IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Staff Sergeant (E-6) **DAVID C. TATE** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT Crim. App. Dkt. No. 20180477 USCA Dkt. No. 21-0235/AR

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Issue Presented

WHETHER THE TRANSCRIPT OF APPELLANT'S TRIAL IS SUBSTANTIALLY VERBATIM.

Statement of Statutory Jurisdiction

For the reasons set forth below, the Army Court of Criminal Appeals (Army Court) lacked jurisdiction over this matter under Article 66, Uniform Code of Military Justice [UCMJ]; 10 U.S.C. § 866 (2018). Despite the Army Court's lack of jurisdiction, it reviewed this case, and Article 67(a)(3), UCMJ, grants this Honorable Court jurisdiction over any cases reviewed by the Army Court.

Statement of the Case

On February 20, April 2, and September 18-20, 2018, a military judge sitting as a general court-martial convicted appellant, Staff Sergeant David C. Tate, in accordance with his plea, of one specification of aggravated assault.[1] (JA 067-085). The military judge sentenced appellant to be reduced to the grade of E-3, confined for twenty-two months, and discharged from the service with a bad-conduct discharge. (JA 158). The convening authority approved only twenty-one months of confinement as a remedy for post-trial delay and approved the remainder of the adjudged sentence. (JA 059).

[1] In accordance with the pre-trial agreement, the government dismissed with prejudice one specification of attempted murder, one specification of assault with intent to commit murder, and one specification of aggravated assault. (JA 060).

On September 25, 2020, the Army Court found that appellant's record was not complete because the transcript was not substantially verbatim. The Army Court set aside the sentence and the convening authority's approval of the findings, and authorized the convening authority to direct a rehearing. *United States v. Tate*, ARMY 20180477, 2020 CCA LEXIS 344 (Army Ct. Crim. App. Sep. 25, 2020) (mem. op.) (JA 017).

On October 23, 2020, the government filed a motion for reconsideration *en banc*, which was granted on November 19, 2020. (JA 036). On February 25, 2021, the *en banc* Army Court reversed the panel's earlier decision by a divided vote, and affirmed the adjudged findings and sentence. *United States v. Tate*, ARMY 20180477, 2021 CCA LEXIS 87 (Army Ct. Crim. App. Feb. 25, 2021) (*en banc*) (JA 001). Appellant was notified of the Army Court's decision and, in accordance with Rule 19 of this Court's Rules of Practice and Procedure, the undersigned appellate defense counsel filed a Petition for Grant of Review on April 26, 2021, while seeking leave to file the Supplement to the Petition for Grant of Review separately. This Court granted the motion, allowing until May 17, 2021 to file the Supplement. Appellant filed the Supplement to the Petition for Grant of Review under Rule 21 on May 17, 2021. This Court granted Appellant's petition for grant of review on June 28, 2021, and ordered briefing under Rule 25.

Statement of Facts

1. The parties discovered the government's entire sentencing case, and a portion of the defense sentencing case, had not been recorded.

Immediately after the military judge announced the finding of guilty, the court reporter's recording equipment stopped functioning. (JA 086). The recording of all proceedings that occurred between 1250 hours on 18 September 2018 and 1000 hours on 19 September 2018 was lost. (JA 086).

The parties determined that the following had occurred during the unrecorded proceedings: the military judge notified appellant of his sentencing rights, the victim gave an unsworn statement, the government presented its entire presentencing case to include defense cross-examination, and one defense witness (Lieutenant Colonel JK) testified. (JA 086-087). The government's presentencing case consisted of testimony from the victim's sister (SG), the victim's friend (RF), the victim's son (CM)[2], an expert witness (Dr. JM), and the admission of prosecution exhibits 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, and 15. (JA 102-103, 116).

2. Defense counsel objected to the military judge's decision to conduct the sentencing "anew" as a "rehearing."

The military judge ruled that the government would be permitted to present its case "anew." (JA 088). The defense lodged several objections to the military

[2] It is not clear what the victim's son's name actually was, because he was referred to at trial as both CM and MGM. Consistent with the Army Court's opinions, this brief refers to him as CM.

judge's proposal, including that "the government has already gotten one bite at the apple. There is prejudice in that they are allowed to perfect their case." (JA 090). The defense further argued that reconstructing the record would not be possible given that nearly four hours of proceedings had been lost. (JA 090).

