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	) APPELLEE FINAL BRIEF)))) Crim. App. Dkt. No. 20180477)) USCA Dkt. No. 21-0235/AR))

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, Appellee	)	APPELLEE FINAL BRIEF
v.	)	
	)	Crim. App. Dkt. No. 20180477
Staff Sergeant (E-6) **DAVID C. TATE,** United States Army, Appellant	)	USCA Dkt. No. 21-0235/AR

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

Issue Presented

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

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (ACCA) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 866. (JA 001). This Court exercises jurisdiction over Appellant's case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). On August 5, 2021, this Court granted Appellant's petition for review. *United States v. Tate*, No. 21-0235/AR, 2021 CAAF LEXIS 727, at *1 (C.A.A.F. Aug. 5, 2021).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his plea, of aggravated assault, in violation of Article 128, Uniform Code of Military Justice, 10 U.S.C. § 928 (2018) [UCMJ]. (JA 085). Consistent with his approved offer to plead guilty, the government dismissed[1] the remaining specifications of attempted murder, assault with intent to commit murder, and aggravated assault, in violation of Articles 80, 134, and 128, UCMJ, 10 U.S.C. §§ 880, 934, 928 (2018). (JA 085). On September 20, 2018, the military judge sentenced Appellant to reduction to E-3, confinement for twenty-two months, and a bad-conduct discharge. (JA 061). The convening authority disapproved Appellant's request to defer his rank reduction and approved twenty-one months confinement, reduction to E-3, and a bad-conduct discharge. (JA 061).

On September 25, 2020, the ACCA held the transcript was not substantially verbatim, set aside the sentence and the convening authority's action in approving the findings, and authorized a rehearing. *United States v. Tate*, ARMY 20180477, 2020 CCA LEXIS 344 (Army Ct. Crim. App. Sep. 25, 2020) (mem. op.). On November 19, 2020, the ACCA granted Appellee's motion for reconsideration *en banc*. *United States v. Tate*, ARMY 20180477, 2021 CCA LEXIS 87 (Army Ct.

[1] In accordance with the pretrial agreement, the Government motioned to dismiss the remaining specifications without prejudice to ripen into prejudice upon announcement of the sentence. (JA 085).

Crim. App. Feb. 25, 2021) (mem. op.) (*en banc*). On February 25, 2021, the ACCA reversed its prior holding, held that it had a complete verbatim record, and affirmed the findings and sentence. *Tate*, 2021 CCA LEXIS 87, at *11. On August 5, 2021, this Court granted Appellant's petition for review. *United States v. Tate*, No. 21-0235/AR, 2021 CAAF LEXIS 727, at *1 (C.A.A.F. Aug. 5, 2021).

Statement of Facts

A. Appellant's uncontested aggravated assault offense.

After an intoxicated argument with his wife, Appellant began to drive away from his house. (JA 160). Instead of departing, Appellant rammed his car into the closed garage door, entered his house, and strangled his wife. (JA 070, 161–62). To complete the offense, he "pushed her down," "straddled her," and put both hands on her neck as he screamed, "You deserve to die! You are a pox on this world!" (JA 67, 160). It was his intent to cut off her breathing long enough that she "was likely to die." (JA 071). His wife lost consciousness, sustained petechial hemorrhaging in her eyes, and urinated on herself. (JA 161–62, 165). Appellant told the responding military police officer and later a junior-enlisted soldier, "I should have killed her." (JA 161).

B. A recording error during presentencing proceedings.

After the military judge found Appellant guilty of aggravated assault in accordance with his plea, the court recessed for lunch at 1250 on September 18,

2018. (JA 085). At 1340, the court reconvened and began presentencing proceedings. (JA 086, 087). At this point, the recording equipment "malfunctioned," and this afternoon session went unrecorded.[2] (JA 086).

