No. _____

IN THE

Supreme Court of the United States

MAXWELL A. MATTHEW,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Staff Sergeant (SSgt) Maxwell A. Matthew's Convening Authority ordered his court-martial conviction expunged. He then ordered SSgt Matthew to again face a court-martial for the same offenses for which his initial court-martial tried him. The Convening Authority did this because the government lost a portion of the court reporter's transcription of the court-martial.

The question presented is: did the Convening Authority's action violate the Fifth Amendment's double jeopardy clause?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for the purposes of Rule 14.1(b)(iii).

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INTRODUCTION

The government lost a recording of the court-martial that tried SSgt Matthew. Consequently, the transcript of the proceedings was not substantially verbatim. To impose a punitive discharge or a sentence to confinement exceeding six months, the Uniform Code of Military Justice (UCMJ) requires a substantially verbatim transcript. *United States v. Gray*, 7 M.J. 296, 297-98 (C.M.A. 1979); see also Rule for Courts-Martial (R.C.M.) 1103.[1] This is because in the absence of a complete transcription, military Courts of Criminal Appeals cannot conduct their required Article 66, UCMJ, 10 U.S.C. § 866, factual sufficiency review.

Instead of simply approving a reduced sentence that a non-verbatim transcript could support, the Convening Authority chose to expunge the findings and sentence of the court-martial and order a second court-martial for the same offense as the first. Although this course was authorized by R.C.M. 1103(f), it violated SSgt Matthew's double jeopardy protection by literally forcing him to again stand trial for the same offense. This Honorable Court should therefore review the decisions of the military courts affirming the findings of SSgt Matthew's second court-martial.

PETITION FOR A WRIT OF CERTIORARI

SSgt Matthew respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF).

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[1] All references to the Rules for Courts-Martial are to the version published in the *Manual for Courts-Martial, United States* (2016 ed.).

OPINIONS BELOW

The decisions of the Air Force Court of Criminal Appeals (Air Force Court) are unreported. They are available at 2024 CCA LEXIS 460 and 2022 CCA LEXIS 425 and are reproduced in the Appendix at pages 3a-36a and 37a-59a. The CAAF's summary affirmance is not yet reported. It is available at 2025 CAAF LEXIS 598 and reproduced in the Appendix at page 1a.

JURISDICTION

The CAAF issued its decision on July 22, 2025. This Court has jurisdiction under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

R.C.M. 1103(f)(2016) provides:

> If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and 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.

STATEMENT OF THE CASE

On January 25, 2019, and June 19, 2019, a military judge sitting as a general court-martial in initial hearing tried SSgt Matthew. Pet.App. 38a. Consistent with his pleas, the military judge convicted SSgt Matthew of one specification of attempted distribution of child pornography and one specification of possession of child pornography, in violation of Articles 80 and 134, UCMJ, 10 U.S.C. §§ 880 and 934 (2012). Pet.App. 38a. The military judge found SSgt Matthew not guilty of distribution of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. Pet.App. 38a-39a. The military judge sentenced SSgt Matthew to confinement for seventeen months, reduction to the grade of Airman Basic (E-1), and to be dishonorably discharged from the military service. *Id.* The military judge entered a finding of Not Guilty as to distribution of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. Pet.App. 5a.

On December 23, 2020, the Air Force Court ordered the Judge Advocate General of the Air Force to return the record of trial to the Convening Authority because it was substantially incomplete. Pet.App. 39a. On March 4, 2021, the Judge Advocate General of the Air Force returned the record of trial to the Air Force Court because "[a]n authenticated

transcript of SSgt Matthew's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." Pet.App. 40a. The Air Force Court then set aside the finding because it found that the record of trial was incomplete. *Id.*

On January 31, 2023, and May 30, 2023, a military judge sitting in rehearing as a general court-martial tried SSgt Matthew. Pet.App. 6a. Consistent with SSgt Matthew's conditional guilty plea and a pretrial agreement, preserving him the ability to raise the issue of double jeopardy on appeal, the military judge convicted SSgt Matthew of one specification of possession of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2012). *Id.* The military judge sentenced SSgt Matthew to confinement for twelve months, reduction to the grade of Airman Basic (E-1), to forfeit all pay and allowances, and to be discharged from the military service with a bad conduct discharge. *Id.* The military judge dismissed one specification of distribution of child pornography, in violation of Article 134, UCMJ, 10 U.S.C. § 934, for former jeopardy. *Id.*

The Air Force Court affirmed the remaining specification and the sentence. Pet.App. 36a. On November 28, 2024, SSgt Matthew moved the Air Force Court to reconsider its decision. On December 19, 2024, the Air Force Court refused to reconsider its decision.

SSgt Matthew timely petitioned the CAAF for review of the Air Force Court's decision. The CAAF declined to review the double jeopardy issue that

SSgt Matthew specified before that court and affirmed the findings and sentence. Pet.App. 1a-2a.

REASONS FOR GRANTING THE PETITION

This Court should grant review of SSgt Matthew's petition because R.C.M. 1103 violates the double jeopardy clause, generally and as applied.

A. R.C.M. 1103(f)(2) is generally unconstitutional because it permits the government a second chance to meet its burden of proof.

R.C.M. 1103(f)(2) unconstitutionally permits the Government a second chance to meet its burden of proof both as to jurisdiction over the sentence and as to factual sufficiency.[2] The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Fifth Amendment "shield[s] individuals from the harassment of multiple prosecutions for the same misconduct." *United States v. Rice,* 80 M.J. 36, 40 (C.A.A.F. 2020) (quoting *Puerto Rico v. Sánchez Valle*, 136 S. Ct. 1863, 1877 (2016) (Ginsburg, J., with whom Thomas, J., joined, concurring)).