The military judge responded, "It is the court's intent to wash out that proceeding, as for purposes of record of trial, as if it never occurred." (JA 091). The defense then objected based on the inability to impeach the unrecorded sworn testimonies, and moved for an abatement until the government could produce the verbatim transcripts. (JA 092-093). In response, the judge ruled that an abatement is not a proper remedy because of the inability to produce a verbatim record. (JA 093).

The government in turn argued that the defense would have an "opportunity to perfect their case" through cross-examination, that the unrecorded proceedings were "similar to as if all of the parties sat in for a witness interview ahead of time," and "it doesn't benefit the government in any way." (JA 094, 098). The government asked the military judge to disregard everything not recorded from the previous day and proposed that if the defense attempts to impeach a witness with previous unrecorded testimony the government "can stand up and agree that whatever was said was said." (JA 095). The military judge asked the government if it would "concede that that's what the recording said" if the defense raised an

issue with impeaching a witness on his or her prior testimony. (JA 096). However, the government changed their position and instead of agreeing to concede, proposed, "if there is a misinterpretation of what was heard, we would address that as we get there" on a "step-by-step basis." (JA 096).

The defense argued that the court was proceeding with a non-verbatim transcript:

> I just don't see where the government has articulated a rule or responded to [*United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014)] that allows for this. And so case law settled. The Rules for Court-Martial require a determination of a verbatim and non-verbatim hearing. And so I just am missing the rule that they are citing that allows us to do this without conceding that for us to go in this manner to the conclusion of a court-martial is that they cannot substantially re-create this testimony and that this is a non-verbatim transcript, period. Anything that went past yesterday and is now not part of the record by definition makes it non-verbatim.

(JA 098).

The judge denied the defense motion for appropriate relief and characterized the proceedings as a "rehearing":

> The court does find that the admitted material from yesterday's session would be both qualitatively and quantitatively substantial were such testimony to be considered by the court in determining an appropriate sentence. However, the court will not consider any of the testimony that was presented yesterday afternoon. . . .

(JA 102). He further noted that the loss of the prior proceedings "would be both qualitatively and quantitatively substantial were such testimony to be considered by the court in determining an appropriate sentence." (JA 102).

3. The government put on a different sentencing case the second time around.

Perhaps based on their successes and failures during the first presentencing case, the government changed strategies the second time around. In three respects, the government's second presentencing case was different from its first, unrecorded presentencing case.

First, the government recalled all of the sentencing witnesses it had called in the first proceeding, except for CM. (JA 145-146). The government explained they elected not to recall CM due to the late hour and because CM was on the East Coast. (JA 145).[3] The parties made no effort to summarize or recreate CM's original (unrecorded) testimony.

Second, the government elected not to re-introduce Prosecution Exhibit 11, a video that the military judge examined during the initial proceedings. (JA 116). Apparently, there had been audio issues with that exhibit. (JA 116-117).

Third, the government elicited new aggravation testimony from at least two witnesses, SG and RF. SG, the victim's sister, admitted she had not previously described how her mother had been undergoing surgery and treatment for cancer

[3] The court-martial took place at Fort Huachuca, Arizona.

while appellant committed his misconduct. (JA 121, 124). RF, the victim's friend, admitted she had been impeached on a prior statement during her initial testimony, and she had added several new details to her testimony because the government had asked her new questions during the second proceeding. (JA 141).

Before announcing the sentence, the military judge found that the recalled witnesses had testified "substantially the same as they had during their unrecorded testimony given when they were first called as witnesses." (JA 156). He also stated he had disregarded any testimony in aggravation that defense counsel showed during cross-examination had not been presented during the unrecorded proceedings. (JA 156-157).

Summary of the Argument

When a recording malfunction is discovered mid-trial, starting "anew" is an authorized method for ensuring the record is substantially verbatim. However, under this Court's precedent, starting "anew" means reconstructing or recreating exactly what was lost—not beginning a *new and different* proceeding, unless a mistrial is declared or the convening authority orders it under Rules for Courts-Martial [RCM] 1103(f) . The military judge's attempt to make the transcript substantially verbatim was not authorized under this Court's precedent or the Rules for Court-Martial and risks impeding appellate review of his rulings.

Without having recreated or reconstructed CM's testimony, or ordering a mistrial, there was a substantial omission in the transcript. Additionally, the military judge filtered the new proceedings through the old, unrecorded proceedings to compare what he would disregard. He chose not to reconsider Prosecution Exhibit 11. This created a new proceeding still tainted by the old but not a mere recreation, which has no legal underpinning.