During the unrecorded portion, the military judge informed Appellant of his rights during the sentencing phase, and the government presented their entire presentencing case—including four witnesses and thirteen documentary exhibits. (JA 087, 094, 103). The victim read her unsworn impact statement, and the defense introduced all documentary exhibits and called one witness. (JA 087, 094, 103). In total, approximately four hours of witness testimony went unrecorded. (JA 091). The trial was still in the presentencing phase; the military judge had not announced, or even deliberated on, a sentence. (JA 087, 104, 158).

C. The military judge's remedial actions.

Within twenty-four hours of the September 18, 2019 presentencing proceedings, the government discovered the recording malfunction and notified the military judge. (JA 086). The parties engaged in an "extensive" Rule for Courts-Martial [R.C.M] 802 session regarding the issue. (JA 086). At 1000, on September 19, 2018, the military judge called the court to order, summarized the issue, and presented his solution. (JA 086).

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[2] It appears only "a few minutes with regard to [the parties'] entry into the sentencing phase" was actually recorded before the malfunction. (JA 108–09).

> So given the situation we find ourselves in, it is the court's intent to start over from the point of the sentencing case where I informed the accused that we are entering the sentencing phase of the trial, I notified him of his rights during this phase of the trial, and to allow the government to present the case anew. In order to ensure that a verbatim record can be prepared in accordance with R.C.M. 1103 for this case, I will not consider anything I heard during the sentencing portion of the case yesterday afternoon from any witness, to include any documentary evidence that has previously been admitted unless either party decides to reoffer such evidence during the sentencing hearing, which I intend to begin shortly.

(JA 088). The military judge felt it would be impossible "to capture accurately the testimony that was delivered yesterday afternoon from the various witnesses." (JA 087). Therefore, the military judge made clear that he was not attempting "to create a verbatim transcript at all for that portion of the hearing," but instead wanted to "wash out that proceeding . . . as if it never occurred." (JA 091). Nothing admitted on September 18, 2018, would factor into his sentence determination. (JA 088).

In response to the loss of the recording, Appellant requested that he be subjected to limited punitive exposure. (JA 089). Citing *United States v. Davenport*, 73 M.J. 373 (C.A.A.F. 2014), and R.C.M 1103(f),[3] Appellant asked for a "remedy of only the maximum allowed punishment of a non-verbatim

[3] Both sets of Appellant's charge sheets were referred on February 8, 2018. (JA 53–56). Accordingly, the rules in effect on the date of referral are found in the 2016 *MCM*, and apply here.

transcript." (JA 090). Alternatively, Appellant requested abatement of the proceedings until verbatim transcripts were generated. (JA 091). The military judge denied both motions. (JA 093, 102).

D. The military judge's mechanism to regenerate the record.

After a recess to consider counsels' arguments, the military judge called the court to order and explained how he intended to proceed. (JA 101–02). "I am going to restart this sentencing phase of the court-martial from the beginning." (JA 109). The military judge informed Appellant that "nothing [he] heard yesterday with regard to the sentencing portion of the trial" will be considered in "deciding an appropriate sentence" in this case. (JA 109).

Left uncorrected, the military judge reasoned, the omitted material "from yesterday's session would be both qualitatively and quantitatively substantial." (JA 102). However, none of that evidence would be considered in "determining an appropriate sentence." (JA 102, 109). Instead, characterizing the new proceeding as a "rehearing,"[4] the military judge stated he would only consider evidence the government admitted in the new proceeding—going so far as to mark documentary evidence with different color ink to "indicate that they had been admitted at this portion of the trial." (JA 108). The military judge reasoned that any other course

[4] The use of the term "rehearing" is discussed *infra*, p. 16 n.6.

of action would "constitute judicial waste" and was "unnecessary given the timeliness" with which they discovered the issue. (JA 104).

The military judge provided Appellant an opportunity to voir dire him on his ability to disregard anything from yesterday's proceedings, but Appellant asked no questions. (JA 107). The military judge also gave Appellant an opportunity to "withdraw from his pretrial agreement or his plea of guilty," given his proposed course of action. (JA 089). Appellant kept his bargain intact. (JA 108–09).

