the charges (UMC) addressed by his first court-martial. In raising this motion, trial defense counsel specifically emphasized—both in his written brief and during argument to the judge—that the matter before the court involved UMC and *not* claims of multiplicity or double jeopardy. The military judge provided Appellant partial relief by declaring that, during sentencing, he would not punish Appellant for the conduct captured by Specification 1 of Charge II.

has forfeited this issue, and we test for plain error.[8] In a plain error analysis, Appellant has the burden of persuading us that there was error, that the error was plain or obvious, and that the error materially prejudiced a substantial right of the appellant. *United States v. Akbar*, 74 M.J. 364, 392-93 (C.A.A.F. 2015) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014), *reconsideration denied*, 73 M.J. 237 (C.A.A.F. 2014)). ***HN6***[↑] In the multiplicity context, Appellant may show plain error by showing that the specifications are facially duplicative—that is, "factually the same." *United States v. Hudson*, 59 M.J. 357, 359 (C.A.A.F. 2004) (citations omitted). Whether two offenses are facially duplicative is a question of law that we will review de novo. *United States v. Pauling*, 60 M.J. 91, 94 (C.A.A.F. 2004). Two offenses are not facially duplicative if each requires proof of a fact which the other does not. Rather than constituting "a literal application of the elements test," determining whether two specifications are facially duplicative involves a realistic comparison of the two offenses to determine whether one is rationally derivative of the other. *Id.* (citing *Hudson*, 59 M.J. at 359). This analysis turns on both "the 'factual conduct alleged in each specification'" and "'the providence inquiry conducted by the military judge at trial.'" *Id.* (quoting *United States v Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997)).

Under Specification 1 of Charge II in the present case, Appellant was found guilty of wrongfully *distributing* pornographic images of his stepdaughter MK. At his first court-martial, Appellant was found guilty of wrongfully *producing* and *possessing* pornographic images of MK.[9] Having carefully examined the records of both trials, we are convinced that the conduct addressed by the production and the possession specifications at Appellant's first court-martial is not "factually the same" as the conduct addressed by the distribution allegation of Charge II, Specification 1.

*Production*. Appellant's production of child pornography stands as its own separate behavior and offense. During the providence inquiry at his first court-martial, Appellant made it clear that producing child pornography was—in and of itself—an activity that gave him sexual pleasure. He declared that taking the pictures of himself molesting the victim, MK, actually stimulated him to the point of erection.[10] He explained further:

> I have made pornographic images of myself and [MK's] mother. I get sexually aroused by the idea of making these images. It was the same when I took the photographs of my actions with [MK]. I am ashamed to admit this Ma'am, but I was sexually excited by taking these pictures. There is no excuse for taking pictures of these sorts of acts with a six-year-old girl.

*Possession*. Similarly, under the particular facts before us, Appellant's possession of child pornography was a crime separate from any other. In **[*11]** *United States v. Craig*, 68 M.J. 399 (C.A.A.F. 2010) (per curiam), our superior court

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[8] In *United States v. Campbell*, 68 M.J. 217, 219-20 (C.A.A.F. 2009), our superior court stated that the appellant "waived" his ability to raise a multiplicity issue on appeal. However, the court's previous decision in *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009), noted that military courts have at times failed to "consistently distinguish between the terms 'waiver' and 'forfeiture'" and went on to hold that a claim of multiplicity was only waived by the appellant's unconditional guilty plea because the appellant agreed to waive all waivable motions **[*9]** in a pretrial agreement. Applying *Gladue*, the term "forfeiture" should generally characterize the effect of an unconditional guilty plea on multiplicity claims, absent some affirmative waiver. *See United States v. St. John*, 72 M.J. 685, 687 n.1 (Army Ct. Crim. App. 2013) ("We interpret [*Campbell* and related cases] to mean that an unconditional guilty plea, without an affirmative waiver, results in a forfeiture of multiplicity issues absent plain error.").

[9] At Appellant's first court-martial, the production and possession of child pornography were alleged to have occurred "between on or about 1 April 2012 and on or about 24 May 2012." The distribution of child pornography alleged at Appellant's **[*10]** present court-martial involves the same time frame.

[10] Included in the pornography produced by Appellant were images of MK touching his penis with her tongue, Appellant pressing his penis against her buttocks and upper thigh, and Appellant masturbating in her presence.

held that ***HN7***[] receipt and possession of child pornography were not facially duplicative where the appellant received files on one medium and stored them on another. *Id.* at 400. Similarly, we find here that Appellant's possession is not facially duplicative with his production or distribution of child pornography. Here, as in *Craig*, the possession involved multiple media—Appellant stored pornographic images of MK on both the digital storage of his camera and the hard drive of his computer. Moreover, it is plain that he kept the pornographic images for his own satisfaction, independent of any desire to produce or distribute them. Indeed, he explicitly informed one fellow user of child pornography, "Yes i did have some private pics that I was willing to share of me and my daughter ... but I think I'm going to keep the pictures for myself and enjoy the fun I am having with my 6yo daughter."

*Distribution*. It is likewise clear from the record that Appellant's distribution of child pornography was a course of conduct separate and apart from his production or possession of it. During his providence inquiry, he stated that after producing the pornographic images of MK, he **[*12]** transferred them to others through a pedophilia website called Pedobook. Documents admitted at trial establish that—in addition to producing and possessing these images for his own gratification—Appellant uploaded them to impress and interact with others who shared his interest in child molestation. As noted above, Appellant was found guilty in the present case of 12 specifications of communicating indecent language; and, in numerous instances, the child pornography he distributed served as the focal point for these indecent communications. Occasionally, Appellant would also in fact offer his pictures of MK in exchange for child pornography from others—as one might trade baseball cards.

Ultimately, having conducted a "realistic comparison" of the offenses, we are convinced that Appellant's conviction of wrongfully distributing child pornography is not rationally derived from any offense for which he was previously convicted. *See Pauling*, 60 M.J. at 94. We find that the offenses at issue are not facially duplicative. Appellant has thus failed to demonstrate that the trial judge committed plain error by not dismissing Specification 1 of Charge II.[11]

*B. Multiplicity—Distributing and Possessing Child Pornography*

The foregoing AOE involves pornography of Appellant's stepdaughter, MK. At issue in Appellant's next AOE is pornography involving children other than MK. Appellant claims here that his convictions of distributing and possessing pornography of those other children (Specifications 2 and 4 of Charge II, respectively) are multiplicious. In addressing this AOE, we adopt the case law and other legal authority cited above. We again find that Appellant did not raise the present multiplicity claim at trial, and thus proceed to a forfeiture analysis. In so doing, we conclude that the offenses are not factually the same, and Appellant has therefore failed to establish plain error.

Specification 2 of Charge II alleges that Appellant distributed six specific images of child pornography—all ".jpg" files and identified by their file name.[12] During his providence inquiry, Appellant acknowledged that he did in fact distribute those six images and that those **[*14]** images were found in Prosecution Exhibit 2. Specification 4 of Charge II alleges that Appellant possessed "multiple" depictions of child pornography on a Western Digital (WD) hard drive. In pleading guilty to this possession offense, Appellant agreed that the WD hard drive held

[11] Although not specifically raised before us now, we have also **[*13]** considered whether Appellant's convictions for producing, possessing, and distributing child pornography amount to an unreasonable multiplication of charges (UMC). We find that they do not.

[12] Both Specification 2 and Specification 4 of Charge II allege misconduct at the same location and during the same time frame.

"dozens" of images of minors engaging in sexually explicit conduct, and that those images were now listed in Prosecution Exhibit 4.[13] From our review of the record, including Prosecution Exhibits 2 and 4, it is clear that the six images Appellant was alleged to have distributed under Specification 2 are separate and distinct from any of those he was charged with possessing under Specification 4. For this reason alone, the specifications at issue are not facially duplicative.[14]

Moreover, even had one or more of the six images distributed by Appellant overlapped with those he possessed on the WD hard drive, the offenses of possessing and distributing child pornography would not—under the unique facts of the present case—be facially duplicative. In *United States v. Williams*, 74 M.J. 572 (A.F. Ct. Crim. App. 2014), this court found an appellant's conviction for possession of child pornography multiplicious with his convictions for receiving and distributing child pornography. However, we emphasized in *Williams* that "[n]o binding authority provides that possessing child pornography is per se a lesser included offense of receiving or distributing the same files of child pornography." *Id.* at 575. We noted that *Williams* involved its own unique **[*16]** set of circumstances. In that case, the appellant had downloaded child pornography from a peer-to-peer file sharing program, and all the images he downloaded were maintained in a single default folder on his computer. The appellant's distribution of child pornography consisted solely of allowing those images to remain in the default folder under conditions permitting others to access them. In finding the appellant's possession of the images multiplicious with his receipt and distribution of them, we suggested that the outcome may well have been different had additional or affirmative steps separated the appellant's possession from the receipt and distribution of contraband images. *Id.*

In the present case, those additional or affirmative steps do in fact exist. That is, Appellant came to possess the child pornography by downloading it from websites and by receiving it electronically from others. He then went beyond maintaining these depictions on his hard drive by intentionally uploading the six images in question to the website Pedobook.com . In reviewing his providence inquiry in the context of the entire record, we are convinced that—as with the pornography involving his stepdaughter, **[*17]** MK—Appellant had one criminal purpose in maintaining or possessing these images, and he had another criminal purpose in uploading and sharing them. We find the present case analogous to *United States v. Purdy*, 67 M.J. 780, 781 (N.M. Ct. Crim. App. 2009), where our sister court reviewed a claim of multiplicity under the plain error standard, and found specifications of receipt and possession of child pornography not multiplicious, because the appellant exhibited "a clear exercise of dominion over the child pornographic images separate and apart from his initial receipt sometime earlier." *Id.* at 781. *See also Craig*, 68 M.J. at 400 (rejecting multiplicity challenge and affirming convictions for receipt and possession of child pornography on grounds that (1) appellant's unconditional guilty plea waived any multiplicity claim, and (2) "the receipt and possession offenses were not facially duplicative because appellant received the files on one medium and stored them on another.")

### *C. Unreasonable Multiplication of Charges*

Appellant next alleges the military judged abused

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[13] By our count, Prosecution Exhibit 4 actually contains 31 images of child pornography.

[14] It is worth noting that Specification 3 of Charge II alleged that Appellant wrongfully *viewed* child pornography at the same location and during the same time frame alleged in Specifications 2 and 4 of that charge. Unlike Specification **[*15]** 4-where the contraband images were entirely separate from those alleged in Specification 2-Specification 3 charged that Appellant wrongfully viewed three of the same images (154417.jpg, 133151.jpg, 10213.jpg) he was alleged to have possessed in Specification 2. In this instance, recognizing the overlap between Specifications 2 and 3, the military judge carefully and appropriately questioned Appellant to establish that his distribution and viewing of the matching images involved distinctly separate conduct.

his discretion by failing to merge Specifications 5-17 of Charge II for sentencing purposes. We disagree.