Failing to have a substantially verbatim transcript is jurisdictional error. Article 54(a), UCMJ, requires a "complete record" for all general courts-martial in which the sentence adjudged includes a discharge, or confinement for one year or more. In such cases, RCM 1103(b)(2)(B) requires a "verbatim transcript of all sessions except sessions closed for deliberations and voting." Failure to have a substantially verbatim transcript of CM's testimony deprived the Army Court of jurisdiction to act on appellant's sentence. This should be remedied by setting aside the bad-conduct discharge and any confinement of more than six months.

Standard of Review

Whether a record is complete and a transcript is verbatim are questions of law reviewed de novo. *See United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014). "The requirement that a record of trial be complete and substantially verbatim . . . is one of jurisdictional proportion that cannot be waived." *Id*. (quoting *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)).

Law

1. The requirement for a substantially verbatim transcript.

Article 54(a), UCMJ, requires a "complete record" for all general courts-martial in which the sentence adjudged includes death, a dismissal, a discharge, or confinement for one year or more. In such cases, RCM 1103(b)(2)(B) requires a "verbatim transcript of all sessions except sessions closed for deliberations and voting."

Even if there are omissions in the transcript, it can still be "substantially verbatim" in some circumstances. "[T]he threshold question is whether the omitted material was 'substantial' either qualitatively or quantitatively." *Davenport*, 73 M.J. at 377 (internal citations omitted). In *Davenport*, this Court described a qualitative omission as one "related directly to the sufficiency of the Government's evidence on the merits" and "the testimony could not ordinarily have been recalled with any degree of fidelity." 73 M.J. at 377. However, this Court based that definition on a case involving evidence lost during the sentencing case, indicating that a qualitative omission also extends to an omission related to the government's sentencing evidence. *Id.* (citing *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000) (omission of sentencing exhibits was a substantial omission because they related to the sentencing decision and the contents were not identified in the record)).

An omission is quantitatively substantial unless the omission is "so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Id*. (quoting *United States v. Nelson*, 3 C.M.A. 482, 487, 13 C.M.R. 38, 43 (1953)). This Court held that the loss of a witness's entire testimony was a quantitatively substantial omission in *Davenport*, for example. 73 M.J. at 377-78.

2. Trial remedies for lost recordings.

In what appears to be the earliest case of discovering a recording malfunction at trial, this Court's predecessor found that it was appropriate for the military judge to order a mistrial, because "the record of proceedings was so legally defective that it could not support a conviction, regardless of the compelling nature of the evidence." *United States v. Schilling*, 7 U.S.C.M.A. 482, 484, 22 C.M.R. 272, 274 (1957); *see also United States v. Benoit*, 43 C.M.R. 666, 668 (A.C.M.R. 1971) (holding that a military judge must reconstruct lost proceedings or declare a mistrial).

Only two, decades-old, decisions from this Court's predecessor have addressed the propriety of the military judge's efforts to remedy recording problems when the error was discovered prior to adjournment: *United States v.*

Platt, 21 U.S.C.M.A. 16, 44 C.M.R. 70 (1971) and *United States v. Lashley*, 14 M.J. 7 (C.M.A. 1982).[4]

As discussed more fully below, the common thread in those cases was that this Court's predecessor approved of the military judges' efforts to capture as closely as possible *all* of the lost dialogue, either through recalling the witnesses to repeat their testimony, or reconstructing the substance of the testimony through notes and the parties' recollection. This process ensured that, going forward, the transcript of the proceedings was substantially verbatim. Importantly, such an approach was an actual recitation or repetition of the previous testimony – not a second new and different proceeding.

This Court's predecessor found no error when the military judge recreated the record beginning from the point the recording stopped. In *Platt*, the parties discovered mid-trial that the dictaphone had failed to record the forum election, arraignment, and beginning of a motions hearing. *Platt*, 44 C.M.R. at 71-72.