E. The regenerated presentencing proceedings.

The presentencing proceedings began anew. (JA 109). The military judge informed Appellant of his rights during a presentencing proceeding. (JA 109–10). As the government acknowledged, this was not an "opportunity to perfect [their] case," or "change [their] tactics"; the government presented a substantially similar presentencing case with only a few exceptions. (JA 094). The government called three of the four witnesses called the previous day. (JA 103–04, 119, 127, 143). The government did not call Mr. CM[5] because he lived on the east coast and had work the following morning. (JA 145). Appellant had no objection to Mr. CM's absence. (JA 146). The government's expert, who had already departed, testified telephonically. (JA 094, 145).

[5] In the record, trial counsel referred to this witness as Mr. CM, but the military judge referred to him as Mr. MGM. This appears to be the same individual. (JA 145, 156).

The government introduced all of the same exhibits except for a video that had given the parties an "issue" with the audio the day before. (JA 103, 111–16). Ensuring no confusion between the proceedings, the military judge initialed admitted exhibits with "red ink" over the previous day's "blue ink" to "indicate they have been admitted at this portion of the trial"; the unadmitted video became an appellate exhibit. (JA 108, 116).

After the government rested, the victim again read her unsworn statement under R.C.M. 1101A. (JA 103, 146–47). During the defense sentencing case, Lieutenant Colonel (LTC) JK testified. (JA 148). The evening prior, Appellant had requested a recess because LTC JK "wasn't as strong of a witness as she might've been had she been more rested." (JA 200). She testified to Appellant's positive attitude and strong work performance, even while facing adverse judicial proceedings, and that he has a "high" rehabilitative potential. (JA 149, 151). Even where there was a possible inconsistency in her replicated testimony, the military judge confirmed that he was not going to consider it. (JA 153–54). Appellant finished his sentencing case by calling five additional witnesses, submitting a "Good Soldier Book," and providing an unsworn statement. (R. at 297, 304, 315, 322, 326, 346, 450; JA 155).

F. Conclusion of Appellant's new presentencing proceedings.

The military judge deliberated on the sentence for one hour and fifteen minutes. (JA 155–56). Before announcing the sentence, the military judge reiterated that he did "not consider[] any evidence offered or testimony given during the unrecorded portion of this trial and the afternoon of its first day." (JA 156). Regarding the witnesses who had been recalled, the military judge noted: "[E]ach of those witnesses testified substantially the same as they had during their unrecorded testimony given when they were first called as witnesses." (JA 156). No party disagreed with or objected to this statement. (JA 157). The military judge ensured "there would be no prejudice to the accused" and "did not consider any aggravation testimony by the government witnesses" that had been absent from their initial testimony. (JA 156–57). Then, the military judge announced a sentence that was fourteen months less than the bargained-for confinement cap in appellant's pretrial agreement. (JA 158).

Summary of Argument

The loss of an entire day's presentencing proceedings would be substantial if left uncorrected. However, by starting anew—the preferred remedy—the military judge eliminated any omissions, regenerated the proceedings, and produced a verbatim transcript. Appellate courts across all services have functionally endorsed this practice since the 1950s. Therefore, the convening authority

correctly approved Appellant's sentence with a complete record in hand. Thus, this Court should affirm the judgment of the Army Criminal Court of Appeals.

Standard of Review

Whether a record of trial is complete and a transcript is verbatim are questions of law reviewed de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citing *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)).

Law

A. The Article 54 requirement for a complete record of proceedings.

A "complete record of proceedings" must exist for general courts-martial in which a sentence includes death, a punitive discharge, or confinement for one year or more. UCMJ art. 54(c)(1)(A). The President prescribed the method of compliance with this requirement in R.C.M. 1103. *Manual for Courts-Martial, United States* (2016 ed.) [*MCM*]. This rule requires a verbatim transcript "of all sessions" when "the sentence adjudged includes confinement for twelve months or more or any punishment that may not be adjudged by a special court-martial," or when a "bad-conduct discharge has been adjudged." R.C.M. 1103(b)(2)(B)(i)–(ii). A verbatim transcript comprises "all proceedings," including "arguments of counsel, and rulings . . . by the military judge." R.C.M. 1103(b)(2)(B) discussion.