Specifications 5-16 allege that Appellant communicated indecent language to interlocutors via the Pedobook website. **[*18]** Specification 17 involved posting indecent language to Pedobook where it could be viewed by members of the website generally. At trial, Appellant moved that Specifications 5-17 be merged for sentencing purposes on grounds that they represented an unreasonable multiplication of charges. Applying a *Quiroz* analysis, the military judge denied the motion. The judge found that each specification addressed "separate and distinct communication(s) to a separate and distinct third party"—and were thus separate criminal acts. The judge found no prosecutorial overreaching in the drafting of the charges. He also found that the number of charges did not misrepresent or exaggerate Appellant's criminality, nor unreasonably increase his punitive exposure.

Having carefully reviewed the record, we find that the military judge applied the correct law and that his findings of fact were not clearly erroneous. We hold that he did not abuse his discretion in declining to merge the specifications for sentencing.

*II. Providence of Plea*

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant argues that his conviction of Specification 17 of Charge II—communicating indecent language—is legally insufficient. On appeal, both Appellant and the Government **[*19]** address this issue in terms of sufficiency of the evidence and thereby apply the wrong legal analysis. ***HN8***[] When, as here, an appellant pleads guilty, "the issue must be analyzed in terms of providence of his plea, not sufficiency of the evidence." *United States v. Faircloth*, 45 M.J. 172, 174 (C.A.A.F. 1996).

***HN9***[] Although we review questions of law from a guilty plea de novo, we review a military judge's acceptance of an accused's guilty plea for an abuse of discretion. *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008) (citations omitted). In order to prevail on appeal, the Appellant has the burden to demonstrate "'a substantial basis' in law and fact for questioning the guilty plea." *Id.* (quoting *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991)). The "mere possibility" of a conflict between the accused's plea and statements or other evidence in the record is not a sufficient basis to overturn the trial results. *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996) (quoting *Prater*, 32 M.J. at 436). "The providence of a plea is based not only on the accused's understanding and recitation of the factual history of the crime, but also on an understanding of how the law relates to those facts." *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (citing *United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247, 250-51 (C.M.A. 1969)). We "examine the totality of the circumstances of the providence inquiry, including [any] stipulation of fact, as well as the relationship between the accused's responses to leading questions and the full range of the accused's **[*20]** responses during the plea inquiry." *United States v. Nance*, 67 M.J. 362, 366 (C.A.A.F. 2009). Among the reasons for giving broad discretion to military judges in accepting guilty pleas is the often undeveloped factual record in such cases as compared to that of a litigated trial. *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002).

During the providence inquiry into Specification 17 of Charge II, the military judge properly explained to Appellant the elements of the offense: (1) at the time and place alleged, Appellant posted the comments alleged onto the Pedobook website; and (2) under the circumstances, his conduct was of a nature to bring discredit upon the armed forces. Appellant does not claim that his plea inquiry failed to establish the first element of the offense. Rather, he argues the second element was not met, because the judge elicited "no facts to suggest how his actions affected how others viewed the military

service where none of the other participants knew he was an Airman." We reject this argument.

The military judge carefully discussed with Appellant the requirement under Article 134, UCMJ, that his conduct be of a nature to bring discredit upon the armed forces. Their colloquy included the following:

> MJ: . . . While I've already told you this, I do wish to repeat it just **[*21]** since this is, again, a different specification. "Service discrediting conduct" is conduct which tends to harm the reputation of the service or lower it in public esteem. With respect to service discrediting, the law recognizes that almost any irregular or improper act on the part of service member could be regarded as service discrediting in some indirect or remote sense. However, only those acts which have a tendency to bring the service into disrepute or which tend to lower it in public esteem are punishable under this Article. Do you understand the elements and definitions as I have read them to you?
> ACC: Yes, Your Honor.
> MJ: Do you have any questions about any of them?
> ACC: No, Your Honor.

Appellant acknowledged, in turn, that he did indeed make the numerous comments alleged in Specification 17. He declared that his comments pertained to "pictures involving children doing sexual acts." He stated that his language was "truly vulgar, filthy and disgusting" and "harmful and so horribly demeaning to the individuals who were abused in these photographs." Appellant added, "Any decent person who reads these comments is sickened by them. So I have no doubt that what I wrote grossly offends **[*22]** the community's sense of decency and shocks the morals of our military. The things I said also discredit the Air Force because no person should be saying these things. Let alone someone entrusted to defend this country and wear the uniform." Appellant explained that his comments were designed to "incite arousal" in child pornography users, and they were posted so as to be visible to any member of the website.[15]

***HN10***[↑] "Conduct of a nature to bring discredit upon the armed forces (clause 2)" is defined broadly to include that behavior "which *has a tendency* to bring the service into disrepute or which *tends* to lower it in public esteem." *Manual for Courts-Martial*, pt. IV, ¶ 60(c)(3) (emphasis added). Public knowledge of Appellant's misconduct is not necessary. *See United States v. Phillips*, 70 M.J. 161, 165-66 (C.A.A.F. 2011) (conviction for possessing child pornography under clause 2 of Article 134 upheld, despite absence of "any direct evidence that public was or would have become aware of Appellant's conduct."). *See also United States v. Garrigan*, ACM 37920, 2013 CCA LEXIS 118 (A.F. Ct. Crim. App. 15 February 2013 (unpub. op.) **[*23]** , *pet. denied*, 72 M.J. 393 (C.A.A.F. 2013) (conviction for communicating indecent language under Article 134 upheld absent any evidence of public disclosure). We find that the military judge elicited facts sufficient to support the guilty plea and did not abuse his discretion in accepting that plea. We do not find a substantial basis in law and fact for questioning the providence of the plea. *See Inabinette*, 66 M.J. at 322.

*III. Sentencing Argument*

Appellant argues that the sentencing argument by the Government was improper. Identifying seven comments in particular, Appellant claims that "[a]lmost the entirety of government counsel's argument was improper." At trial, defense counsel objected to four of the seven comments he deems improper, but did not object to the others.

***HN11***[↑] Improper argument involves a question of law that we review de novo. *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014). When the defense has objected at trial, we review alleged

[15] The testimony of one investigator from the Federal Bureau of Investigation indicated that, at or about the time Appellant was using the website, Pedobook had more than 8,000 members.

improper argument for prejudicial error. *United States v. Hornback*, 73 M.J. 155, 159 (C.A.A.F. 2014). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *Frey*, 73 M.J. at 248 (quoting *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000)). "Where improper argument occurs during the sentencing portion of the trial, we determine whether or not we can **[*24]** be 'confident that [the appellant] was sentenced on the basis of the evidence alone.'" *Frey*, 73 M.J. at 248 (brackets in original) (quoting *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013)). Our superior court has identified a three-part test for determining prejudice when trial counsel has engaged in improper argument: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Hornback*, 73 M.J. at 160 (quoting *United States v. Fletcher*, 62 M.J. 175, 184 (C.A.A.F. 2005)). Our superior court has utilized these factors to review allegations of improper sentencing argument. *See, e.g., Frey*, 73 M.J. at 249; *Halpin*, 71 M.J. at 480.

***HN12***[] To the extent that trial defense counsel has failed to object to the arguments at trial, we review for plain error. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011). To establish plain error, Appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (quoting *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007)). Error occurs when counsel fail to limit their arguments to "the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Baer*, 53 M.J. at 237 (citing *United States v. Nelson*, 24 C.M.A. 49, 1 M.J. 235, 239, 51 C.M.R. 143 (C.M.A. 1975)). Even within the context of the record, it is error for trial counsel to make arguments that "'unduly . . . inflame the passions or prejudices of the court members.'" *Marsh*, 70 M.J. at 102 (alteration in original) (quoting *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007)); *see* ***[*25]*** *also* R.C.M. 919(b), Discussion. On the other hand, trial counsel is expected to zealously argue for an appropriate sentence, so long as the argument is fair and reasonably based on the evidence. *United States v. Kropf*, 39 M.J. 107, 108 (C.M.A. 1994).

In the present case, one of the seven allegedly improper comments involved an attempted allusion by assistant trial counsel to a scene from the Dracula tale. Trial defense counsel quickly objected. The military judge sustained this objection, and admonished assistant trial counsel that his attempt to draw this analogy was improper.

The remaining six comments claimed by Appellant to be objectionable were relatively innocuous. Assistant trial counsel argued that: (1) Appellant presented an ongoing danger to children,[16] (2) he was a pedophile,[17] and (3) his distribution of child pornography caused an ongoing victimization of the minors involved.[18] The military judge overruled defense objections to these arguments. Assistant trial counsel further argued, without objection, that: (4) Appellant's distribution of child pornography would likely encourage pedophile behavior among the recipients of his child pornography,[19] (5) his crimes contributed to a worldwide scourge of child abuse,[20] and (6) he should receive lengthy **[*26]** confinement for protection of society and for

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[16] Assistant trial counsel argued that Appellant "is dangerous to children and [] he has no ability to stop being dangerous."

[17] Assistant trial counsel argued that Appellant is "an aggressive and ambitious and horribly destructive pedophile that will continue to be so while he is young."

[18] Assistant trial counsel argued, "Now and finally, the victims in this case which are children whose pictures that he distributed, will never be whole. And these children, these images he distributed are being victimized on a daily and nightly basis. Every time pedophiles lust over their defiled images...."

[19] Assistant trial counsel argued, "Sir, your reason and common sense and knowledge of the ways of the world tell you that his distribution didn't just hurt the victims that were the subjects of the photos which he distributed. These photos will inspire and encourage each individual pedophile that receives the pictures."

[20] Assistant trial counsel argued that Appellant "did a lot to contribute to the scourge of child abuse around the world through the medium of Facebook—of Pedobook."

general deterrence.[21]

We find that Appellant's offenses were egregious and that, under the circumstances, the comments of assistant trial counsel were generally proper. *See, e.g., Nelson*, 1 M.J. at 239 (noting that ***HN13***[] arguments may be based on the evidence as well as reasonable inferences drawn therefrom); *United States v. Doctor*, 7 C.M.A. 126, 21 C.M.R. 252, 256 (1956) (***HN14***[] "[Trial counsel] may strike hard blows but they must be fair." (quoting *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935))). To the extent that any of trial counsel's arguments may have exceeded the bounds of proper argument, we find that in this particular case any error was harmless. This was a judge-alone trial. ***HN15***[] Military judges are "presumed to know the law and to follow it absent clear evidence to the contrary." *Erickson*, 65 M.J. at 225 (citation omitted). We are convinced the military judge was not unduly swayed by any argument from assistant trial counsel. Confident that he was sentenced on the basis of the evidence alone, we find no prejudice to Appellant.

*IV. Post-trial Processing Delay*

The Government took 132 days to process his case from the end of trial to convening authority action. Appellant argues that this **[*28]** delay was unreasonable and warrants sentencing relief in the form of confinement credit.