The Air Force Court's second decision in SSgt Matthew's case misdescribes his appeal as "unrelated to the sufficiency of the evidence." Pet.App. 14a. This statement is incorrect because a claim of an incomplete transcript is a claim of

[2] Although not directly at issue here because of SSgt Matthew's guilty plea, R.C.M. 1103(f)(2) unconstitutionally permits the government to save a conviction that would not survive factual sufficiency review by adding evidence to the record that it did not elicit at the initial court-martial.

insufficient evidence of jurisdiction. "The Government carries the burden of proving jurisdiction by a preponderance of the evidence." *United States v. Sullivan*, No. NMCCA 201400071, 2014 CCA LEXIS 336, at *5 (N-M. Ct. Crim. App. May 29, 2014) (citing *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002)). "The lack of a verbatim transcript is a jurisdictional error that cannot be waived." *United States v. Tate*, 82 M.J. 291, 294 (C.A.A.F. 2022) (citing *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)). Court reporter error in losing a recording of proceedings is government error because the "actions of the court reporter . . . [are] entirely under the Government's control." *United States v. Anderson*, 82 M.J. 82, 86 (C.A.A.F. 2022).

Here, the Government failed to provide a transcript that was substantially verbatim. The missing transcription therefore is a deficiency in the proof of a matter that the Government is required to prove–that it has met a jurisdictional prerequisite. The Government may not cure the lack of that proof by causing SSgt Matthew to face a second court-martial.

The R.C.M.'s authorization to expunge a conviction and retry a Servicemember cannot escape an "iron-clad fact: [the R.C.M.s] cannot supplant or supersede the Constitution of the United States." *B.M. v. United States*, 84 M.J. 314, 324 (C.A.A.F. 2024) (citing *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787-88 (N-M. Ct. Crim. App. 2017)). This Court should grant review for the purpose of addressing the constitutional permissibility of second courts-martial to cure defects in the proof of jurisdiction over the sentence.

B. Even if not generally unconstitutional, R.C.M. 1103(f)(2) is unconstitutional as applied because SSgt Matthew was acquitted of a greater included offense at his first court-martial.

R.C.M. 1103(f)(2) is unconstitutional as applied because, as the Air Force Court noted, SSgt Matthew was acquitted of a distribution offense that was facially duplicative of the lesser included offense of possession of child pornography. "We agree with [SSgt Matthew], and the Government also appears to agree, that Specification 1 is multiplicious with Specification 2." Pet.App. 14a.[3] Possession of child pornography is multiplicious with distribution of child pornography when the charge involves the same images on the same dates. *United States v. Williams*, 74 M.J. 572, 575-76 (A.F. Ct. Crim. App. 2014). Charges that are multiplicious offend the Constitution's prohibition against double jeopardy because they impose "multiple convictions and punishments under different statutes for the same act or course of conduct." *Id.* at 574 (citing *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). In a case involving child pornography possession and distribution, where a Specification alleges only a date range and does not allege possession of specific images, double jeopardy attaches as to all child pornography images possessed or distributed within that same date range. *United States v. Rice*, 2020 CCA LEXIS 375, at *4-5 (A. Ct. Crim. App. Oct. 22,

[3] "Multiplicity" and "multiplicious" are the terms used in military practice to describe violations of the *Blockburger* test for double jeopardy. *Blockburger v. United States*, 284 U.S. 299, 304 (1932); *United States v. Teters*, 37 M.J. 370, 377 (C.M.A. 1993).

2020) (sum. disp. on further rev.).

The Air Force Court incorrectly found that SSgt Matthew "has never been acquitted" of possession. Pet.App. 14a. In acquitting SSgt Matthew of Specification 2, without announcing a lesser included finding of guilt of possession within Specification 2, the military judge acquitted SSgt Matthew of **both** distribution **and** possession of child pornography, because possession is a lesser included offense of distribution. Acquittal of a greater offense is also an acquittal of a lesser included offense, unless the finder of facts returns a verdict of guilt as to the lesser included offense. *See, e.g.*, *United States v. Ayalacruz*, 79 M.J. 747, 752-53 (N-M. Ct. Crim. App. 2020) (holding that the panel's failure to return a valid finding of guilty to any lesser included offense resulted in an acquittal as to that offense and all lesser included offenses). After an acquittal lifts jeopardy, "the common proposition, entirely in accord with *Blockburger v. United States*, 284 U.S. 299 (1932)] [is] that prosecution for a greater offense . . . bars prosecution for a lesser included offense." *Rice*, 80 M.J. at 50 (quoting *United States v. Dixon*, 509 U.S. 688, 705 (1993)). Where a verdict results in "both guilty and not guilty [findings] of the same offense . . . the principles underpinning the Double Jeopardy Clause" cause jeopardy to attach to both specifications and prevent a rehearing on them. *United States v. Stewart*, 71 M.J. 38, 43 (C.A.A.F. 2012).

Since the military judge both acquitted SSgt Matthew (in Specification 2, as a lesser included offense) of possession and convicted SSgt Matthew (in Specification 1) of the same offense, his retrial for possession was barred by double jeopardy.

In *Stewart,* members considered two specifications "that… alleged exactly the same offense." *Id*. at 42. They were instructed to consider lesser included offenses in both specifications. *Id.* The members acquitted the appellant of Specification 1 and did not return a guilty finding for any lesser included offense. The members then convicted the appellant of the same offense within Specification 2. This Court held that a concurrent conviction and acquittal for the same offense was an acquittal as to both and caused double jeopardy to attach to both. *Id.* at 43.

Similar to *Stewart,* where two specifications were duplicative, the Air Force Court found that Specifications 1 and 2 are duplicative. Further similar to *Stewart*, in which the panel acquitted the appellant of one of the duplicative specifications, 71 M.J. at 42, here, the military judge acquitted SSgt Matthew of one of the two duplicative specifications. (Trial Tr. 43)(original hearing). As in *Stewart*, the military judge's concurrent acquittal and conviction of SSgt Matthew for duplicative specifications constituted an acquittal as to all. *Stewart*, 71 M.J. at 43. Double jeopardy therefore attached as to all.

To accomplish its apparent aims, the Government should have amended Specification 1 to transform it into an attempted distribution specification and dismissed the unamended distribution language. Such an amended specification would not be facially duplicative of Specification 2. The Government, however, did not do this. Instead, the Government opted to present no evidence as to Specification 2 and acquiesced to the military judge's entering of a finding of not guilty as to it. (Trial Tr. 43)(original hearing). This finding of not guilty attached to Specification 2

and to every lesser included offense within that specification to which the military judge did not return a lesser included finding of guilty. Since the military judge did not return a finding of guilty as to the lesser included offense of possession within Specification 2, he acquitted SSgt Matthew of possession as alleged within Specification 2 as a lesser included offense.