"By definition, if there is not a verbatim transcript, there is also no 'complete record.'" *Davenport*, 73 M.J. at 376 (citing R.C.M. 1103(b)(2)(D)).

In determining whether a transcript is substantially verbatim, "the threshold question is whether the omitted material was 'substantial' either qualitatively or quantitatively." *Id.* at 377. A qualitative omission is one "related directly to the sufficiency of the Government's evidence on the merits," where "the testimony could not ordinarily have been recalled with any degree of fidelity." *Id.* (citing *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)). This standard also applies to sentencing evidence. *See United States v. Stoffer,* 53 M.J. 26, 27 (C.A.A.F. 2000) (omission of three exhibits presented during sentencing was substantial because the exhibits presumably related to the sentencing decision). The "requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *Davenport,* 73 M.J. 376 (quoting *Henry*, 53 M.J. at 110).

B. Mid-trial remedial measures for an incomplete record of proceedings.

The military judge is the presiding officer in a court-martial. R.C.M. 801(a). A military judge's ability to start proceedings anew after discovering a recording error has deeply rooted support. The Army Court of Military Review (A.C.M.R.) in *United States v. Benoit* established a bright-line rule: "When recording devices

fail, the military judge may employ one of two procedures." 43 C.M.R. 666, 668 (A.C.M.R. 1971). Faced with an omission, a military judge may "declare a mistrial" or "reconstruct the record out of the presence of the court, and thereafter the record will be tested for substantial compliance with Article 54." *Id.* at 668.

In *United States v. Schilling*, this Court's predecessor first granted military judges the authority to order a mistrial where, due to a recording malfunction, "the record of the proceedings was so legally defective that it could not support a conviction." 7 U.S.C.M.A. 482, 484, 22 C.M.R. 272, 273 (1957) (affirming a conviction where "a great deal of the proceedings . . . had not been recorded," the "law officer declared a mistrial," and the "case again came on for hearing" six days later). The United States Court of Military Appeals (C.M.A.) acknowledged that where an error occurs "in the course of trial which is of such a nature as to vitiate the result justifies the declaration of a mistrial, even in the face of objection by the accused." *Schilling*, 7 U.S.C.M.A. at 484. In *Schilling*, "the unnoticed breakdown in the recording device" constituted such an error, as it "made continuation of the trial impossible." *Id*. Ultimately, the C.M.A. approved of the law officer's choice to declare a mistrial and bring the case "on for hearing" again six days later. *Id*.

Soon, the C.M.A. placed even less importance on the need for an actual mistrial, authorizing a military judge to effectively create the same conditions as a mistrial—one where the military judge could begin anew. *See United States v.*

Platt, 21 U.S.C.M.A. 16, 17, 44 C.M.R. 70, 72 (1971). In *Platt*, the dictaphone machine failed to record two hours of a morning Article 39(a), UCMJ, session. *Id.* The military judge recognized "it would be impossible to reconstitute the record of proceedings that had occurred," declared "a mistrial," and proceeded with the case "anew" that afternoon. *Id.* Notably, while the C.M.A. assumed "without deciding" that the military judge declared a mistrial, the critical point was that the remedy put the "accused in the *same position he was in before trial*." *Id*. at 73 (emphasis added). Even if "what transpired in the morning Article 39(a) session was not repeated with punctuational detail in the afternoon session, the substance was fully recorded, thereby obviating any possibility of prejudice to the accused." *Id.* at 72. It is this very distinction that the C.M.A. continued to affirm a decade later. *See Lashley*, 14 M.J. at 9 (quoting *Platt*, 44 C.M.R. at 72) ("In at least one case we found that any possibility of prejudice to the accused was obviated where the military judge simply began the proceedings anew after an equipment failure.") (internal quotations omitted).