***HN16***[] We review de novo Appellant's claim that his due process rights were violated due to post-trial delay. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)). Where the convening authority's action is not taken within 120 days of the end of trial, we apply a presumption of unreasonable delay. However, the Government "can rebut the presumption by showing the delay was not unreasonable." *Moreno*, 63 M.J. at 142.

We presume unreasonable delay in this case because 132 days had elapsed when the convening authority took action. We thus consider the remaining factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972), including the reasons for the delay, Appellant's assertion of the right to timely review, and prejudice. *Moreno*, 63 M.J. at 135 (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)).

Post-trial processing time in this case included transcription and assembly of the record when the court reporter was busy with other cases. Otherwise, we can find little explanation for the Government's failure to meet the *Moreno* standard.[22] On the other hand, the 12-day violation is relatively modest, Appellant did not demand timely review, and he has not shown any prejudice from post-trial delay in this case. We also consider the lack of evidence of malicious delay. Ultimately, **[*29]** upon balancing all *Barker* factors, we find no violation of Appellant's due process right to speedy post-trial review.

Next we review Appellant's request for relief pursuant to *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). ***HN17***[] Article 66(c), UCMJ, 10 U.S.C. § 866(c), empowers appellate courts to grant sentence relief for excessive post-trial delay without the showing of actual prejudice required by Article 59(a), UCMJ, 10 U.S.C. § 859(a). *Id.* at 224. In *United States v. Gay*, 74 M.J. 736, 744

[21] Assistant trial counsel argued, "And it would be horrific if [Appellant] **[*27]** were released into a world where [his victims are] still children. So he must he held until he's in his 60s so he can be safer for society and must he held for that symbolic reason."

[22] The Government urges that we attribute 28 days of post-trial processing time to defense delay in reviewing the record of trial. An affidavit from the enlisted court reporter, however, indicates that the last of the trial transcript sections was sent for defense review on 21 August 2014; and the court reporter chronology shows trial defense counsel completed their examination of the record on 9 September 2014. Thus, by our calculation, any delay attributable to defense review of the record would be 19 days.

(A.F. Ct. Crim. App. 2015), we identified a list of factors to consider in evaluating whether Article 66(c), UCMJ, relief should be granted for post-trial delay. Those factors include how long the delay exceeded appellate review standards, the reasons for the delay, whether the government acted with bad faith or gross indifference, evidence of institutional **[*30]** neglect, harm to Appellant or to the institution, whether relief is consistent with the goals of both justice and good order and discipline, and whether this court can provide any meaningful relief. *Id.* No single factor is dispositive, and we may consider other factors as appropriate. *Id.*

We have carefully considered the relevant factors in this case including the amount by which post-trial review standards were exceeded, the lack of bad faith or gross indifference on the part of the Government, and the absence of any prejudice to Appellant. On the whole, we conclude no *Tardif* relief is warranted.

*IV. Adequacy of SJAR and Action*

The copy of the record of trial provided to this court had placeholder sheets stating that Prosecution Exhibits 1-7 had been ordered sealed by the military judge, and that each exhibit could "be found at AFOSI Det 531 and may be examined under such conditions as the equipment custodian prescribes." Appellant infers from this notation that Prosecution Exhibits 1-7 were not available to the Staff Judge Advocate (SJA) and the convening authority at the time the Staff Judge Advocate's Recommendation (SJAR) and the action were completed. He argues that "the SJA erred **[*31]** when he advised the convening authority without utilizing a complete record of trial. As a result, the SJA's advice is legally insufficient and the rights of the Appellant were prejudiced." Appellant urges that we return the record to the convening authority for a new action based upon a "complete record of trial" and "complete and proper advisement from his legal representative."[23]

***HN19***[↑] This court reviews allegations of improper completion of post-trial processing de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). If defense counsel does not make a timely comment on an error or omission in the SJAR, that error is waived unless it is prejudicial under a plain error analysis. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). To prevail under this analysis, the appellant must demonstrate three things: "(1) there was an error; (2) it **[*32]** was plain or obvious, and (3) the error materially prejudiced a substantial right." *Kho*, 54 M.J. at 65 (citing *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999)).

***HN20***[↑] "[B]ecause of the highly discretionary nature of the convening authority's clemency power, the threshold for showing [post-trial] prejudice is low." *United States v. Lee*, 52 M.J. 51, 53 (C.A.A.F. 1999). Only a colorable showing of possible prejudice is necessary. *Id.* Nevertheless, an error in the SJAR "does not result in an automatic return by the appellate court of the case to the convening authority." *United States v. Green*, 44 M.J. 93, 95 (C.A.A.F. 1996). "Instead, an appellate court may determine if the accused has been prejudiced by testing whether the alleged error has any merit and would have led to a favorable recommendation by the SJA or corrective action by the convening authority." *Id.* (citations omitted).

In the present case, Appellant made no timely objection or comment in the proceedings below. Even if we now accept Appellant's assumption that Prosecution Exhibits 1-7 were missing from the record at the time the SJAR and action were

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[23] Appellant also contends that, because Prosecution Exhibits 1-7 were missing, the Government "failed to adhere to the rule mandating creating of a complete record of trial." The Government has since provided these exhibits, and they have been added to the record of trial. Accordingly, this claim has been rendered moot. *See United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982) (stating that ***HN18***[↑] the presumption of prejudice from substantial omissions may be overcome by the retrieval of the missing material).

completed, and even were we to agree that this omission amounted to plain error, we are convinced any error would be harmless. We have examined the seven exhibits in question. Each contains multiple images of the child pornography with which Appellant was involved. **[*33]** The images are graphic and disturbing, some depicting the sexual abuse of infants. Nothing in those exhibits reflects favorably upon Appellant. Also, the trial transcript contains detailed descriptions of the multiple sex abuse images contained in the allegedly missing exhibits—thereby informing the SJA and convening authority as to the content of those exhibits. We find no likelihood that Appellant could have been harmed through any failure by the SJA to consider these exhibits in signing the SJAR. Nor do we find any likelihood that Appellant was harmed by the alleged failure of the convening authority to consider these exhibits in taking action. We find no colorable showing of possible prejudice to Appellant. *See Lee*, 52 M.J. at 53.

*Conclusion*

The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are **AFFIRMED**.

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# United States v. Hudgins

United States Air Force Court of Criminal Appeals

April 3, 2014, Decided

ACM 38305

**Reporter**
2014 CCA LEXIS 227 *

UNITED STATES v. Airman First Class COREY K. HUDGINS, United States Air Force

**Notice:** THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL RELEASE.

**Subsequent History:** Review denied by United States v. Hudgins, 2014 CAAF LEXIS 846 (C.A.A.F., Aug. 20, 2014)

**Prior History: [*1]** Sentence adjudged 9 November 2012 by GCM convened at Kirtland Air Force Base, New Mexico. Military Judge: W. Shane Cohen (sitting alone). Approved Sentence: Dishonorable discharge, confinement for 11 years, and a reprimand.

## Core Terms

military, charges, boyfriend, mental health records, specifications, sexual assault, records, allegations, defense counsel, multiplication, sentencing, trial counsel, mistrial, offenses, severance motion, sexual, questions, intercourse, penis, cross-examination, reasonable doubt, bed, witnesses, mouth, sever, touch, constitutionally required, sexual contact, court-martial, credibility

## Case Summary

**Overview**

HOLDINGS: [1]-The military judge did not err in declining to provide one victim's mental health record excerpts to the defense; the judge did provide defense counsel with one record in which the victim expressed some dissatisfaction with her relationship with her boyfriend, and the defense did not use it to impeach her; [2]-The military judge did not err in denying defense counsel's motion to sever the offenses involving the two victims; because it was a military judge-alone case, there was no need for a spillover of limiting instruction; [3]-The military judge did not err in failing to sua sponte stop trial counsel from questioning witnesses about other witnesses' truthfulness; while trial counsel's repeated inquiries into whether Government witnesses were lying might be impermissible in some contexts, trial counsel asked no more than what defense counsel had already asserted.

**Outcome**
Judgment affirmed.

## LexisNexis® Headnotes

Military & Veterans Law > ... > Courts Martial > Evidence > Evidentiary Rulings

Military & Veterans Law > Military

Justice > Judicial Review > Standards of Review

***HN1***[] **Evidence, Evidentiary Rulings**

An appellate court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion.

Military & Veterans Law > ... > Evidence > Privileged Communications > Psychotherapist-Patient Privilege

***HN2***[] **Privileged Communications, Psychotherapist-Patient Privilege**

Mil. R. Evid. 513(a), Manual Courts-Martial states that a patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist in a case arising under the Uniform Code of Military Justice, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. Rule 513(d) contains certain exceptions to this privilege, including when admission or disclosure of a communication is constitutionally required. Mil. R. Evid. 513(d)(8), Manual Courts-Martial. The rule establishes procedures to determine the admissibility of patient records or communications. Generally, the rule requires a party seeking such records or communications to seek an interlocutory ruling from the military judge. Mil. R. Evid. 513(e)(1), Manual Courts-Martial. The military judge conducts a hearing and examines the evidence or a proffer thereof in camera. Mil. R. Evid. 513(e)(2)-(3), Manual Courts-Martial.

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN3***[] **Motions, Motions for Mistrial**

An appellate court reviews a military judge's denial of a motion for a mistrial for a clear abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Motions > Motions for Mistrial

***HN4***[] **Motions, Motions for Mistrial**

A mistrial is a drastic remedy and is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice. The declaration of a mistrial is a drastic resolution and military judges are encouraged to take other remedial actions to correct an error. A military judge has discretion to declare a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings. R.C.M. 915(a), Manual Courts-Martial. In deciding whether to grant a mistrial, the military judge should examine numerous factors, including the timing of the incident leading to the question of mistrial, the identity of the factfinder, the reasons for a mistrial, and potential alternative remedies; but, most importantly, the desires of and the impact on the defendant.

Military & Veterans Law > ... > Courts Martial > Motions > Severance

***HN5***[] **Motions, Severance**

R.C.M. 906(b)(10), Manual Courts-Martial permits a party to move for severance of offenses, but only to prevent manifest injustice. The discussion to the rule states that ordinarily, all known charges should be tried at a single court-martial and joinder of

minor and major offenses, or of unrelated offenses, is not alone a sufficient ground to sever offenses.

Military & Veterans Law > ... > Courts Martial > Motions > Severance

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN6***[] **Motions, Severance**

An appellate court reviews a military judge's decision to deny a severance motion for an abuse of discretion. Where a military judge has denied a severance motion, an appellant must demonstrate more than the fact that separate trials would have provided a better opportunity for an acquittal. The appellant must show that the ruling caused actual prejudice by preventing the appellant from receiving a fair trial. In reviewing a military judge's denial of a severance motion, an appellate court examines three factors: (1) Do the findings reveal an impermissible crossover of evidence; (2) Would the evidence of one offense be admissible proof of the other; and (3) Did the military judge provide a proper limiting instruction.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN7***[] **Pretrial Proceedings, Charges & Specifications**

A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

***HN8***[] **Pretrial Proceedings, Charges & Specifications**

Unreasonable multiplication of charges is a distinct concept from the constitutional prohibition against multiplicity. The concept of unreasonable multiplication of charges provides courts-martial and reviewing authorities with a traditional legal standard, reasonableness, to address the consequences of an abuse of prosecutorial discretion in the context of the unique aspects of the military justice system.