The military judge began the proceedings "anew" by repeating what had been done during the lost portions of the record, beginning with the accused's

[4] In some cases, such as *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981), it is unclear from the opinion whether the error was discovered before or after adjournment. However, the approach to reconstruct the record was indistinguishable from the approaches in *Platt* or *Lashley*.

election to proceed with the judge-alone trial. *Id.*[5] The court found no error because "the substance was fully recorded, thereby obviating any possibility of prejudice to the accused." *Id.* This approach has been followed in a number of service court opinions. *See, e.g.*, *United States v. Griffin*, 17 M.J. 698 (A.C.M.R. 1983) (when a witness's testimony was lost, the military judge had her recalled to re-testify and ordered the panel to consider only her second testimony); *United States v. English*, 50 C.M.R. 824 (A-F.C.M.R. 1975) (after discovering preliminary matters prior to acceptance of the pleas were unrecorded, the military judge "proceeded anew on the same matters" by repeating the required colloquies with the accused); *United States v. Howard*, 9 M.J. 873 (N-M.C.M.R. 1980) (record substantially verbatim even though the first 78 minutes of the first proceedings on the record were unrecorded because the military judge "summarized the unrecorded proceedings and "started over").

Reconstructing the lost testimony is another viable option in some circumstances. In *Lashley*, the recording equipment began "sticking" so that chunks of a witness's testimony went unrecorded. *Lashley*, 14 M.J. at 8. The military judge, using the partial transcript and a verbatim list of questions the trial counsel had prepared, had the witness help fill in the blanks of what was missing

[5] Chief Judge Darden noted that the proceedings were "really a repetition of testimony" from the unrecorded portions. 21 U.S.C.M.A. at 10-11, 44 C.M.R. at 74 (Darden, C.J., concurring in the result).

from the skeletal transcript. *Id*. This Court's predecessor found that the omissions would have been qualitatively substantial, but that the military judge's "prompt and remedial action" rendered the reconstructed record "substantially verbatim." *Id*. at 9. This Court affirmed when the parties took a similar approach and used their notes and recollections to create a "meticulous" summary of the unrecorded session when the military judge announced the sentence. *United States v. Eichenlaub*, 11 M.J. 239 (C.M.A. 1981). Again, in both cases, the parties worked together to repeat what had already been stated – they did not conduct a second hearing.

This Court has never addressed what the military judge did here: order and preside over an entirely new sentencing proceeding in which the evidence presented was *different* than what was presented in the unrecorded proceedings. Nor has any service court endorsed this approach either, as the majority noted in the original panel decision. *Tate*, 2020 CCA LEXIS 344, at *fn 5 (JA 021).

3. Post-trial and appellate remedies for a non-verbatim transcript.

Whether the military judge orders a mistrial, or conducts a reconstruction or recreation that he or she finds makes the record "substantially verbatim," the record will eventually go to the convening authority if there is a finding of guilty. RCM 1103(f) gives the convening authority two options if he or she finds the transcript is not substantially verbatim: (1) approve no more than six months of

confinement and no discharge; or (2) order a rehearing. If the convening authority finds the record substantially verbatim, but an appellate court does not, the appellate court does not test for prejudice: the record must be remanded for the convening authority to select among the two RCM 1103(f) remedies. *Davenport*, 73 M.J. at 378-79.

Following *Davenport*, Congress amended Article 60, UCMJ, to prohibit the convening authority from disapproving the findings or sentence for certain offenses or when the adjudged sentence contains a discharge or sentence to confinement. However, disapproval of the findings and/or sentence is a prerequisite of the convening authority ordering a rehearing, pursuant to Article 60(f)(3), UCMJ.

Regardless of which of these options the convening authority selects, he must first disapprove the findings and/or the sentence, or a portion thereof. However, now, he can neither disapprove the findings nor the sentence in nearly every case (including this one) as a result of the amendments to Article 60, UCMJ, made by the National Defense Authorization Act for Fiscal Year 2014 (NDAA 2014), Pub. L. No. 113-291, 128 Stat. 3292, 3365 (2014). These amendments fall into a gap between the effective date of NDAA 2014 but before the effective date of the Military Justice Act of 2016 (MJA 16), National Defense Authorization Act

for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016).[6] Rule 21(b)(5)(A). As a result, the convening authority is caught in a "do-loop": he cannot *approve* the findings or sentence because it is incomplete under RCM 1103, nor can he *disapprove* the findings or sentence (or order a rehearing) because of Article 60, UCMJ.