The Air Force Court held that "the Government is not prohibited from charging multiplicious specifications in the alternative." Pet.App. 14a. *See*, however, R.C.M. 907(b)(3)(B) for the proposition that where one charge subsumes the other, the subsumed charge should be dismissed before findings, *contra* Pet.App. 11a-12a. Even if the practice of charging multiplicious offenses is permissible, this case illustrates the risk in so doing. When the Government charges multiplicious specifications, an acquittal of one specification results in an acquittal of all. Trial counsel realized this but realized it too late and unsuccessfully moved the court-martial to reconsider its finding of not guilty as to distribution. (Trial Tr. 170)(original hearing). "[A] finding of *not guilty*—whether erroneous or not—is final, may not be appealed, and terminates jeopardy." Pet.App. 11a. This Court should grant review to address this double jeopardy issue. This Court should find that jeopardy attached and lifted when the military judge both acquitted and convicted SSgt Matthew of the same offense.

C. Even if Double Jeopardy did not attach to the possession specification when SSgt Matthew was acquitted of distribution, it attached when the Convening Authority expunged the findings as to Specification 2.

The Convening Authority's decision to expunge the previous finding of guilt as to Specification 2 caused jeopardy from SSgt Matthew's acquittal for the original Specification 1 to attach to it. When the convening authority orders a re-hearing under R.C.M. 1103(f)(2), the new proceeding is not a continuation of the previous one but a "start . . . anew." *Tate*, 82 M.J. at 297. The previous proceeding is expunged. The prohibition against double jeopardy not only protects against multiple punishments for the "same offence," *Dixon*, 509 U.S. at 696 (internal quotation marks omitted) (citation omitted), but also "forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). This is true irrespective of finality under Article 76, UCMJ, because an appellant has an "interest . . . in avoiding multiple prosecutions even where no final determination of guilt or innocence has been made." *United States v. Scott*, 437 U.S. 82, 92 (1978).

SSgt Matthew's acquittal for Specification 2 and the subsequent expungement of the findings as to Specification 1 caused jeopardy to attach to Specification 1 because Specification 1 is a lesser included offense of Specification 2. Jeopardy attached at the taking of evidence as to Specification 2. It terminated once SSgt Matthew was acquitted of that charge. As a result, SSgt Matthew could not be placed in jeopardy again for Specification 2 or the lesser-included Specification 1.

Jeopardy for both specifications terminated because the rehearing was not a continuation but a "start anew" of a previously concluded court-martial. *See Tate*, 82 M.J. at 297. Unlike cases in which a court sets aside a finding of guilty for legal error, here, the Air Force Court did not dismiss the findings as to any Specification. Pet.App. 51a. The Convening Authority, however, elected to "expunge" the findings from the original hearing and start anew. The Government may not begin a "new" second prosecution because SSgt Matthew was already tried for the greater included offense and found not guilty of it. It also may not expunge a conviction and then retry the Charge because jeopardy attached at trial and then terminated with the expungement.

"Reversal of a conviction by appellate authority and the direction of a rehearing of the case generally leaves the proceedings in the same position as before trial." *United States v. Cox*, 12 U.S.C.M.A. 168, 169 (C.M.A. 1969) (citing *Spriggs v. United States*, 225 F.2d 865 (9th Cir. 1955)(no pin cite in original citation)). In this case, the Convening Authority reversed SSgt Matthew's convictions for possession and attempted distribution of child pornography. SSgt Matthew therefore entered rehearing in the same position as if he were never tried for possession with one exception – he was now acquitted of a greater included offense of distribution. The previous finding of guilt was no longer intact. It did not prevent jeopardy from attaching to proceedings such as this which "start anew" of the previously concluded court-martial. *See Tate*, 82 M.J. at 297.

Therefore, this Honorable Court should grant review for the purpose of dismissing the Charge and

its Specification with prejudice to remedy the double jeopardy violation present here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 25-0083/AF
Crim.App. No. 39796

v.

ORDER

Maxwell A. Matthew,
Appellant

On further consideration of the granted issue, __ M.J. __ (Daily Journal March 4, 2025), and in view of *United States v. Johnson*, __ M.J. __ (C.A.A.F. 2025), it is, by the Court, this 22nd day of July, 2025,

ORDERED:

That the decision of the United States Air Force Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Feldmeier)
Appellate Government Counsel (Payne)

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

USCA Dkt. No. 25-0083/AF
Crim.App. No. 39796

v.

ORDER GRANTING REVIEW

Maxwell A.
Matthew,
Appellant

On consideration of the petition for grant of review of the decision of the United States Air Force Court of Criminal Appeals, it is, by the Court, this 4th day of March, 2025,

ORDERED:

That said petition is hereby granted on the following issue:

AS APPLIED TO APPELLANT, WHETHER 18 U.S.C. § 922 IS CONSTITUTIONAL IN LIGHT OF RECENT PRECEDENT FROM THE SUPREME COURT OF THE UNITED STATES.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (Feldmeier)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39796 (reh)

UNITED STATES
Appellee

v.

Maxwell A. MATTHEW
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 31 October 2024

Military Judge: Matthew N. McCall (arraignment); Pilar G. Wennrich.

Approved sentence: Bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to E 1. Sentence adjudged on 30 May 2023 at Patrick Space Force Base, Florida.

For Appellant: Robert Feldmeier, Esquire.

For Appellee: Colonel Matthew D. Talcott, USAF; Major Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, RICHARDSON, and KEARLEY, *Appellate Military Judges*.