Military & Veterans Law > ... > Courts Martial > Pretrial Proceedings > Charges & Specifications

***HN9***[] **Pretrial Proceedings, Charges & Specifications**

In Quiroz, a five-pronged approach is used to evaluate claims of unreasonable multiplication of charges: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications? (2) Is each charge and specification aimed at distinctly separate criminal acts? (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality? (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure? (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges? These factors are not "all-inclusive," nor is any one of them a prerequisite to finding unreasonable multiplication of charges. In addition, the concept of unreasonable multiplication of charges may apply differently to findings than to sentencing, and in a case where the charging scheme does not implicate the Quiroz factors in the same way that the sentencing exposure does, the nature of the harm requires a

remedy that focuses more appropriately on punishment than on findings.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Arguments on Findings

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

***HN10***[] **Trial Procedures, Arguments on Findings**

A military judge's decision to permit questioning and comment, in the absence of defense objection, is reviewed for plain error. Under the plain error standard, an appellant must demonstrate: 1) an error was committed; 2) the error was plain, clear, or obvious; and 3) the error resulted in material prejudice to substantial rights.

Military & Veterans Law > ... > Trial Procedures > Witnesses > Examination of Witnesses

***HN11***[] **Witnesses, Examination of Witnesses**

A witness is generally not permitted to opine that another witness is lying or telling the truth. It may be improper for trial counsel to ask an accused to opine whether government witnesses against him are lying. However, this principle is to be applied on a "case-by-case basis" to determine if such questions are prejudicial. A lack of objection is some measure of the minimal impact of the questions and answers.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN12***[] **Posttrial Procedure, Record**

Whether a record of trial is complete is an issue an appellate court reviews de novo.

Military & Veterans Law > ... > Courts Martial > Posttrial Procedure > Record

***HN13***[] **Posttrial Procedure, Record**

Unif. Code Mil. Justice art. 54(c)(1), 10 U.S.C.S. § 854(c)(1), requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. R.C.M. 1103(b)(2)(D)(v), Manual Courts-Martial. Failure to comply with the rule does not necessarily require reversal. Where a record is missing an exhibit, an appellate court evaluates whether the omission is substantial. Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one. If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material.

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN14***[] **Judicial Review, Standards of Review**

A claim for relief under the cumulative error doctrine is reviewed de novo. Under the cumulative error doctrine, a number of errors, no one perhaps sufficient to merit reversal, in combination

necessitate the disapproval of a finding.

Military & Veterans Law > ... > Courts Martial > Trial Procedures > Burdens of Proof

Military & Veterans Law > Military Justice > Judicial Review > Standards of Review

***HN15***[] **Trial Procedures, Burdens of Proof**

An appellate court reviews issues of factual sufficiency de novo. The test for factual sufficiency is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the appellate court is convinced of the appellant's guilt beyond a reasonable doubt. In conducting this unique appellate role, the appellate court takes a fresh, impartial look at the evidence, applying neither a presumption of innocence nor a presumption of guilt to make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.

**Counsel:** For the Appellant: Major Zaven T. Saroyan and William E. Cassara, Esquire.

For the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

**Judges:** Before HELGET, WEBER, and PELOQUIN, Appellate Military Judges.

**Opinion by:** WEBER

## Opinion

OPINION OF THE COURT

WEBER, Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of two specifications of abusive sexual contact; one specification of rape; one specification of forcible sodomy; and one specification of assault consummated by a battery, in violation of Articles 120, 125, and 128, UCMJ, 10 U.S.C. §§ 920, 925, 928. The adjudged and approved sentence consisted of a dishonorable discharge, confinement for 11 years, and a reprimand.

The appellant raises nine issues on appeal: (1) Whether the military judge erred in failing to disclose constitutionally required portions of the mental health records of one **[*2]** of the alleged victims, Airman First Class (A1C) PS; (2) Whether the appellant was denied a fair trial when the military judge refused to grant a mistrial; (3) Whether the military judge abused his discretion in denying the appellant's motion to sever charges; (4) Whether the military judge erred by failing to merge Specification 3 of Charge I with Charge II in findings due to an unreasonable multiplication of charges; (5) Whether the military judge committed plain error when he permitted the trial counsel to question the appellant about the truthfulness of other Government witnesses; (6) Whether the military judge committed plain error in admitting and considering evidence that A1C PS's boyfriend did not think A1C PS was being dishonest when she claimed she had been assaulted; (7) Whether the record of trial is incomplete under Article 54, UCMJ, 10 U.S.C. § 854, due to failure to include the Government's response to the appellant's motion to sever as an appellate exhibit; (8) Whether the cumulative effect of errors in the court-martial denied the appellant a fair trial and a fair sentencing hearing; and (9) Whether the evidence is factually insufficient to support a finding of guilty **[*3]** on any of the offenses. We find no error materially prejudicial to a substantial right of the appellant, and affirm.

*Background*

At the time of trial the appellant was a 23-year-old stationed at Kirtland Air Force Base (AFB). He

enlisted in the Air Force in January 2011.

The appellant met A1C DB, a female Airman also stationed at Kirtland AFB, in the fall of 2011. Both he and A1C DB had been in the Air Force for less than a year when they met, and they promptly struck up a sexual relationship. A1C DB did not want a romantic relationship, but she did consensually engage in sexual intercourse with the appellant about five times over the course of three to four months. Sometime around Thanksgiving A1C DB discovered the appellant had a child and a girlfriend, so she broke off contact with him. They had little contact with each other until February 2012, when they renewed their friendship. For the next few months, the friendship continued. They spent several nights together after their friendship renewed and would "cuddle," but they did not have sexual intercourse during this time, and A1C DB repeatedly told the appellant that she did not want a sexual relationship. A1C DB nonetheless characterized **[*4]** their relationship during this time as "confusing," as neither of them "knew what was really going on."

One such overnight encounter took place in A1C DB's room in early May 2012. This time, A1C DB characterized the appellant's behavior as "a little more pushy than normal" and "very persistent" in repeatedly trying to touch her genitals. A1C DB did not order the appellant to leave her room because she trusted him and "felt like [she] had the situation under control." She successfully diverted the appellant's attention and spent the remainder of the night with him without further incident.

About two weeks later, A1C DB and her best friend, AI, headed out to a local night club. Although she was under the age of 21, A1C DB had about two 16-ounce "Four Loco" drinks before departing for the night club. The two spent time at the club, ate some food, returned to A1C DB's dormitory room on base to change clothes, and spent some time at the smoke pit. A1C DB and AI met the appellant briefly while eating, and the appellant showed up for a time at the smoke pit pursuant to AI's text message invitation. The appellant sat quietly by himself at the smoke pit before leaving, which A1C DB noticed as **[*5]** abnormal behavior for him. As a result, A1C DB tried to call the appellant, and she also sent a text message to the appellant stating, "Come to my room in 5. But you have to leave at 8 i work. And no moves lol." When she received no answer, she and AI went to his dormitory room. They knocked on his door, and when he did not answer, they proceeded to the window of his first-floor room, where A1C DB and AI removed the screen. They found the appellant asleep and woke him up, and after the appellant opened the door and let the two women in his room, the women invited the appellant back to A1C DB's room.

At A1C DB's room the three were joined by two other male Airmen, and they socialized for about 15 to 20 minutes. They then realized that the sun was rising and that they needed to get to sleep, so the two other Airmen and AI departed. A1C DB told the appellant he could stay with her, but consistent with her earlier text message, she falsely told him she had to rise at 0800 hours, since she did not want him staying with her all day. By this point, it was about 0600 hours. She also reiterated that she was not going to have sex with the appellant and warned him, "no moves." The appellant and **[*6]** A1C DB got into A1C DB's bed together and after talking and laughing for a while, A1C DB began to fall asleep with her back to the appellant and the appellant "spooning" her. This activity appeared to be consensual.

The appellant then rolled A1C DB onto her back and began kissing her. A1C DB responded, "No. We are not hooking up. What did you not get about that?" As A1C DB lay on the bed, the appellant touched her buttocks and legs, and she again rebuffed his attempts at such contact. A1C DB rolled over with her back to the appellant and fell back asleep, but awoke when the appellant said he was leaving because he could not "just stay here and not have sex with [A1C DB]." A1C DB told the appellant he was free to leave, but he decided to

remain. She did not feel threatened by him at that time because he had heeded her instructions concerning other times she did not wish to be intimate with him.

A1C DB again fell asleep, but awoke to find the appellant's hand inside her pants touching her buttocks. He then moved his hands toward her genitals, and she moved his hands away. The appellant repeated his attempt to touch her genitals, tried to take off her pants, and he "kept getting forceful **[*7]** with it," so A1C DB turned toward the appellant to confront him. As she did that, he began pulling her pants off and A1C DB also saw that the appellant was masturbating with his free hand. A1C DB falsely told him she was intoxicated and needed to vomit, which allowed her to quickly extricate herself from the situation and go to the bathroom. Either in bed or as A1C DB exited the bed, her sweatpants (which the appellant had begun removing) came off. A1C DB remained in the bathroom for a minute or two before returning to the bed. At that point, she felt "more annoyed than anything," but "felt like [she] had the situation under control" because she trusted him and had been able to successfully repel his advances in the past.

A1C DB pretended to fall asleep immediately after returning to the bed. At that point, the appellant was clad only in a t-shirt with his bottom half fully exposed. As A1C DB lay with her back to the appellant, he pulled her right arm back and placed it on his penis. A1C DB let her hand drop, still pretending to be asleep, but the appellant continued to place her hand on his penis and then finally began masturbating using her hand. The appellant then dropped A1C DB's **[*8]** hand and reached over to touch her vagina, but she repeatedly moved his hand away. After his repeated attempts to touch her vagina, A1C DB turned toward him, put her hands up, and said, "What the f*ck, Corey?"

The appellant grabbed both of A1C DB's wrists at that point and pinned her to the bed. As she began saying "no," the appellant released one of A1C DB's wrists and inserted his finger into her vagina. A1C DB used her free hand to push away from the appellant while still in the bed, but she backed herself up against a wall. As A1C DB turned away from him in the fetal position, the appellant pulled her underwear off, pried her legs open, and penetrated her. A1C DB repeatedly said "no" while she was crying, but lay still out of resignation that her resistance was ineffective. After about a minute, the appellant ejaculated, got up, dressed, pulled A1C DB toward the middle of the bed and covered her, asked A1C DB if she was mad at him and if he could call her, and left.