The A.C.M.R. followed suit and focused on placing the Appellant in the same position as he was before any recording malfunction. In *United States v. Griffin*, the victim and sole eye-witness's testimony—a "crucial government witness"—was not recorded. 17 M.J. 698, 699 (A.C.M.R. 1983). The trial counsel wanted to "recall" the witness "with an instruction to the members to disregard her

previous testimony," while Appellant objected and argued "the jurisdictional limit of the case should not exceed that of a regular special court-martial." *Id.* Both the trial and appellate courts ultimately disagreed with this proposed limitation and concluded that when faced with an equipment failure, an appropriate remedy was to "examine the witness anew." *Id.* at 700.

Additional authority for beginning anew appears in more recent binding precedent. In *United States v. Gaskins*, a case that concerned a missing defense exhibit, this court noted that remedial action is available. 72 M.J. 225 (C.A.A.F. 2013). Specifically, "the *MCM*—including Article 54, UCMJ, and R.C.M. 1103—does not limit the court of criminal appeals' (CCA's) discretion to remedy an error in compiling a complete record. *Id*. at 230.

C. When a verbatim transcript cannot be prepared.

Only when a verbatim transcript "cannot be prepared" do the Rules for Courts-Martial instruct a remedy. R.C.M. 1103(f). Transcripts with substantial omissions require redress and remedial options are "limited and definitively circumscribed." *Davenport*, 73 M.J. at 378. Confronted with a nonverbatim transcript, the convening authority may:

> (1) Approve only so much of the sentence that could be adjudged by a special court-martial, except that a bad-conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or (2) Direct a rehearing as to any offense of which the accused was found guilty if the

> finding is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial.

R.C.M. 1103(f)(1)–(2). These are "the only two options available to the convening authority when a verbatim transcript cannot be prepared." *Davenport*, 73 M.J. at 378.

Argument

A. When the military judge started the proceedings anew, it cured the recording error and created a verbatim record.

When the military judge declined to embark on the futile task of creating a verbatim transcript of the unrecorded, lengthy, prior proceedings, he elected the more reasonable, "preferred method of handling unrecorded testimony"—he began anew. *Griffin,* 17 M.J. at 700. He "wash[ed] out that proceeding . . . as if it never occurred" and essentially restated Appellant's presentencing proceedings. (JA 091). When starting anew, there are no omissions or attempts to reconstruct the record. Starting anew is distinct from reconstructing the omitted testimony, and it is an important feature that enabled the military judge to create a complete verbatim transcript in this case. The military judge here, confronted with a problem after the guilty findings but before announcement of the sentence, took control of the courtroom and fashioned a remedy. *See* R.C.M. 801(a) ("The military judge is the presiding officer in a court-martial").

On its face, the approximately four hours of lost witness testimony and introduction of multiple documentary exhibits would have been both qualitatively and quantitatively substantial. *See Davenport*, 73 M.J. at 377 (finding "[t]he omission of the testimony of [one government] merits witness" to have been substantial, both quantitatively and qualitatively). However, the military judge recognized this fact and ordered what he characterized as a "rehearing,"[6] allowing both sides to recall the witnesses that gave testimony the previous day. (JA 102). The military judge made this decision after reasoning that he could either "continue, knowing in the middle of trial that . . . a portion of the record was not recorded," only to send it to the Convening Authority who would then have to remedy the situation, (JA 104), or he could capture the "witnesses' recollection" that same day, when they are the most "fresh." (JA 106). The military judge opted for the later, "ensur[ing] that a verbatim record can be prepared" for this case. (JA 088). Because the military judge opted for the latter, all "sessions" that contributed to the relevant portion of Appellant's sentence—twenty-one months' confinement and bad-conduct discharge—contain a verbatim transcript as required. R.C.M. 1103(b)(2)(B)(i)–(ii).