Chief Judge JOHNSON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

JOHNSON, Chief Judge:

Appellant's case is before this court for a third time. At Appellant's original court-martial, he was charged with one specification of wrongful possession of child pornography on divers occasions (Specification 1) and one specification of wrongful distribution of child pornography on divers occasions (Specification 2), both offenses occurring between 30 August 2015 and 19 October 2017, and both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[1] A general court-martial composed of a military judge alone found Appellant guilty, in accordance with his pleas, of wrongful possession of child pornography, as alleged in Specification 1, and attempted wrongful distribution of child pornography in violation of Article 80, UCMJ, 10 U.S.C. § 880, a lesser-included offense of the wrongful distribution offense alleged in Specification 2. After the Government informed the military judge it did not

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[1] All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2012 ed.). Unless otherwise noted, all other references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

intend to offer proof of the greater offense, the military judge entered a finding of not guilty as to wrongful distribution of child pornography. The military judge sentenced Appellant to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Appellant initially raised two assignments of error on appeal: (1) whether Appellant's guilty plea to attempted distribution of child pornography was provident; and (2) whether the record of trial was incomplete. During this court's initial review of the record, we determined the transcript of Appellant's arraignment was missing. Pursuant to Rule for Courts-Martial (R.C.M.) 1104(d)(1), this court remanded the record of trial for corrective action. *United States v. Matthew*, No. ACM 39796, 2020 CCA LEXIS 486, at *2 (A.F. Ct. Crim. App. 23 Dec. 2020) (order). The Government subsequently returned the record without correction, stating "[a]n authenticated transcript of Appellant's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." This court found the record was not verbatim as required by Article 54, UCMJ, 10 U.S.C. § 854, and R.C.M. 1103(b)(2)(B),[2] set aside the findings and sentence, and returned the record to The Judge Advocate General (TJAG) "for return to an appropriate convening authority for action consistent with R.C.M. 1103(f).[3]" *United States v. Matthew*, No. ACM 39796

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[2] *Manual for Courts-Martial, United States* (2016 ed.).

[3] *Manual for Courts-Martial, United States* (2016 ed.).

(f rev), 2022 CCA LEXIS 425, at *16 (A.F. Ct. Crim. App. 21 Jul. 2022) (unpub. op.).

On remand, the convening authority referred the original Specifications 1 and 2 and the Charge to a second general court-martial. Pursuant to a pretrial agreement (PTA) between Appellant and the convening authority, the military judge accepted Appellant's conditional guilty plea to Specification 1 and the Charge. The military judge dismissed Specification 2 with prejudice pursuant to a defense motion. The military judge sentenced Appellant to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to the grade of E-1. The convening authority approved the rehearing sentence in its entirety.

Now again before us on appeal, Appellant raises five issues, which we have reordered and rephrased: (1) whether the Double Jeopardy Clause[4] prohibited a rehearing as to Specification 1 of the Charge; (2) whether the Charge and Specification 1 must be dismissed, with or without prejudice, due to violation of Appellant's R.C.M. 707 right to speedy trial; (3) whether Appellant's sentence violates Article 63, UCMJ, 10 U.S.C. § 863; (4) whether Appellant is entitled to relief for excessive post-trial delay; and (5) whether the Government can prove 18 U.S.C. § 922 is constitutional, meaning its application is consistent with the nation's historical tradition of firearm regulation, when Appellant was convicted of a nonviolent offense. We also address two matters the court identified in our review of the record: (6) an omission from the record of trial; and (7) an error in the court-martial promulgating order. We have

[4] U.S. CONST. amend. VI.

carefully considered issue (5) and find it does not warrant discussion or relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987). We direct correction of the court-martial order in our decretal paragraph. As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

In April 2017, a computer application company self-reported multiple files of apparent child pornography, located on its servers and associated with a particular account, to the National Center for Missing and Exploited Children (NCMEC). NCMEC was able to identify an Internet Protocol (IP) address and email address associated with the reported account. NCMEC notified the Federal Bureau of Investigation, which obtained additional information associating Appellant with the IP address, email, and suspected child pornography. The Air Force Office of Special Investigations (AFOSI) initiated an investigation in October 2017. In November 2017, the AFOSI interviewed Appellant, who admitted to possessing and watching child pornography, including receiving and storing such material on the Internet and viewing such material on his cell phone. With Appellant's consent, the AFOSI searched his phone and found several files containing child pornography. The AFOSI also searched Appellant's residence pursuant to a search warrant and found additional child pornography on electronic devices located there.

II. DISCUSSION

A. Double Jeopardy

1. Additional Background

After Appellant was arraigned for the rehearing, the Defense filed a pretrial motion to dismiss the Charge and both specifications on double jeopardy grounds. The Defense argued Appellant's re-prosecution for Specification 2 (wrongful distribution of child pornography) was barred because the military judge at the original court-martial had entered a finding of not guilty as to that specification. The Defense further argued Specification 1 (wrongful possession of child pornography) must be dismissed because Specification 1 was a lesser-included offense of, and multiplicious with, Specification 2, of which Appellant had been acquitted. In response, the Government argued neither specification was required to be dismissed because the convening authority's decision to order a full rehearing "expunged" the result of the first court-martial.

While the defense motion to dismiss was pending, Appellant and the convening authority entered a PTA which provided Appellant would plead guilty to Specification 1 and to the Charge, but not guilty to Specification 2. The PTA further provided that "upon the announcement of the findings of the court," the convening authority would "direct Trial Counsel to dismiss Specification 2 of the Charge, necessarily including its lesser included offense of attempted distribution of child pornography." The PTA further provided Appellant's guilty pleas were "conditioned on [Appellant's] ability to preserve for review the military judge's decisions concerning [Appellant's] motion to dismiss the Charge for violation of R.C.M.

707 and [his] motion to dismiss the Charge for double jeopardy."

When the court-martial reconvened on 30 May 2023, prior to entry of pleas, the military judge entered an oral ruling on the Defense's motion to dismiss for former jeopardy, which she subsequently supplemented in writing. The military judge granted the motion in part and denied it in part. She dismissed Specification 2 with prejudice, explaining "an announced decision to acquit is final" and "cannot be impeached, . . . withdrawn or disapproved." However, the military judge denied the motion with respect to Specification 1. She explained "[t]he Government is permitted to charge in the alternative as required by exigencies of proof," and that "[t]he judgment assessed at the original court-martial with respect to its finding as to [S]pecification 1 was not final, and the finding of the original [c]ourt as to [S]pecification 1 appropriately underwent appellate review and was appropriately referred for rehearing."

After the military judge announced her ruling, and following a short recess, trial counsel announced the convening authority intended "to proceed according with" the PTA, notwithstanding the ruling on the motion to dismiss. Appellant entered a plea of guilty to "the Charge and Specifications [sic]." After a thorough providency inquiry, the military judge found Appellant guilty of "Specification 1" and of the Charge. No findings were entered with respect to Specification 2.