A1C DB immediately called her friend AI, went to meet her, and told her what happened. AI encouraged her to report it, but A1C DB did not do so immediately because she did not want to report she had consumed alcohol under **[*9]** the age of 21. After carrying out some routine activities and talking to her sister over the telephone about the incident, A1C DB reported the alleged sexual assault less than 24 hours after the event. Subsequent examination found injuries consistent with A1C DB's report, including bruises on her wrists and legs. A1C DB also reported that she experienced vaginal bleeding after the incident, which was not normal for her following consensual intercourse. A forensic examination of A1C DB and subsequent testing revealed semen taken from A1C DB matched the appellant's profile.

Soon after A1C DB reported this incident, another female Airman came forward to report the appellant sexually assaulted her several months earlier in August or September 2011. A1C PS was newly assigned to Kirtland AFB, having just arrived from technical training school. She had briefly met the appellant at technical training school, but had no meaningful interaction with him there. Soon after she arrived at Kirtland, the appellant sent her a text message offering to sell her a DVD. Since she had not provided her cell phone number to the appellant, she assumed the appellant obtained the number from a unit recall roster. **[*10]** A1C PS agreed to buy the movie, and went

to the appellant's dormitory room and paid cash for it. A1C PS then became interested in another movie playing on the appellant's television, so she sat on the floor near the appellant's recliner to watch it while the appellant sat in the recliner.

A1C PS reported that after about five minutes, the appellant reached over, touched her leg, and then touched her inner thigh in an upward motion toward her vaginal area. A1C PS did not remember if he actually touched her genitals through the clothes, but she panicked and tried to turn around and stand up to confront him. As she turned around and got on her knees to stand up, the appellant grabbed the back of her neck and pulled it toward his exposed penis. A1C PS tried to pull back but as she opened her mouth to yell at him to stop, he inserted his penis into her mouth. A1C PS reacted by starting to bite the appellant's penis, but as she began to do so, he hit the back of her head. A1C PS did not know if the appellant hit her with an open palm or a clenched fist, but she described the hit as "hard enough to scare me." A1C PS stated that this placed her in sufficient fear that she felt compelled to **[*11]** keep her mouth on his penis for the next 10 to 15 minutes, and as he sat down in the recliner, she moved forward and continued to keep her mouth on his penis out of fear that he would hit her again. At some point, she suspected that he was inebriated and about to fall asleep, so she waited for him to fall asleep. A1C PS then exited the room, sat down in the staircase outside the appellant's room, and cried.

A1C PS did not report this incident immediately. A few weeks later, she started dating another Airman at Kirtland AFB, and that relationship became intimate. A1C PS later told her boyfriend what happened with the appellant because she was having nightmares about the incident. A1C PS's boyfriend encouraged her to report it, but she did not feel comfortable doing so at that time. Instead, she saw a counselor for a few months until she decided to make a restricted report to the Sexual Assault Response Coordinator (SARC) several months after the incident. A1C PS then changed her report to an unrestricted report about a week later, after she learned about A1C DB's allegations and the SARC encouraged her to make an unrestricted report to support A1C DB's case.

The appellant testified at **[*12]** trial and also provided an unsworn statement in the investigation pursuant to Article 32, UCMJ, 10 U.S.C. § 832. He averred that the intercourse with A1C DB was fully consensual and she actively participated in the activity. He testified that while he believed she was intoxicated and remembered A1C DB went to the bathroom purportedly to vomit from intoxication, he believed she consented to the intercourse because she had frequently been under the influence of alcohol when they had consensual intercourse in the past. He also testified that A1C DB's "no moves" comment did not convey lack of consent to him, because she had previously "played hard to get" at first, only to later consent to sexual activity. Concerning A1C PS, he denied she performed oral sex on him the day he sold her the DVD. He did testify, however, that he and A1C PS had consensual intercourse on a later date. He stated the intercourse only lasted for "a minute and a half [to] two minutes," and he "wasn't really pleased with it and [he] wasn't really having a good time," so he told A1C PS he was tired and wanted to go to bed, ceasing the intercourse.

Further relevant facts are detailed for each assignment of error below.

*A1C **[*13]** PS's Mental Health Records*

Shortly before trial, defense counsel requested production of A1C PS's mental health records covering her active duty service. Defense counsel sought several pieces of information they believed were contained in the mental health records, including "where she talks about issues with her current boyfriend." The defense asserted this information was relevant and necessary because it would further the defense theory that A1C PS reported the sexual assault because her boyfriend might surmise it was consensual if she did not

report it, possibly jeopardizing the relationship. The Government opposed producing her mental health records. The military judge reviewed A1C PS's mental health records in camera and determined none of the mental health records were relevant, at least in regard to findings.

Following the finding of guilty as to all charges and specifications, and in response to the testimony of a Government expert about post-traumatic symptoms A1C PS and A1C DB displayed, the military judge reopened findings and released certain medical and mental health records of A1C DB and A1C PS to the defense. This matter is more fully discussed in Issue II below. The **[*14]** defense did not receive all of A1C PS's medical or mental health records. The records provided generally contain A1C PS's positive impressions of her relationship with her boyfriend. However, one entry provided to the defense noted A1C PS rated her satisfaction with her relationship as four on a scale of five and noted that she experienced "differences, miscommunication, and different values" with her boyfriend. Several other mental health records not received by defense counsel covered A1C PS's relationship with her boyfriend. Those records generally noted A1C PS's satisfaction with the relationship and the fact that she looked to him as a source of emotional support. However, the records also contained entries noting concerns her boyfriend was too "controlling" or "bossy," he had a "double standard for women," and they had "almost nothing in common."

The appellant now alleges the military judge erred in not releasing excerpts of A1C PS's mental health records that indicate her boyfriend may have been controlling or bossy or held women to a different standard than men. He argues such records were constitutionally required for two reasons: (1) The defense could have used the records **[*15]** to counter A1C PS's testimony in the Mil. R. Evid. 412 hearing that her relationship with her boyfriend was very strong; and (2) The statements in the mental health records could have supported the defense's theory that A1C PS fabricated the sexual assault allegation to cover up a consensual sexual encounter with the appellant out of fear that her boyfriend would be upset with her.

***HN1***[] "We review a military judge's decision to admit or exclude evidence for an abuse of discretion." *United States v. Jenkins*, 63 M.J. 426, 428 (C.A.A.F. 2006) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000)).

***HN2***[] Mil. R. Evid. 513(a) states that "[a] patient has a privilege to refuse to disclose and prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist . . . in a case arising under the UCMJ, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition." Mil. R. Evid. 513(d) contains certain exceptions to this privilege, including "when admission or disclosure of a communication is constitutionally required." Mil. R. Evid. 513(d)(8). The rule establishes procedures **[*16]** to determine the admissibility of patient records or communications. Generally, the rule requires a party seeking such records or communications to seek an interlocutory ruling from the military judge. Mil. R. Evid. 513(e)(1). The military judge conducts a hearing and examines the evidence or a proffer thereof in camera. Mil. R. Evid. 513(e)(2)-(3).

On appeal, the appellant requested oral argument on this issue, but provided no rationale for his request. This Court denied the motion, since the appellant did not provide good cause for the motion or indicate why oral argument would be helpful. Having fully evaluated the thorough briefs of the appellant and the Government, we find the military judge did not abuse his discretion in declining to provide the mental health record excerpts to the defense. Even assuming that he did err, we find any such error was harmless beyond a reasonable doubt.

Notably, the military judge did provide the defense counsel with one record in which A1C PS expressed some dissatisfaction with her relationship

with her boyfriend, and the defense did not use it to impeach A1C PS. The released records contained an entry in which A1C PS rated her satisfaction with **[*17]** her relationship as four on a scale of five and noted she experienced "differences, miscommunication, and different values" with her boyfriend. The military judge reconsidered his findings of guilty after providing mental health records to the defense, and he allowed the defense to present additional evidence or cross-examine witnesses in findings. The defense cross-examined A1C PS again about matters contained in her mental health records, but defense counsel asked no questions about A1C PS's relationship with her boyfriend and did not use the mental health record entry to impeach her previous testimony that her relationship with her boyfriend was positive. Trial defense counsel's own actions therefore demonstrate that the additional evidence contained in A1C PS's mental health records was not so probative as to be constitutionally required, or if it was required to be disclosed, its absence was harmless beyond a reasonable doubt.[1]

Other facts support our finding that this evidence was not constitutionally **[*18]** required and any error was harmless beyond a reasonable doubt. For example, the vast majority of the mental health entries that concerned A1C PS's relationship with her boyfriend spoke positively of their relationship. A1C PS repeatedly referred to her boyfriend as her primary source of support in dealing with the sexual assault and other stressors in her life, and she repeatedly expressed her gratitude to her boyfriend for his support and characterized their relationship positively. It is therefore unlikely that the evidence the appellant now alleges he should have received could have been so useful to the defense as to be constitutionally required or affect the outcome of the trial. In addition, the charged acts took place weeks before A1C PS's relationship with her boyfriend began. Even assuming A1C PS's boyfriend was controlling and had a double standard toward women, the relevance of such evidence is somewhat less when the event took place before he even had a relationship with A1C PS. Finally, the defense pursued two slightly different lines of attack to assert that A1C PS fabricated the sexual assault allegation in order to save her relationship with her boyfriend. The defense **[*19]** alternately suggested that A1C PS's boyfriend coerced her to report the encounter with the appellant as a sexual assault because he was a controlling person, or that A1C PS's relationship with her boyfriend was so good and important to her that she reported the sexual assault in order to preserve the relationship. To the extent that some of the statements in A1C PS's mental health records may have supported a theory that her boyfriend was controlling, those same statements would tend to somewhat undercut the defense theory that A1C PS fabricated the allegation because her relationship with her boyfriend was so good that she did not want to lose it.

We find no abuse of discretion in the military judge's refusal to disclose additional mental health records to the defense. Even assuming the military judge erred, such error was harmless beyond a reasonable doubt.

*Defense Motion for Mistrial*

As discussed above, in motions practice the defense sought production of portions of A1C PS's mental health records that were constitutionally required. During discussion with counsel on the motion before he reviewed the records, the military judge noted "[t]here is a difference in my mind between sentencing **[*20]** and findings," and disclosure of mental health records might be required for sentencing (for example, to rebut victim impact evidence), but not findings. The military judge advised the parties he would review the records only to determine what information should be disclosed for findings at that point, and that he would revisit the issue in sentencing if applicable.

[1] The appellant has not alleged his trial defense counsel were ineffective in failing to cross-examine Airman First Class PS concerning these statements in her mental health records.

The military judge then clarified exactly what defense counsel was seeking, and defense counsel specifically focused on four types of evidence: (1) any factual assertion A1C PS made about the allegations in the court-martial; (2) any statement regarding her relationship with her boyfriend, particularly any statement that might support the defense's theory that A1C PS falsely reported a sexual assault to preserve her relationship with her boyfriend; (3) any statement relating to the appellant's sale of the DVD to her; and (4) "any statement [A1C PS] may have made to a provider about prior sexual offenses that contradict[s] what she mentioned in court . . . ."