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[6] The military judge referred to this proceeding as a "rehearing." (JA 102). However, as the ACCA noted, "the mere use of this term does not transform what actually occurred at trial into an R.C.M. 1103(f) rehearing . . . ." *Tate*, 2021 CCA LEXIS 87, at *11.

As the military judge explained before Appellant elected not to withdraw from his plea agreement, "nothing he heard yesterday with regard to the sentencing portion of trial" would be considered in deciding an appropriate sentence. (JA 109). Instead, the only evidence up for consideration "in determining an appropriate sentence in this case" is the new proceedings. (JA 91). This was a historically supported and logically sound choice. Ultimately, it produced a complete record of trial in Appellant's case.

Like the military judge's ruling in *Griffin*—mirroring the ruling in this case—when the members were instructed to "disregard all the testimony you've heard from Mrs. [T]" and to "only consider the testimony you hear the second time," *Griffin,* 17 M.J. at 699, the military judge in this case ensured compliance with Article 54, UCMJ. (JA 102, 106*). Griffin's* "prompt" response that "ensured the fresh recollection of the witness and counsel alike," *Id.*, matches Appellant's case where the military judge recaptured the testimony while "the witnesses' recollection of their testimony from yesterday will be more fresh today." (JA 106). Also, just as the panel in *Griffin* destroyed their notes and heard the victim testify anew, *Id.*, the military judge here similarly disregarded his notes and started over. (JA 106). As in *Griffin*, the military judge "obviated the possibility of prejudice by beginning the examination of Mrs. T *anew* shortly after the failure to record the testimony was noted." *Id.* (emphasis added); (JA 091). Given the strong

similarities between Appellant's case and *Griffin*, this court should likewise be "convinced that calling the witness to testify again provided a substantially verbatim transcript." *Id*. Upon learning of the recording omission, the military judge correctly concluded that he was not required to notify the convening authority before recalling witnesses and deciding to conduct presentencing proceedings anew. *Tate*, 2021 CCA LEXIS 87, at *10–11.

Appellant's arguments at trial show that without the ability to start anew, the military judge faces a lose-lose situation. Despite the fact that Appellant recognized how "impossible" it would be to recall four hours of testimony, (JA 090), he asserted the only option the military judge had was to "substantially re-create this testimony," as anything else would result in a "non-verbatim transcript, period." (JA 098); *see also United States v. Harmon*, 29 M.J. 732, 734 (A.F.C.M.A. 1989) ("The length of the reconstruction and the nature of the omitted testimony lead us to conclude that the record in its present state is not substantially verbatim."). The law cannot mandate such an impasse, especially in a situation where almost all witnesses are still easily accessible and the event still freshest in their minds.

In sum, Appellant is not entitled to relief because the present record is a "complete record" that captures all evidence the military judge used to determine Appellant's sentence.[7] *Davenport*, 73 M.J. at 376; (JA 156).

B. Rule for Court-Martial 1103(f) is inapplicable to Appellant's case.

Contrary to Appellant's assertion that "[the military judge's] action effectively usurps the convening authority's power to decide what to do with an accused's case under RCM 1103" when "the military judge orders a new and different proceeding on his own," (Appellant's Br. 21), the military judge in this case did not usurp any of the authority that R.C.M. 1103(f) provides to the convening authority. The express terms of R.C.M. 1103(f), as well as binding precedent, clarify that this rule is not applicable to Appellant's case. R.C.M. 1103(f) is only available where "a verbatim transcript cannot be prepared." As explained *supra* pp. 15–19, Appellant has a verbatim, complete record of trial. Also, if R.C.M. 1103(f) is only available where "a verbatim transcript cannot be prepared," this rule cannot control mid-trial regeneration of the record because at that point in the proceedings, a verbatim transcript *can* still be prepared.