2. Law

Double jeopardy is a question of law we review de novo. *See United States v. Driskill*, 84 M.J. 248, 252

(C.A.A.F. 2024) (citing *United States v. Hutchins*, 78 M.J. 437, 444 (C.A.A.F. 2019)).

> Three prohibitions against "double jeopardy" apply to courts-martial. *United States v. Rice*, 80 M.J. 36, 40 n.8 (C.A.A.F. 2020). The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Similarly, Article 44(a), UCMJ, provides: "No person may, without his consent, be tried a second time for the same offense." And Rule for Courts-Martial (R.C.M.) 907(b)(2)(C) requires dismissal of a charge or specification if "[t]he accused has previously been tried by court-martial or federal civilian court for the same offense."

Id. (ellipsis and alteration in original).

The United States Court of Appeals for the Armed Forces (CAAF) has explained "[a]pplying these three prohibitions requires multiple steps." *Id.* One question to be answered is whether the accused has been "tried twice." *Id.* This question involves determining whether jeopardy as to a particular offense has both "attached" and "terminated." "[O]nce jeopardy has attached, an accused may not be retried for the same offense without consent once jeopardy has terminated." *United States v. Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012) (footnote omitted) (citing *Richardson v. United States*, 468 U.S. 317, 325 (1984)); *see also United States v. McMurrin*, 72 M.J. 697, 704 (N.M. Ct. Crim. App. 2013) ("A successful double jeopardy claim, therefore, must have two temporal components: first, that jeopardy attaches, and second, that it terminates." (citation omitted)).

In general, "jeopardy attaches pursuant to Article 44(a), UCMJ, 'when evidence is introduced.'" *Driskill*, 84 M.J. at 252 (quoting *Easton*, 71 M.J. at 172). As for termination, with regard to a finding of *guilty*, in general "[n]o proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of [Article 44, UCMJ,] until the finding of guilty has become final after review of the case has been fully completed." 10 U.S.C. § 844(b). "The successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge." *United States v. Scott*, 437 U.S. 82, 90–91 (1978) (citing *Burks v. United States*, 437 U.S. 1, 1 (1978)). In contrast, a finding of *not guilty*—whether erroneous or not—is final, may not be appealed, and terminates jeopardy. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977); *United States v. Hardy*, 46 M.J. 67, 73 (C.A.A.F. 1997); *United States v. Marcee*, ARMY MISC 20210550, 2022 CCA LEXIS 68, at *3–4 (A. Ct. Crim. App. 28 Jan. 2022) (unpub. op.).

In addition to attachment and termination, double jeopardy analysis requires determination "whether the accused is truly being tried twice 'for the same offense.'" *Driskill*, 84 M.J. at 252. Military courts generally apply the test announced in *Blockburger v. United States*, 284 U.S. 303, 303–04 (1932), to determine whether two offenses are the same for double jeopardy purposes, whereby the elements of each offense are compared to determine whether each offense requires proof of at least one element the other

offense does not. *Driskill*, 84 M.J. at 252–53.[5] The prohibitions on double jeopardy "also 'forbid[ ] successive prosecution and cumulative punishment for a greater and lesser included offense.'" *Rice*, 80 M.J. at 40 (quoting *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).

Related to the prohibition on double jeopardy is the concept of multiplicity. Multiplicity in violation of the Double Jeopardy Clause 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. 378, 385 (C.A.A.F. 2010) (emphasis and internal quotation marks omitted) (quoting *United States v. Roderick*, 62 M.J. 425, 431 (C.A.A.F. 2006)). The Government may properly charge multiplicious specifications in the alternative in order to "meet the exigencies of proof, . . . but if a conviction to both [specifications] ensues, one or the other must be dismissed." *United States v. Earle*, 46 M.J. 823, 825 (A.F. Ct. Crim. App. 1997) (citation omitted).

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[5] The CAAF has held "that only some 'differences are valid ones when determining what constitutes the same offense for purposes of a double jeopardy analysis involving Article 134, UCMJ.'" *Driskill*, 84 M.J. at 253 (quoting *Rice*, 80 M.J. at 43). The CAAF further noted that in *Rice* they

> held that the Double Jeopardy Clause precluded the [G]overnment from exploiting the unique nature of Article 134, UCMJ, to try a servicemember by court-martial for conduct that the [G]overnment had previously charged as violations of Title 18 offenses in federal civilian court "simply by removing a jurisdictional element" and refiling the charges under clause 1 or 2 of Article 134, UCMJ.

Id. at 256 (quoting *Rice*, 80 M.J. at 40–44).

As charged in Appellant's case, the elements of the offense of distribution of child pornography (Specification 2) include that within the continental United States, on divers occasions between 30 August 2015 and 19 October 2017, Appellant: (1) "knowingly and wrongfully distributed child pornography to another," and (2) "under the circumstances, the conduct of [Appellant] was . . . of a nature to bring discredit upon the armed forces." *Manual for Courts-Martial, United States* (2012 ed.) (2012 *MCM*), pt. IV, ¶ 68b.b.(3). "'Distributing' means delivering to the actual or constructive possession of another." 2012 *MCM*, pt. IV, ¶ 68b.c.(3).

As charged in Appellant's case, the elements of the offense of possession of child pornography (Specification 1) include that within the continental United States, on divers occasions between 30 August 2015 and 19 October 2017, Appellant: (1) "knowingly and wrongfully possessed . . . child pornography," and (2) "under the circumstances, the conduct of [Appellant] was . . . of a nature to bring discredit upon the armed forces." 2012 *MCM*, pt. IV, ¶ 68b.b.(1). "'Possessing' means exercising control of something" and "may be direct physical custody . . . or it may be constructive . . . ." 2012 *MCM*, pt. IV, ¶ 68b.c.(5).