4. Lack of a "complete" transcript deprives the service courts of jurisdiction.

The lack of a "complete" record of trial with a "substantially verbatim" transcript deprives appellate courts of jurisdiction, and cannot be waived. *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)). Records of trial that are incomplete cannot support a sentence that includes a punitive discharge or confinement in excess of six months. *Id.* A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the government must rebut. *Id.* (internal citation omitted). Failure to make a verbatim record of proceedings and testimony deprives a court of an ability to adjudge a bad-conduct discharge. *United States v. Whitney*, 23 U.S.C.M.A. 48, 48 C.M.R. 519, 520 (C.M.R. 1974).

[6] For cases referred after January 1, 2019, RCM 1112(d) lays out the procedure for fixing an incomplete record of trial. Under these rules, the convening authority is not involved. Instead, the record is returned directly to the military judge to either reconstruct the lost proceedings, dismiss the affected charges, reduce the sentence, or declare a mistrial for some or all of the charges. There are no statutory limits on the military judge's power to order these remedies.

Argument

When a recording malfunction is discovered mid-trial, starting "anew" is an authorized method for ensuring the record is substantially verbatim. However, under this Court's precedent, starting "anew" means reconstructing or recreating what was lost—not beginning a new and different proceeding, unless a mistrial is declared or the convening authority orders it under RCM 1103(f). The military judge's attempt to make the transcript substantially verbatim was not authorized under this Court's precedent or the Rules for Court-Martial and risks impeding appellate review of his rulings.

Simply referring back to the old proceedings and omitting previously admitted exhibits does not recreate the old proceeding, nor does it provide a true rehearing unmoored from the first proceeding. The military judge wanted to have his cake and eat it too, but ultimately the cake was poisoned.

1. The military judge attempted to do a distinct proceeding, but repeatedly referred to the old proceeding, thus failing at reconstruction and recreation, resulting in a substantial omission.

In essence, the military judge tried to both reconstruct the previous unrecorded testimony *and* completely start anew. He said that he was going to "wash out" the prior proceedings and essentially conduct an unauthorized rehearing, but instead both parties and the military judge consistently referred back to the old proceedings when evaluating the new one. (JA 091). As if that wasn't

bad enough, things truly went awry when the military judge failed to recall CM or reintroduce Prosecution Exhibit 11. (JA 145, 116, 155). This failure ensured that the new proceedings were substantially and significantly different from the first, and therefore the unrecorded proceeding was never successfully reconstructed.

While the military judge noted on the record that "the court will not consider any of the testimony that was presented yesterday afternoon," both he and the parties consistently did just that throughout the second proceeding. (JA 091, 102, 129-139).

The military judge never attempted to recreate or reconstruct CM's testimony. Following *Platt*, he could have recreated CM's testimony by having the government recall CM to testify again from the beginning. In fact, that is precisely what happened with all of the other witnesses who had testified during the unrecorded proceedings. Yet, the military judge made no effort to do so for CM. This alone creates fact distinguishable from *Platt*, where though the exact punctuation in the previous testimony was not recreated, most of the testimony was. Additionally, the accused in *Platt* did not object, whereas appellant here repeatedly objected to restarting the proceedings anew. (JA 089-091)

Alternatively, the military judge could have followed the steps the military judge took in *Lashley*, by using notes and the parties' recollections to reconstruct the substance of CM's testimony. However, the military judge did not put even the

most barebones summary of CM's testimony onto the record. As such, this Court is completely in the dark as to what CM testified about during the unrecorded session.

Instead of following these well-established cases, the military judge did something new and unprecedented: he presided over a materially *different* sentencing proceeding than what had happened the afternoon prior while consistently referring back to the first. (JA 095, 096, 107, 116, 145, 146).[7] This Court cannot say the unrecorded proceedings were reconstructed or recreated—and therefore, that the transcript is substantially verbatim—if the entire testimony of a witness and an exhibit are omitted. *See Davenport*, 73 M.J. at 377 (the loss of a witness's entire testimony is a "quantitative" omission that renders the transcript nonverbatim).

Because the plain and unambiguous language of Article 54(a), UCMJ and RCM 1103(b)(2)(B) require a "complete record" and a "verbatim transcript of all sessions except sessions closed for deliberations and voting," neither of which were present here, the military judge erred.

[7] The military judge repeatedly used the phrase "disregard" to refer to things he was not considering based on the unrecorded proceedings. The Discussion to RCM 1103(b) specifically notes that a verbatim transcript *includes* matters which the military judge orders stricken from the record or disregarded. Discussion of RCM 1103.