A1C PS had earlier testified in motions practice. After questioning by counsel, the military judge asked her whether she had ever previously been a victim of sexual **[*21]** assault. She replied affirmatively, and testified as to certain instances. However, when the military judge asked her if any other sexual assaults took place, A1C PS replied, "No, sir, not that I recall."

After reviewing several hundred pages of A1C PS's mental health records, the military judge stated he found nothing in her mental health records that was constitutionally required to be provided to the defense, at least for findings. Specifically concerning past allegations of sexual abuse, the military judge stated the following:

> In addition, there were very general references to a history of past sexual abuse during adolescent years by relatives or similar to what she had testified to in here. Once again, there were no specifics as to what occurred, how many times it occurred, those types of things, the level of specificity. And additionally the witness testified on the stand under oath this morning that none of those incidents were similar to the acts alleged here. There was nothing in the records to indicate that in fact any of those alleged acts of prior sexual abuse while she was an adolescent would've been similar in nature to anything that's alleged here.

Defense counsel did **[*22]** not further question or seek clarification of the military judge's ruling.

In findings, the Government called its expert psychologist, Dr. DL, to testify about responses exhibited by victims of sexual assault, including tonic immobility. Dr. DL did not testify in findings that he had actually examined either A1C PS or A1C DB, and he did not specifically testify as to responses by A1C PS or A1C DB. After the military judge found the appellant guilty of all charges and specifications, the Government recalled Dr. DL, who testified as to conditions commonly experienced by victims of sexual assault, including post-traumatic stress disorder (PTSD). He then testified that he had interviewed or examined both A1C PS and A1C DB, and testified that both Airmen exhibited many symptoms consistent with PTSD.

After direct examination of Dr. DL, the military judge advised both parties that the Government had placed the mental health of A1C PS and A1C DB at issue in sentencing proceedings, and therefore he planned to disclose certain records to the defense. The military judge excused Dr. DL, stating that the defense could recall him and question him after reviewing the records the military judge would **[*23]** provide. However, he then allowed the Government to call A1C DB in sentencing to testify as to the effect of the appellant's actions upon her. The defense did not cross-examine A1C DB.

The military judge then re-reviewed A1C PS's mental health records as well as records pertaining to A1C DB. He released to the defense 35 pages of A1C PS's records, finding these were the only records "that would contain any reference to anything that I could even conceivably see as a possible contributing factor to her mental state." He also released 13 pages concerning A1C DB. The military judge gave the defense a recess to review these records and prepare any questions they might prompt for Dr. DL.

The defense moved for a mistrial following the recess. The defense asserted some of the records

provided should have been disclosed in findings, because they contained evidence of other previous sexual assault allegations in addition to those A1C PS testified about, potentially providing a basis to impeach her. The military judge determined a possible contradiction was raised and the information should have been made available to the defense in findings. He then considered and rejected the defense's motion **[*24]** for a mistrial, finding a less drastic remedy was available and appropriate. He ruled that under Rule for Courts-Martial (R.C.M.) 924(c), it was appropriate for him to reconsider his findings and allow the defense to reopen its case in findings and present additional information. The defense availed itself of this opportunity, recalling two Government witnesses who had previously testified as to A1C PS's character for truthfulness to ask if it would change their opinion to learn she falsely testified in motions practice. The defense recalled A1C PS's boyfriend to ask about other issues raised by the mental health records. Finally, the defense thoroughly cross-examined A1C PS about the matters raised by the mental health records, including any contradictions between the mental health records and her testimony in motions practice.

The parties then presented new closing arguments and the military judge again deliberated on findings. The military judge again found the appellant guilty of all charges and specifications, and he elaborated on his findings as follows:

> [A]s an effort to provide as much transparency as I can without going into specific deliberations of the Court, due to the unique **[*25]** circumstances of this case I want to provide at least some additional information.
> Each offense stood on its own. No offense played any role with respect to any other. Additionally, when I went back into my deliberations I started over with a new review of all evidence presented on the matter with the assumption that the allegation in this case could actually be false especially in light of the additional testimony that was provided by the defense. Therefore I awarded the accused a presumption of innocence unless I was re-convinced that the accused was guilty beyond a reasonable doubt of the offenses alleged.
> I had the opportunity to observe both the accused and [A1C PS's] demeanor on the stand as well as consider all inconsistencies, motives to fabricate, all evidence either supporting or contradicting the two differing accounts and at the end of the day I was firmly convinced of the accused's guilt beyond a reasonable doubt. Had I not been re-convinced of the accused['s] guilt I would have found him not guilty but, I was.

The appellant alleges the military judge abused his discretion by denying the motion for a mistrial. The appellant focuses on three aspects of the ruling: (1) The **[*26]** military judge erroneously permitted the Government to call A1C DB as a sentencing witness before disclosing records to the defense and reconsidering his findings; (2) By denying the motion for a mistrial, the military judge countenanced "sandbagging" by the Government in withholding evidence of A1C PS's and A1C DB's mental health information from the defense until sentencing; and (3) The military judge's remedy of reconsidering his findings did not address harm to the defense in preparing its case.

***HN3***[] We review a military judge's denial of a motion for a mistrial for a clear abuse of discretion. *United States v. Coleman*, 72 M.J. 184, 186 (C.A.A.F. 2013) (citing *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009)).

"[A] mistrial ***HN4***[] is a drastic remedy and is reserved for only those situations where the military judge must intervene to prevent a miscarriage of justice." *United States v. Garces*, 32 M.J. 345, 349 (C.M.A. 1991) (citing *United States v. Jeanbaptiste*, 5 M.J. 374 (C.M.A. 1978)). The declaration of a mistrial is a drastic resolution and military judges are encouraged to take other remedial actions to correct an error. *Ashby*, 68 M.J.

at 122. A military judge has discretion to "declare **[*27]** a mistrial when such action is manifestly necessary in the interest of justice because of circumstances arising during the proceedings which cast substantial doubt upon the fairness of the proceedings." R.C.M. 915(a). In deciding whether to grant a mistrial, the military judge should examine numerous factors, "including the timing of the incident leading to the question of mistrial, the identity of the factfinder, the reasons for a mistrial, and potential alternative remedies; but, most importantly, the desires of and the impact on the defendant." *United States v. Harris*, 51 M.J. 191, 196 (C.A.A.F. 1996) (citing *United States v. Donley*, 33 M.J. 44, 47 (C.M.A. 1991)).

We find no abuse of discretion in the military judge's decision to deny a mistrial. We recognize that the defense specifically asked for information about any statement A1C PS made about prior sexual offenses that contradicted her in-court testimony. We agree with the military judge that in retrospect, he should have disclosed these records at the outset of the trial, as they set up at least a possible contradiction with A1C PS's testimony the defense could have used to impeach her credibility. We also agree with the appellant **[*28]** that once the military judge noted the mental health condition of A1C PS and A1C DB had been placed at issue, he should have provided the records at that point instead of allowing A1C DB to testify in sentencing. However, we nonetheless hold the military judge acted within his discretion in denying the motion for mistrial.

The military judge appropriately realized that a mistrial is a drastic remedy to be employed sparingly. He then chose a remedy — reopening the defense's case in findings and reconsidering his findings — that was reasonably tailored to address the harm presented by the defense not having the information in A1C PS's medical records earlier. The defense was able to fully cross-examine A1C PS, the two character for truthfulness witnesses, and A1C PS's boyfriend about this additional information. A1C PS specifically addressed the inconsistency, and the military judge was able to evaluate her testimony and demeanor just as if the information had been disclosed to the defense at the beginning of trial. There is no reason to believe the defense was in any way hampered by not having received the information in A1C PS's mental health records earlier. In fact, at the conclusion **[*29]** of the defense's reopened case in findings, the military judge asked trial defense counsel, "[h]ad this information been provided earlier, is this everything that you would have done in the presentation of your case?" Trial defense counsel responded, "[y]es, this is what we would have done if we had known this information."

We also reject the appellant's contention that the military judge's ruling sanctioned "sandbagging" on the part of the Government. The Government timely provided this information to the military judge for his review and there is no reason to believe the Government was aware of the inconsistency between A1C PS's testimony in motions practice and the mental health records.

While not directly related to the defense's mistrial motion, we also find that any error in allowing A1C DB to testify in findings before providing the mental health records to the defense was harmless under any standard of review. There is every reason to believe that had the defense asked to reopen its cross-examination of A1C DB, the military judge would have allowed this. There also was nothing to prohibit the defense from recalling A1C DB and cross-examining her on information in her mental health **[*30]** records, as the defense's sentencing case had not been presented when the military judge provided the mental health records. The defense declined to do so.

Despite the unusual procedural matters that led to this issue, the appellant received a fair trial, and the military judge's comments following the re-announcement of findings confirm the appellant received the full benefit of the presumption of innocence upon reconsideration, just as he did in the initial findings phase. Reconsideration of

findings by a military judge is a permissible option when information is raised that may cause the military judge to question the findings. We are fully satisfied that any error in failing to earlier provide the defense with the mental health record excerpts was cured when the military judge reopened the case and reconsidered the findings, again applying the proof beyond a reasonable doubt standard to determine the appellant's guilt. We see no reasonable possibility that earlier disclosure of this information would have affected the outcome of the trial. We therefore deny the appellant relief on this issue.

*Defense Motion for Severance*

Defense counsel moved the military judge before arraignment **[*31]** to sever the offenses involving A1C PS into a separate trial from the offenses involving A1C DB. The defense asserted the offenses involving A1C PS were significantly weaker than those involving A1C DB and cited a concern about possible spillover. The Government opposed the severance motion. The military judge denied the defense's motion, finding he could take sufficient protective measures such as requiring the Government to present its evidence separately and issuing instructions that would cure any possible confusion or spillover effect.

The military judge stated he would issue a more detailed ruling on the severance motion later. However, soon after denying the motion, the appellant elected to be tried by military judge alone. The military judge explored the impact of the appellant's forum choice on the severance issue with the appellant and his counsel. Defense counsel agreed the appellant's choice "could potentially impact the validity of [the] motion for severance and manifest injustice with respect to members." Defense counsel then clarified that the appellant's forum selection would have been different had the severance motion been granted, and he asserted the defense was not **[*32]** waiving the issue by electing to be tried by a military judge alone. However, defense counsel and the appellant both acknowledged that the election of a military judge alone as the forum affected the continuing viability of the severance motion. The military judge issued a more detailed ruling on this issue after entry of pleas.

***HN5***[↑] R.C.M. 906(b)(10) permits a party to move for severance of offenses, "but only to prevent manifest injustice." The discussion to this rule states, "[o]rdinarily, all known charges should be tried at a single court-martial" and "[j]oinder of minor and major offenses, or of unrelated offenses, is not alone a sufficient ground to sever offenses." R.C.M. 906(b)(10), Discussion.