3. Analysis

Appellant contends his re-prosecution for Specification 1 of the Charge (wrongful possession of child pornography) was barred by the constitutional prohibition on double jeopardy. He argues Specification 1 was facially multiplicious with Specification 2 (wrongful distribution of child pornography). Therefore, he reasons, because the original court-martial acquitted him of wrongful

distribution of child pornography, and this court's prior opinion expunged the guilty verdict as to the lesser included offense of possession (as well as to the lesser included offense of attempted distribution), jeopardy both attached and terminated as to Specification 1. However, we find no double jeopardy violation.

We agree with Appellant, and the Government also appears to agree, that Specification 1 is multiplicious with Specification 2. Both specifications identify identical locations and time spans for the alleged offenses. Neither specification identifies specific files or items constituting the child pornography in question. Moreover, in order to "distribute" child pornography—*i.e.*, to deliver it to the possession of another—it is necessary to exercise some control over it either physically or constructively—*i.e.*, to "possess" it. *See* 2012 *MCM*, pt. IV, ¶¶ 68b.c.(3), (5).

However, the Government is not prohibited from charging multiplicious specifications in the alternative. *Earle*, 46 M.J. at 825. Moreover, at his original court-martial Appellant was convicted of the separately charged lesser included possession offense; he has never been acquitted of it. Jeopardy attached as to the lesser included possession conviction when the military judge received evidence at the original court-martial, but it did not terminate because review of the case was never fully completed. *See* 10 U.S.C. § 844(b); *Driskill*, 84 M.J. at 252. In his initial appeal to this court, Appellant successfully appealed the conviction on grounds unrelated to the sufficiency of the evidence, which is no bar to his re-prosecution for that offense. *See Scott*, 437 U.S. at 90–91. This court's prior opinion and remand to the convening authority may have "expunged" the result of the original court-

martial in the sense that the findings of guilty were set aside, but not in any sense that would bar Appellant's re-prosecution for Specification 1 of the Charge.

B. R.C.M. 707 Speedy Trial

1. Additional Background

a. Pre-Rehearing Processing

Appellant's original court-martial took place at Patrick Air Force Base, Florida, in June 2019. The original convening command, 14th Air Force, was redesignated as Space Operations Command (SpOC) in December 2019. In 2021, Space Systems Command (SSC) replaced SpOC as the general court-martial convening authority for the host unit of what is now Patrick Space Force Base (SFB).

On 21 July 2022, this court issued its prior opinion setting aside the findings and sentence and returning the record to TJAG for return to an appropriate convening authority. Matthew, unpub. op. at *16. On or about 15 August 2022, the Office of the Judge Advocate General delivered this court's opinion to the staff judge advocate (SJA) for SpOC. The case was subsequently referred to the commander of SSC.

On 3 October 2022, the legal office at Patrick SFB confirmed receipt of the record of trial. On 13 October 2022, the Government notified Appellant of the authorization for a full rehearing. The same day, Appellant submitted a request for administrative separation in lieu of court-martial pursuant to Chapter 6 of the Department of the Air Force Instruction (DAFI) 36-3211, *Military Separations*. On 27 October 2022, the convening authority at SSC ordered a rehearing.

On 5 December 2022, the convening authority disapproved Appellant's request for administrative separation and directed the Air Force Personnel Center (AFPC) to reassign Appellant to an active duty unit at Patrick SFB. On 7 December 2022, AFPC attached Appellant to a squadron at Patrick SFB and established a report date of 6 January 2023. On 15 December 2022, the Government notified Appellant of his recall from excess leave and permanent change of station authorization.

Appellant demanded speedy trial on 22 December 2022.

On 20 January 2023, the convening authority excused 95 days of delay, including the period from 3 October 2022 until 5 January 2023, for purposes of the R.C.M. 707 speedy trial requirement.

Appellant was arraigned on 31 January 2023.

b. Defense R.C.M. 707 Motion to Dismiss

After the arraignment, the Defense moved to dismiss the Charge and specifications for violation of R.C.M. 707. The Defense contended the 120-day speedy trial "clock" began on or about 15 August 2022, when SpOC received this court's prior opinion authorizing a rehearing. *See Matthew*, unpub. op. at *16. In addition, the Defense contended the convening authority "abused his discretion in excusing a 95-day delay where no special circumstance caused the delay," and that the "[G]overnment's *ex parte* application for approval of delay and the [c]onvening [a]uthority's after-the-fact excusal of the delay" were "indicia of abuse of discretion." Because the R.C.M. 707 clock began on 15 August 2022 and the 95-day excusal was improper, the Defense concluded, the 120-

day standard was greatly exceeded before Appellant was arraigned on 31 January 2023.

In response, the Government argued the R.C.M. 707 speedy trial clock did not start until 3 October 2022, when the record of trial was delivered to the legal office at Patrick SFB. Therefore, Appellant's arraignment on 31 January 2023 was on the 120th day and met the R.C.M. 707 standard. The Government further argued the convening authority's excusal of 95 days was reasonable and not an abuse of discretion.

The military judge denied the motion to dismiss. She agreed with the Government that the speedy trial clock began to run on 3 October 2022, when the convening authority received the record of trial; therefore, she found, Appellant was arraigned within 120 days as required by R.C.M. 707, regardless of the convening authority's exclusion of time.[6] In addition, the military judge found the convening authority excluded time "necessary to ensure [Appellant's] availability for trial" in accordance with R.C.M. 707(c), implying she found no abuse of discretion.

Appellant subsequently entered a PTA with the convening authority, agreeing to conditionally plead guilty to the Charge and Specification 1, but preserving appellate review of, *inter alia*, the military judge's denial of the R.C.M. 707 motion.

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[6] The military judge's written ruling contains an apparent typographical error. Her findings of fact erroneously refer to Appellant being arraigned on 24 January 2023. However, the military judge's conclusions of law refer to Appellant's arraignment on the correct date, 31 January 2023. We find this error does not substantially influence our review of this issue.

2. Law

In general, "[t]he accused shall be brought to trial within 120 days after the earlier of: [p]referral of charges; [t]he imposition of restraint . . . ; or [e]ntry on active duty under R.C.M. 204." R.C.M. 707(a). However,

> [i]f a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule *shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing*. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required . . . at the time of the first session under R.C.M. 803.