2. The military judge presided over a "rehearing" that had not been ordered by the convening authority.

Because the military judge did not recreate or reconstruct the record, the next question is whether he could "wash out" the earlier proceedings and conduct a different proceeding with different evidence. There is no support in the Rules for Court-Martial or in this Court's precedent for doing so.

In finding the military judge's course of action was appropriate, the *en banc* Army Court majority cited no Rule for Court-Martial permitting the military judge to conduct an entirely different sentencing proceeding. That is because no such rule exists. Rule for Court-Martial 915 only permits the military judge to declare a mistrial in the interests of justice. Undoubtedly, it is unjust to proceed when there are quantitative or qualitative omissions from the transcript through no fault of the accused, because the omissions prevent an appellate court from reviewing the propriety of the military judge's rulings or the court-martial's findings and sentence. Thus, this Court has long held that a mistrial is a valid remedy when a transcript cannot be made substantially verbatim.[8] *See United States v. Schilling*, 7 U.S.C.M.A. 482, 484, 22 C.M.R. 272, 274 (1957). The military judge would have

[8] To reflect this precedent, the post-MJA 16 rules provide that if the transcript cannot be "reconstructed," the military judge may either dismiss the charges, reduce the sentence, or declare a mistrial. RCM 1112(d)(3) (2019).

been within his authority under the Rules for Court-Martial to declare a mistrial at this point, but he did not do so.

Instead, the military judge determined it would be "judicial waste" to return the record to the convening authority, even though he found that he would be unable to recreate or reconstruct the lost testimony. (JA 104). In effect, the military judge did an end-run around the procedures, standards, and consequences the President specifically laid out in RCM 915 for when an error like this occurs.[9] The military judge does not have the power to ignore Rules for Court-Martial because he or she believes applying the rule would be cumbersome or delay the proceedings, nor can he do mental gymnastics to compare old proceedings to new or allow an entirely new proceeding without a convening authority ordered rehearing.

Endorsing a solution like the one in this case, where the military judge declares a mulligan because of a fundamental error in the trial proceedings without following RCM 915's procedures, would render RCM 915 superfluous or ineffective. *See United States v. Fetrow*, 76 M.J. 181, 186 (C.A.A.F. 2017) (rules should be construed so as not to make them superfluous or redundant).

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[9] The discussion to RCM 915(a) provides that a mistrial is appropriate for curable jurisdictional defects. As this Court noted in *Davenport*, a nonverbatim transcript is a jurisdictional defect.

3. The military judge's actions violated the plain language of RCM 1103(f).

The plain language of RCM 1103(f) provides that if the recordings are lost and a verbatim transcript cannot be prepared, a summarized transcript will be prepared and the convening authority must either order a rehearing or approve a sentence that would not trigger the requirement of having a verbatim transcription.

In other words, the Rule requires that when the military judge finds he cannot prepare a verbatim transcript, he should submit the summarized proceedings to the convening authority for action—unless, of course, he declares a mistrial.[10] The rules then give the convening authority, not the military judge, the power to order a rehearing (i.e., a new and different proceeding) if the transcript cannot be recreated. Where, as here, the military judge orders a new and different proceeding on his own (without declaring a mistrial under RCM 915), his action effectively usurps the convening authority's power to decide what to do with an accused's case under RCM 1103.

4. The military judge's remedy in this case interferes with appellate review.

Reconstructing or recreating the record (or declaring a mistrial) are necessary to ensure appellate authorities can conduct a thorough and meaningful

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[10] In such a case, the case is returned to the convening authority to determine whether to re-refer the charges. RCM 915(c)(1). The bottom line is that the rules provide for the military judge to send the record to the convening authority to order a rehearing, not to conduct one on his own authority.

review of the proceedings. When a military judge instead conducts a different proceeding and announces the unrecorded evidence will not factor into his conclusions, appellate courts are precluded from determining whether the factfinder was actually able to disregard the inadmissible evidence.

Ordinarily, we presume that judges and panel members will actually disregard evidence found to be inadmissible. However, that presumption is not irrefutable. This Court has recognized circumstances where the inadmissible evidence is so profound or prejudicial that no curative action—even prompt instructions to disregard the inadmissible evidence—will suffice. *See United States v. McFadden*, 74 M.J. 87, 89-90 (C.A.A.F. 2015) (citing *United States v. Diaz*, 59 M.J. 79, 92 (C.A.A.F. 2003)).