***HN6***[↑] We review a military judge's decision to deny a severance motion for an abuse of discretion. *United States v. Duncan*, 53 M.J. 494, 497-98 (C.A.A.F. 2000) (citations omitted). Where the military judge has denied a severance motion, the appellant must demonstrate more than the fact that separate trials would have provided a better opportunity for an acquittal. *Id*. The appellant must show that the ruling caused actual prejudice by preventing the appellant from receiving a fair trial. *Id*.

In reviewing **[*33]** a military judge's denial of a severance motion, we examine three factors: (1) Do the findings reveal an impermissible crossover of evidence; (2) Would the evidence of one offense be admissible proof of the other; and (3) Did the military judge provide a proper limiting instruction. *United States v. Curtis*, 44 M.J. 106, 128 (C.A.A.F. 1996) (citations omitted).

The appellant claims each of these factors reveals the military judge abused his discretion in denying the severance motion. We disagree. The military judge analyzed all three factors and concluded the appellant did not demonstrate "manifest injustice" would result from failing to sever the charges. Concerning the first factor, the allegations concerning A1C PS and A1C DB were fairly dissimilar in the manner in which the acts were allegedly committed, the extent of their previous

interaction with the appellant, the way in which the two Airmen reported their allegations, and the defense's strategy at trial. Trial defense counsel recognized this in their motion for severance, acknowledging that "the two situations share nothing in common." The appellant nonetheless alleges that the allegations concerning A1C DB were stronger than **[*34]** the allegations concerning A1C PS, and therefore joinder of the two sets of allegations risked the factfinder finding the appellant guilty of the actions concerning A1C PS simply because of the stronger allegations concerning A1C DB. Our review of the record reveals no such concern. A1C PS's allegations were sufficiently credible to stand on their own, and when combined with the differences in their factual nature, we find no possibility the appellant was prevented from receiving a fair trial.

We note one issue as to the second factor. The military judge stated that under Mil. R. Evid. 413, evidence for each of the offenses may properly be admitted to prove the other, and that either offense may have been admitted to show the appellant's propensity to commit sexual assault. This was not so in the appellant's case, as the Government never provided notice that it intended to offer Mil. R. Evid. 413 evidence. However, the military judge stated that this factor "is not dispositive of the issue." We agree this factor is not dispositive, as the other two factors weigh strongly against severance.

Finally, concerning factor three, this was a military judge-alone case; therefore there was no **[*35]** need for a spillover or limiting instruction. As the defense counsel noted, the appellant's election to be tried before a military judge alone greatly reduced any potential risk of spillover. Nonetheless, the military judge extensively voiced recognition of the appropriate spillover and limiting instructions, and the military judge — in an abundance of caution — did take measures to prevent spillover, such as instructing the Government to keep the evidence concerning each alleged victim separate in its case-in-chief. The Government called all its witnesses regarding A1C PS's allegation first, and a clear transition marked the point at which the Government began presenting evidence regarding A1C DB's allegation. Trial counsel actually argued that the case presented "[t]wo very different victims, two very different assaults." Immediately before closing argument, the military judge reiterated that "I am very aware as I've mentioned numerous times of the spillover [sic]. Each offense will be treated separately." The military judge also noted the Government had properly bifurcated its case and no propensity evidence was introduced under Mil. R. Evid. 413; therefore, it was "very easy for **[*36]** the court to determine which facts relate to each of the offenses alleged and to each of the alleged victims in this case."

Even had the appellant elected to be tried before members, we are confident joinder of the two sets of allegations presented no risk of manifest injustice. The appellant's position — if taken to its logical conclusion — is that nearly every sexual assault case involving more than one victim should be severed. No such requirement exists, and nothing about this case poses any risk of manifest injustice. The military judge did not abuse his discretion in denying the motion to sever.

*Unreasonable Multiplication of Charges*

The appellant was convicted of two specifications concerning his sodomy with A1C PS. First, he was convicted of a specification under Article 120, UCMJ, for abusive sexual contact, which alleged that he caused A1C PS to engage in sexual contact — placing his penis in her mouth — by placing her in fear of physical injury. Second, he was convicted of a specification under Article 125, UCMJ, which alleged that he committed sodomy with A1C PS by force and without her consent.

During the investigation under Article 32, UCMJ, defense counsel asserted the two **[*37]** charges were multiplicious or represented an unreasonable multiplication of charges. The Government responded, "they are being charged in the

alternative. If this case goes forward to trial, it is our intent to submit an instruction to the jury to explain this."

The defense moved at trial to dismiss the abusive sexual contact specification involving A1C PS, asserting this specification was either multiplicious with the forcible sodomy charge and specification or it represented an unreasonable multiplication of charges. Defense counsel noted the Government had earlier represented its intention to charge this matter in the alternative. In the unreasonable multiplication of charges discussion, the defense particularly focused on the fact that the Government initially represented that the charges were being offered in the alternative as proof of prosecutorial overreaching. The Government opposed the motion, asserting that the two charges were neither multiplicious nor represented an unreasonable multiplication of charges because they "cover two different aspects of criminal behavior." The Government reasoned that the two charges represented two distinct acts by the appellant: the forcible **[*38]** sodomy charge covered the appellant's alleged act of grabbing A1C PS's neck and holding her down while he inserted his penis into her mouth, while the abusive sexual contact charge covered what took place immediately thereafter when he allegedly struck A1C PS on the back of her head, placing her in fear that caused her to continue the sexual act.

The military judge heard argument on the motion. He asked trial counsel about the Government's representation at the Article 32, UCMJ, investigation that the two charges were being offered in the alternative. Trial counsel stated he was assigned to the case after the Article 32, UCMJ, hearing, whereupon he examined the charges and believed they were more properly read as covering two distinct acts by the appellant rather than alternative charging. After hearing argument on the motion, the military judge ruled the two charges were neither multiplicious nor represented an unreasonable multiplication of charges. The military judge first found the two charges were not multiplicious because the elements of the two offenses were distinct in that forcible sodomy required an additional element that abusive sexual contact did not, namely that A1C PS **[*39]** did not consent to the act. The appellant does not challenge this ruling on appeal. The military judge then deferred ruling on the unreasonable multiplication of charges issue until the parties presented evidence. At the conclusion of evidence in findings, the military judge found appellant was not subject to an unreasonable multiplication of charges, though he did merge the two offenses for sentencing purposes. The appellant now challenges the unreasonable multiplication of charges aspect of the military judge's ruling.

***HN7***[] A military judge's decision to deny relief for unreasonable multiplication of charges is reviewed for an abuse of discretion. *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004) (citations omitted).

In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), our superior court explained that ***HN8***[] unreasonable multiplication of charges is a distinct concept from the constitutional prohibition against multiplicity. The Court noted the concept of unreasonable multiplication of charges "has long provided courts-martial and reviewing authorities with a traditional legal standard — reasonableness — to address the consequences of an abuse of prosecutorial discretion in the context **[*40]** of the unique aspects of the military justice system." *Id*. at 338. ***HN9***[] The Court then approved of a five-pronged approach for evaluating claims of unreasonable multiplication of charges:

> (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications?
>
> (2) Is each charge and specification aimed at distinctly separate criminal acts?
>
> (3) Does the number of charges and specifications misrepresent or exaggerate the appellant's criminality?
>
> (4) Does the number of charges and

specifications [unreasonably] increase the appellant's punitive exposure?

(5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

*Id*. at 338 (citations omitted). These factors are not "all-inclusive," nor is any one of them a prerequisite to finding unreasonable multiplication of charges. *United States v. Campbell*, 71 M.J. 19, 23 (C.A.A.F. 2012). In addition, the concept of unreasonable multiplication of charges "may apply differently to findings than to sentencing," and in a case where the charging scheme does not implicate the *Quiroz* factors in the same way that the sentencing exposure does, "'the nature of the harm requires a remedy **[*41]** that focuses more appropriately on punishment than on findings.'" *Id*. (quoting *Quiroz*, 55 M.J. at 339).

The military judge thoroughly discussed all five *Quiroz* factors in determining the appellant was not subject to an unreasonable multiplication of charges. The military judge first found the appellant had "explicitly or clearly" objected to unreasonable multiplication of charges. Second, he held the charges to be "distinct criminal acts" with "distinct elements." Next, the military judge found that the appellant's criminality was not misrepresented or exaggerated by the number of charges and specifications brought against him. Addressing the fourth factor, he reasoned that because offenses are combined to find the maximum punishment for a court-martial, the charges at issue caused no risk of increased punitive exposure for the appellant. Finally, the military judge found that trial counsel made clear in their motion response their reason for drafting separate charges and additionally, the offenses require proof of different elements, eliminating any evidence of prosecutorial overreaching or abuse. The military judge then elected to merge the specification alleging abusive sexual contact **[*42]** toward A1C PS and the forcible sodomy charge and specification for sentencing.

We find no abuse of discretion in the military judge's thorough, reasoned ruling. Trial counsel may have initially represented that the two charges were offered in the alternative, but we see no reason why the Government must be permanently bound by such a representation, and the appellant cites no binding or persuasive authority for his proposition that the Government must be bound by its initial charging strategy. The explanation provided at trial for the two charges fits the facts of this case, when the appellant's act of hitting A1C PS on her head transformed the act from forcible sodomy to abusive sexual contact. The Government's case emphasized that this act marked a decisive point in the encounter that placed A1C PS in fear, and the method of charging this case fits the evidence presented. The appellant was subjected to no additional punitive exposure as a result of the charging method, and in any event, the military judge merged the two matters for sentencing. We find no error pertaining to this issue.

*Questioning Witnesses about Other Witnesses' Truthfulness*

The appellant next alleges the military **[*43]** judge committed plain error when he failed to sua sponte stop trial counsel from questioning witnesses about other witnesses' truthfulness at two points in the court-martial. The first came when the appellant took the stand and testified in his defense. On cross-examination, trial counsel repeatedly pointed out the contradictions between the appellant's testimony and that of the two alleged victims, and asked the appellant if the two alleged victims were lying when they testified in a manner inconsistent with the appellant's account. In total, trial counsel asked the appellant about 15 times if the alleged victims were lying in their testimony, and each time the appellant replied that they were.

The second occurrence the appellant cites as error took place when A1C PS's boyfriend testified in findings. Anticipating that defense counsel would

portray him as coercing A1C PS into filing the report, trial counsel asked several questions about the circumstances under which A1C PS decided to report the alleged sexual assault. This led to the following exchange:

> Q: When she confided in you and told you of the incident that had happened, what was your reaction?
>
> A: I was pretty upset about what **[*44]** had happened, especially since it's someone that she works with. I couldn't believe that he would do that to her.
> Q: Were you upset at [A1C PS] at all?
> A: No, ma'am.
> Q: Did you ever accuse her of not telling the truth?
> A: No, ma'am.
> Q: Did you ever feel that she was not being honest?
> A: No, ma'am. I knew she wasn't comfortable talking about it. That's why I recommended that she go talk to a therapist or somebody else if she wasn't comfortable talking to me about it.