R.C.M. 707(b)(3)(D) (emphasis added). "[F]ailure to comply with this rule will result in dismissal of the affected charges," with or without prejudice. R.C.M. 707(d), (1); *United States v. Heppermann*, 82 M.J. 794, 803 (A.F. Ct. Crim. App. 2022).

"All . . . pretrial delays approved by a military judge or the convening authority shall be . . . excluded" for purposes of "determining whether the [120-day] period . . . has run." R.C.M. 707(c); *see also United States v. Guyton*, 82 M.J. 146, 151 (C.A.A.F. 2022) (quoting R.C.M. 707(c)). "[A] 'delay' under R.C.M. 707 [i]s 'any interval of time between events.'" *United States v. Proctor*, 58 M.J. 792, 795 (A.F. Ct. Crim. App. 2003) (quoting *United States v. Nichols*, 42 M.J. 715, 721 (A.F. Ct. Crim. App. 1995)). R.C.M. 707 does not prohibit after-the-fact approval of delays nor *ex parte* requests for excludable delay. *Guyton*, 82 M.J. at 151 (quoting *United States v. Thompson*, 46 M.J.

472, 475 (C.A.A.F. 1997)); *Heppermann*, 82 M.J. at 803.

We review alleged R.C.M. 707 violations de novo. *Guyton*, 82 M.J. at 151 (citation omitted); *Heppermann*, 82 M.J. at 803 (citation omitted). However, "[w]e give substantial deference to findings of fact made by the military judge and will not overturn such findings unless they are clearly erroneous." *United States v. Fujiwara*, 64 M.J. 695, 697 (A.F. Ct. Crim. App. 2007) (citations omitted). We review a decision to approve a delay and exclude time from the 120-day period pursuant to R.C.M. 707(c) for an abuse of discretion. *See United States v. Lazauskas*, 62 M.J. 39, 41–42 (C.A.A.F. 2005). "An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous or if the court's decision is influenced by an erroneous view of the law." *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citation omitted).

3. Analysis

The record indicates the convening authority received the record of trial on 3 October 2022. Therefore, in accordance with R.C.M. 707(b)(3)(D), this marks the earliest date the 120-day speedy trial clock would have begun to run for purposes of the rehearing. Appellant's arraignment occurred on 31 January 2023, exactly 120 days later. Therefore, the Government brought Appellant to trial for purposes of R.C.M. 707 within 120 days, and no violation of the rule occurred.

However, Appellant contends the 120-day clock actually began to run on 15 August 2022, the date SpOC received this court's opinion authorizing a rehearing. He cites DAFI 51-201, *Administration of*

Military Justice, ¶ 26.8 (14 Apr. 2022),[7] which provides in part: "Receipt of decision by the SJA of the original convening authority (or the current convening authority if the original convening authority no longer exists) triggers the speedy trial clock for both rehearings on findings and rehearings on sentence only." Appellant argues the commander of SpOC was the "current convening authority" when the Office of the Judge Advocate General delivered the opinion to SpOC, and that R.C.M. 707 does not provide that the subsequent transfer of the case to another convening authority "resets" the clock. Moreover, Appellant notes DAFI 51-201, ¶ 26.8 provides the 120 days begins to run upon receipt of the appellate decision, without reference to delivery of the record of trial. Appellant further contends, as he did at his court-martial, the convening authority's excusal of 95 days of delay was an invalid blanket exclusion of time that was unwarranted by the circumstances and was an abuse of discretion. Accordingly, as the Defense argued before the military judge, Appellant contends the Government exceeded the 120-day R.C.M. 707 speedy trial clock, requiring the findings to be set

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[7] Appellant's brief purports to cite "the current version of DAFI 51-201, para. 26.8." Based on the paragraph reference, Appellant appears to be referring to the 14 April 2022 version of the instruction. However, we note that at the time Appellant submitted his brief on 28 May 2024, a new version of DAFI 51-201 had gone into effect. DAFI 51-201, *Administration of Military Justice* (24 Jan. 2024). Although it was not in effect at the times relevant to the instant appeal, we observe this newest version of DAFI 51-201 provides at ¶ 26.9 that the speedy trial clock begins once the responsible convening authority or a special trial counsel, as applicable, receives both the record of trial and the opinion authorizing or directing a rehearing.

aside and the charges dismissed, with or without prejudice.

We are not persuaded DAFI 51-201, ¶ 26.8 alters the two R.C.M. 707(e) requirements to start the 120-day clock for a rehearing. "The military has a hierarchical scheme as to rights, duties, and obligations," whereby the Manual for Courts-Martial takes precedence over service regulations. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (citation omitted). To the extent a service regulation provides additional "rights" to a servicemember, those "rights may not conflict with a higher source." *Id.* R.C.M. 707(b)(3)(D) provides the 120-day clock for a rehearing begins when the convening authority has received *both* the appellate court decision *and* the record of trial. We find DAFI 51-201, ¶ 26.8 is best understood not as contradicting R.C.M. 707(b)(3)(D), but as providing additional guidance as to how one of the two criteria is to be interpreted, *i.e.*, receipt of the appellate decision. Specifically, DAFI 51-201, ¶ 26.8 explains the Rule's reference to "the responsible convening authority" means receipt by either "the original convening authority" or, if the original convening authority no longer exists, "the current convening authority." We do not understand the meaning of the provision is to dispense with the R.C.M. 707(b)(3)(D) requirement that the record of trial also be received in order to start the speedy trial clock. *Cf. United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2018) (quoting *United States v. Christian*, 63 M.J. 205, 208 (C.A.A.F. 2006)) (explaining courts "typically seek[ ] to harmonize independent provisions of a statute").

Because the Government initiated the rehearing within 120 days of the commencement of the speedy

trial clock on 3 October 2022, it is unnecessary to address the convening authority's exclusion of time.