When appellate courts can see the evidence that has been ruled inadmissible, they can assess for themselves whether the evidence was of such a nature that the factfinder could actually disregard it during the decision-making process. However, when the inadmissible evidence is wholly missing from the record, as in this case, it is difficult—if not impossible—to fully assess whether the evidence was of a nature that it could have nevertheless crept into the decision-making process. In essence, the military judge's conclusion that a curative action is appropriate becomes *unreviewable*. This is whole point behind the requirement for a complete and verbatim transcript of the entire trial.

This Court should not endorse a course of action that usurps the appellate courts' ability to review a military judge's rulings. Continued adherence to the precedent set in *Platt* and *Lashley*—that military judges must either recreate or reconstruct lost proceedings, or declare a mistrial—obviates this concern, and ensures that appellate authorities have the record they need to review the propriety of the military judge's rulings and the factfinder's ultimate conclusions.

5. Lack of a "complete" transcript deprived the service courts of jurisdiction.

A substantial omission in the transcript is a jurisdictional defect, for which the courts do not test for prejudice. *See Henry*, 53 M.J. at 110. The failure to have a complete record here deprives the trial court of an ability to adjudge a bad-conduct discharge and an appellate court to review said discharge. Courts-martial without discharges and with fewer than six months of confinement do not require substantially verbatim transcripts. Jurisdiction flows from the Army Court's ability to conduct a factual and legal sufficiency review of the entire proceedings. The Army Court denied appellant that right by refusing to acknowledge that there was not a complete record in this case. The Army Court did not have jurisdiction to decide appellant's case without the complete record of trial, which requires a substantially verbatim transcript.

6. The appropriate remedy here is to reduce appellant's sentence to six months and disapprove his bad-conduct discharge.

In *Davenport*, this Court held that if the transcript is not substantially verbatim, "the procedures set forth in RCM 1103(f) control." *Id*. (citing *United States v. Gaskins*, 72 M.J. 225, 230-31 (C.A.A.F. 2013)). Accordingly, this Court remanded the record to the convening authority to either (1) approve no more than could be adjudged by a special court-martial, except that neither a bad-conduct discharge nor confinement for more than six months may be approved; or (2) direct a rehearing as to any offense of which the accused was found guilty. *See* RCM 1103(f)(1), (2).

The NDAA 2014 amendments to Article 60, UCMJ, removed the convening authority's power to disapprove the adjudged findings or sentence in this case, because a punitive discharge was adjudged. Disapproval, however, is required before the convening authority can order a rehearing or reduce the punishment under RCM 1103(f). Article 60(f)(3), UCMJ.

Because the convening authority cannot disapprove the sentence in this case, it would be meaningless for this Court to simply remand the case to the convening authority to take action under RCM 1103(f), as it did in *Davenport*. This Court can do what the convening authority cannot: set aside portions of appellant's sentence. *See United States v. Kelly*, 77 M.J. 404 (C.A.A.F. 2018).

The appropriate action in this case is to set aside all but six months of the sentence and disapprove appellant's bad-conduct discharge. For judicial economy as well as the government's inability to fully reconstruct the original proceeding after over three years' passage of time, this is the right remedy.

A *Dubay* hearing or rehearing will not remedy the error here as there is no feasible way to reconstruct CM's testimony after several years have passed and inevitably notes and memories are missing or discarded. *See United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (C.M.R. 1967). A rehearing only unfairly prejudices appellant as the government gets a third bite at the apple to perfect their sentencing case.

An appellate court must have the "complete" record to conduct its mandatory review of the record. Unless an appellate court is able to review the complete proceedings, to include a substantially verbatim transcript, it cannot know whether a finding or sentence is correct in law, correct in fact, or "should be approved" under either Articles 66 or 67, UCMJ. Thus, because there is no way to remedy the error to properly restore jurisdiction fairly, this Court should reduce appellant's sentence to one that does not require a substantially verbatim record of trial.

Conclusion

This Court should set aside appellant's bad-conduct discharge and reduce appellant's sentence of confinement to no more than six months.

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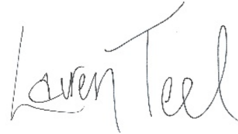
CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 6088 words. This brief complies with the typeface and type style requirements of Rule 37.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Tate, Crim App. Dkt. No. 20180477, USCA Dkt. No. 21-0235/AR was electronically filed brief with the Court and Government Appellate Division on September 2, 2021.

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