***HN10***[] A military judge's decision to permit questioning and comment, in the absence of defense objection, is reviewed for plain error. *United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011) (citing *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008)). Under the plain error standard an appellant must demonstrate: "1) an error was committed; 2) the error was plain, clear, or obvious; and 3) the error resulted in material prejudice to substantial rights." *Maynard*, 66 M.J. at 244 (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)).

***HN11***[] A witness is generally not permitted to opine that another witness is lying or telling the truth. *United States v. Birdsall*, 47 M.J. 404, 410 (C.A.A.F. 1998); *United States v. Marrie*, 43 M.J. 35, 41 (C.A.A.F. 1995). **[*45]** Our superior court has also held it may be improper for trial counsel to ask an accused to opine whether government witnesses against him are lying. *United States v. Jenkins*, 54 M.J. 12, 17-18 (C.A.A.F. 2000). However, the Court also made clear this principle is to be applied on a "case-by-case basis" to determine if such questions are prejudicial. *Id.* at 17. Therefore, in *Jenkins*, the Court held that repeated questions of the accused with regards to whether Government witnesses were lying were not prejudicial because his defense counsel had already implied the Government witnesses were lying in his opening statement. The Court concluded, "For trial counsel to force appellant to acknowledge under oath what his counsel had already asserted was harmless error." *Id.* (citing *United States v. Cole*, 41 F.3d 303, 309 (7th Cir. 1994)).

We find no plain error in trial counsel's questioning of the appellant. Trial counsel's repeated inquiries into whether Government witnesses were lying may be impermissible in some contexts, but here trial counsel asked no more than what trial defense counsel had already asserted. Defense counsel's opening statement repeatedly referred to a "gap" between what **[*46]** Government witnesses would testify to and what the evidence would reveal. Defense counsel also asserted that "the things [A1C PS] will tell you don't match other action." In cross-examination, defense counsel essentially implied A1C PS was lying in a series of questions when he asked her if she was really just embarrassed to talk about a consensual sexual encounter with her boyfriend. Although it came after the appellant's testimony, trial defense counsel's closing argument included a suggestion that A1C DB lied in reporting a sexual assault because she was upset that the appellant ejaculated inside her and then he left the room. In short, no small part of the defense's case was built on the implication — if not the outright assertion — that A1C DB and A1C PS were lying. There is therefore no prejudicial error in trial counsel asking the appellant if these witnesses were lying. Even assuming the military judge erred by failing to stop such questioning and such error was plain and obvious, no material prejudice to the appellant resulted. Trial defense counsel did not object to the questioning, and a lack of objection is "some measure of the minimal

impact" of the questions and answers. **[*47]** *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999) (citations and internal quotation marks omitted).

We see no error — plain or otherwise — in trial counsel's questions toward A1C PS's boyfriend. Trial counsel was not attempting to elicit his opinion as to whether A1C PS was truthful in her sexual assault report. The one question, "Did you ever feel that she was not being honest," was part of a series of questions designed to demonstrate whether A1C PS's boyfriend attempted to coerce her into filing a sexual assault report. It was not designed to intrude upon the factfinder's dominion of observing and assessing A1C PS's credibility, and trial counsel did not ask if her boyfriend believed she was telling the truth at trial. Rather, trial counsel merely asked if A1C PS's boyfriend was upset with her, accused her of not telling the truth, or believed she was untruthful when she first confided in him in order to show A1C PS filed the report voluntarily. The answer provided by A1C PS's boyfriend further demonstrates the question was not understood as a form of human lie detector but as an inquiry into the dynamics of how A1C PS reported the incident. The military judge did not **[*48]** err in failing to sua sponte exclude A1C PS's boyfriend's answer to this lone question.

*Failure to Include Appellate Exhibit II*

The original record of trial submitted contains as Appellate Exhibit I the defense's motion for severance. The index lists Appellate Exhibit II as the Government's response to the severance motion; however, the document at Appellate Exhibit II is actually another copy of the defense's severance motion. The Government's response to the severance motion did not originally appear in the record of trial. Therefore, the appellant asserts that the record of trial is not complete within the meaning of Article 54, UCMJ, limiting the maximum sentence that may be imposed upon the appellant.

In preparing its answer to the appellant's assignment of errors, the Government moved to attach a purported copy of the missing appellate exhibit. Contemporaneously, the Government also moved to submit an affidavit from trial counsel in this case. Trial counsel's affidavit avers that the document the Government moved to attach was identical to the one provided to the military judge, and that the Government's response was properly submitted to the military judge in motions practice. **[*49]** This Court granted the Government's motion to attach its response to the severance motion and the trial counsel's affidavit.

***HN12***[↑] Whether a record of trial is complete is an issue we review de novo. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000).

***HN13***[↑] Article 54(c)(1), UCMJ, requires a "complete" record of the proceedings and testimony to be prepared for any general court-martial resulting in a punitive discharge. A "complete" record must include the exhibits that were received in evidence, along with any appellate exhibits. R.C.M. 1103(b)(2)(D)(v).

Failure to comply with this rule "does not necessarily require reversal." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citations and internal quotation marks omitted). Where a record is missing an exhibit, this Court evaluates whether the omission is substantial. *Henry*, 53 M.J. at 111. "Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Id*. If the omission is substantial, thereby raising a presumption of prejudice, the Government may rebut the presumption by reconstructing the missing material. *See United States v. Garries*, 19 M.J. 845, 852 (A.F.C.M.R. 1985) **[*50]** (finding that where court recording equipment malfunction for approximately five minutes and the military judge promptly directed reconstruction of the unrecorded testimony, the record was rendered substantially verbatim and even assuming a presumption of prejudice arose,

the Government rebutted the presumption through the reconstructed testimony); *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982) (holding that military judge's reconstruction of unrecorded portions of a witness's testimony rendered the record "substantially verbatim"); *but see United States v. Snethen*, 62 M.J. 579, 581 (A.F. Ct. Crim. App. 2005) (holding that where at least an hour of witness testimony and argument in motions practice went unrecorded, a military judge's reconstruction of the missing witness testimony in question and answer format was insufficient to overcome the presumption of prejudice, because of the importance of the lost testimony and arguments, the lengthy duration of the unrecorded portion of the proceedings, and the length of time between trial and reconstruction efforts).

Even assuming the missing appellate exhibit constituted a substantial omission, we find the Government rebutted any presumption **[*51]** of prejudice. Trial counsel's affidavit satisfactorily demonstrates the document now attached to the record is identical to the one submitted at trial. Now having the benefit of the appellate exhibit the military judge reviewed, this Court is able to conduct a full review of the record under Article 66, UCMJ, 10 U.S.C. § 866. There is no conceivable prejudice the appellant can cite in light of the Government's reconstruction of the missing exhibit, and the appellant is therefore not entitled to relief on this issue.

*Cumulative Effect of Errors*

The appellant also contends that even if none of his multiple assignments of error entitle him to relief, he is nevertheless entitled to ***HN14***[] relief under the cumulative error doctrine. We review such claims de novo. *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011). Under the cumulative error doctrine, "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." As we have found no merit in any of the appellant's assigned errors, the cumulative error doctrine provides the appellant with no basis for relief. *See United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999) ("Assertions of error **[*52]** without merit are not sufficient to invoke this doctrine.")

*Factual Sufficiency*

The appellant alleges the evidence is factually insufficient to support a finding of guilty on any of the charges or specifications. We have considered the extensive arguments in the briefs from the appellant and the Government; however, for brevity's sake, we summarize only the most pertinent arguments here. The appellant asserts that his testimony provides a rational hypothesis of innocence while PS and A1C DB — on whose testimony all the charges and specifications rest — did not prove themselves credible witnesses.

The **[*53]** appellant alleges that A1C PS's credibility is undercut by the following facts: the length of time A1C PS continued to keep her mouth on the appellant's penis after he struck her; she kept her mouth on his penis even as he sat down in the recliner; she did not report the incident until several months later; she continued to work in the same shop and accepted occasional car rides from the appellant (including a ride to the SARC when she eventually reported the incident); and her relationship with her boyfriend, which the appellant contends provided A1C PS a motive to fabricate her allegations.

Concerning A1C DB, the appellant alleges that A1C DB's previous consent to intercourse and her actions in waking him and inviting him back to her room demonstrate her consent to intercourse on the morning in question. He surmises A1C DB was upset by the fact that he ejaculated inside her (something he normally did not do during intercourse) and then left. He also asserts that testimony from A1C DB's next-door neighbor that she heard noises like furniture moving cannot be relied upon to support the conviction because the neighbor maintained that the noises took place

hours before the charged event. **[*54]** Finally, he asserts A1C DB falsely told the nurse who conducted her sexual assault examination that she was drunk, undercutting her credibility.

***HN15***[] We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987), *quoted in United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (internal quotation marks omitted). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

We have reviewed the record of trial and evaluated all the arguments by the appellant and the Government. Making our own independent determination as to whether the evidence constitutes proof of each required **[*55]** element beyond a reasonable doubt, and making allowances for not having personally observed the witnesses, we are convinced of the appellant's guilt on all charges and specifications beyond a reasonable doubt. Concerning A1C PS, we have no difficulty believing A1C PS's account of the events in question. It is no great stretch to believe that A1C PS — a young, inexperienced woman newly assigned to her first permanent duty station — would be frightened into performing oral sex upon the appellant after he immediately grabbed her crotch, stuck his penis in her mouth while holding the back of her neck, and then struck her on the head.[2] We see no inconsistency between her account and her failure to report the incident earlier, and her testimony indicates she kept working with the appellant and accepting occasional rides from him because she did not want to alert others what happened, a reasonable response.

Concerning A1C DB, she promptly reported **[*56]** the incident and maintained a consistent account throughout the investigation and court-martial process, admitting her own sexual behavior and her continuing relationship with the appellant while firmly maintaining the appellant sexually assaulted her on the morning in question. Even assuming the neighbor's testimony does not corroborate A1C DB's testimony, no such corroboration is necessary. The "lie" to the sexual assault nurse examiner does not undercut A1C DB's credibility, as there was no doubt A1C DB consumed alcohol that night and the nurse may well have been confused by A1C DB's description of how she faked being drunk to dissuade the appellant from his sexual advances. A1C DB's allegations appear credible and consistent, and form a solid basis for the appellant's conviction.

In short, we ourselves are personally convinced of the appellant's guilt, despite his arguments to the contrary. The appellant's conviction on all charges and specifications is factually sufficient.

*Conclusion*

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), **[*57]** 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are AFFIRMED.

[2] The appellant characterizes the hit as a "bop" or a "tap," but those words were used by trial defense counsel in cross-examination. A1C PS did not testify in great detail as to the force involved, but said the hit was "[h]ard enough to scare me."

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