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[7] Even if the Court decides to address Appellant's assertion that he was prejudiced by the new presentencing proceedings, that argument also fails. (Appellant's Br. 25). The military judge stated on the record that he did not consider any aggravation evidence that was not provided during any witnesses' unrecorded testimony—a fact "effectively demonstrated" by Appellant on cross-examination—or any unrecorded testimony from Mr. CM from the previous day. (JA 156).

Additionally, just as the trial counsel pointed out during litigation, R.C.M. 1103(f) often applies once an omission is discovered after trial and cannot be remedied, or if the omission is inadequately reconstructed during trial.[8] (JA 099); *see also Henry*, 53 M.J. at (finding the government was able to adequately remedy an omission by supplementing the record after trial occurred). This is consistent with the court's approach in *Gaskins*, where the court expressly noted "[t]he problem with both parties' reliance on R.C.M. 1103 is that the provisions they point to are limited in their application, by R.C.M. 1103's express terms, to instances where a verbatim transcript *cannot* be prepared." 72 M.J. at 230 (emphasis added). While *Gaskins* clarified the different outcomes between nonverbatim transcripts and verbatim but otherwise incomplete records (such as missing exhibits), *Id*., the logic applies the same. "[W]here, as here, the record includes a verbatim transcript, R.C.M. 1103(f)'s limiting provisions are inapposite." *Id*.

The logical point at which R.C.M. 1103(f) would apply is adjournment. Prior to this juncture, the military judge is not constrained by R.C.M. 1103(f) because he still has the ability to prepare a verbatim transcript. If a court of appeals is not "constrained in its ability to remedy the prejudice stemming from a

[8] Trial counsel argued, "that is the issue if the case were already tried . . . . The case is already complete and finished and then the recording finds to be lost later." (JA 099).

substantial omission," then certainly a military judge actually engaged in ongoing proceedings would not be so constrained. *Gaskins,* 72 M.J. at 236. As was the case here, the military judge, as the presiding officer of the court-martial, was in a much better position than the convening authority or appellate courts to ensure compliance with Article 54. *See* R.C.M. 801(a). By starting anew, the military judge constructed a verbatim transcript and ensured Appellant could enjoy appropriate appellate review.

C. If this Court finds that starting anew did not create a verbatim transcript, a verbatim transcript could possibly be prepared.

If this Court finds that the military judge's actions resulted in a substantial omission and the record does not comply with Article 54, UCMJ, it 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) (finding that changes to the UCMJ do not constrain CCAs in setting aside a sentence—even if the convening authority may be). While the convening authority is constrained by the 2014 amendments to Article 60, UCMJ—the convening authority cannot disapprove the punitive discharge—this court can set aside this punishment and allow the convening authority to order a rehearing under R.C.M. 1103(f). Article 60(f)(3).

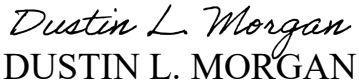
While Appellant asserts that there is "no feasible way to reconstruct CM's testimony," (Appellant's Br. 25), this is not necessarily true. If this court permits a rehearing, the convening authority should be given the opportunity to ascertain

whether CM is still available to provide the missing testimony. *See Davenport*, 73 M.J. at 375-76, 379 (only after a *Dubay* hearing showed reconstruction of the record was impossible was the Appellant granted relief in accordance with R.C.M. 1103(f)).

This is also the appropriate remedy because Appellant entered into a pretrial agreement and received two tremendous benefits as the result of his bargain: dismissal of a specification that carried a maximum punishment of life without the possibility of parole and a thirty six-month confinement cap. (JA 053). Any other lawfully adjudged punishment could be approved, including a bad-conduct discharge. (JA 158). Disapproval of Appellant's bad-conduct discharge and all but six-months confinement would be inequitable given this bargain.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Criminal Court of Appeals.



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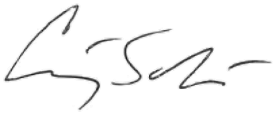

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **5700** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on October 18, 2021.

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