C. Article 63, UCMJ

1. Law

Article 63, UCMJ (*Manual for Courts-Martial, United States* (2016 ed.) (2016 *MCM*)),[8] provides that "[u]pon a rehearing . . . no sentence in excess of or more severe than the original sentence may be approved." As a general rule, "offenses on which a rehearing . . . has been ordered shall not be the basis for an approved sentence in excess of or more severe than the sentence ultimately approved by the convening or higher authority following the previous trial or rehearing." R.C.M. 810(d)(1). "In adjudging a sentence not in excess of or more severe than one imposed previously, a court-martial is not limited to adjudging the same or a lesser amount of the same type of punishment formerly adjudged." *United States v. Turner*, 34 M.J. 1123, 1125 (A.F.C.M.R. 1992) (quoting R.C.M. 810(d), Discussion (*Manual for Courts-Martial, United States* (1984 ed.))). "[T]he application of the Article 63[, UCMJ,] limitation in any case cannot be reduced to a specific formula." *United States v. Altier*, 71 M.J. 427, 428 (C.A.A.F. 2012) (citations omitted).

A general court-martial sentence that includes confinement for more than six months, or for any period of confinement in addition to a dishonorable or bad-conduct discharge or dismissal, results in forfeiture of all pay and allowances during any period of confinement or parole. 10 U.S.C. §§ 858b(a)(1), (2).

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[8] Based on the date of the offense, the version of Article 66, UCMJ, in the 2016 *MCM* applies in this case.

2. Analysis

As described above, Appellant's first court-martial convicted him of one specification of wrongful possession of child pornography on divers occasions and one specification of attempted wrongful distribution of child pornography on divers occasions, in violation of Articles 134 and 80, UCMJ, respectively. Appellant was originally sentenced to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1. At his rehearing, the military judge found Appellant guilty of one specification of wrongful possession of child pornography on divers occasions and sentenced him to a bad-conduct discharge, confinement for 12 months, forfeiture of all pay and allowances for 12 months, and reduction to the grade of E-1.

Appellant contends the rehearing sentence violates Article 63, UCMJ, in two respects. First, he contends the adjudged forfeiture of all pay and allowances for 12 months resulted in a sentence impermissibly "in excess of" his original sentence, which included no adjudged forfeiture of pay or allowances. Second, Appellant contends the adjudged 12 months in confinement renders his rehearing sentence "more severe than" his original sentence which included 17 months of confinement because it represented a greater percentage of the maximum imposable term of confinement, which was only 10 years at the rehearing as compared to 30 years at the original trial. *See* 2012 *MCM*, pt. IV, ¶¶ 4.e., 68b.e. We address each argument in turn.

With regard to the adjudged forfeitures, we first note Article 63, UCMJ, applies to the "sentence" rather than to individual punishments. Moreover, the

applicable precedent in this area indicates it is the original and rehearing sentences as a whole that are to be compared for purposes of Article 63, UCMJ, rather than the individual sentence components. *See, e.g.*, *Turner*, 34 M.J. at 1125. For example, in *Turner*, our predecessor court cited *United States v. Kelley*, 17 C.M.R. 259 (C.M.A. 1954), and *United States v. Smith*, 31 C.M.R. 181, 182 (C.M.A. 1961), for the proposition that where the original sentence included a bad-conduct discharge, any punishment less severe than a bad-conduct discharge could be adjudged at a rehearing, regardless of the fact it had not been imposed at the original court-martial. *Turner*, 34 M.J. at 1125. It follows that forfeitures being adjudged in the rehearing but not in the original proceeding does not necessarily indicate a violation of Article 63, UCMJ; a more holistic assessment of each entire sentence is required. Notably, Appellant's original punishment of a dishonorable discharge was more severe than his rehearing punishment of a bad-conduct discharge, *see United States v. Mitchell*, 58 M.J. 446, 449 (C.A.A.F. 2003), and his original punishment of confinement for 17 months was more severe than his rehearing punishment of confinement for 12 months. In addition, we note the adjudged forfeiture at the rehearing would have little or no practical effect on Appellant, because Article 58b(a), UCMJ, 10 U.S.C. § 858b(a), would also have had the effect of forfeiture of all of Appellant's pay and allowances during his 12-month term of confinement (or parole).

With regard to the percentages of the maximum imposable sentences adjudged at each court-martial, Article 63, UCMJ, prohibits a rehearing "sentence in excess of or more severe than the original sentence."

This indicates a direct comparison of the sentences from each proceeding. There is no "specific formula" for determining the relative severity of sentences, *Altier*, 71 M.J. at 428, to include no requirement to calculate relative percentages of maximum confinement terms where there has been a change in the convicted offenses for which the accused was sentenced. Appellant draws our attention to no case applying such an analysis. With this understanding, we find 12 months of confinement is in fact less severe than 17 months of confinement.

Accordingly, we find Appellant's rehearing sentence to a bad-conduct discharge, confinement for 12 months, total forfeiture of pay and allowances for 12 months, and reduction to the grade of E-1 is not in excess of or more severe than his original sentence to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1 in violation of Article 63, UCMJ.

Appellant makes two related arguments that warrant brief mention. First, he contends the SJA's advice to the convening authority that the latter "d[id] not have the authority to disapprove, commute, or suspend, in whole or in part," Appellant's term of confinement was incorrect. In general, such advice is a correct statement of the limitation on a convening authority's ability to modify a sentence of confinement for more than six months. *See* 10 U.S.C. § 860(c)(4)(A) (2016 *MCM*). However, Appellant contends such advice was incorrect in this case because the convening authority had an independent duty under Article 63, UCMJ, not to approve a sentence in excess of the one adjudged at the original court-martial. As described above, Appellant contends his 12-month term of confinement from the rehearing was in excess

of his original 17-month term of confinement when measured as a percentage of the maximum imposable sentence. However, as we have determined Appellant's rehearing sentence did not violate Article 63, UCMJ, the convening authority had no cause to modify the sentence on that basis. Accordingly, the usual Article 60, UCMJ, limitations on the convening authority applied, and Appellant is not entitled to relief on the basis of the SJA's advice.

Second, at the conclusion of Appellant's argument with respect to Article 63, UCMJ, he includes the following: "If this Court declines to give life to the phrase 'more severe' in Art[icle] 63, UCMJ, this Honorable Court should find, for the same reasons as above, that the sentence is inappropriate under Article 66, UCMJ[, 10 U.S.C. § 866,] and re-assess it to reach the same result." Here Appellant invokes this court's duty to affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Having given such individualized consideration to Appellant, we conclude Appellant's sentence is not inappropriately severe, either in light of the sentence originally adjudged or on any other basis.

A. Post-Trial Delay

1. Law

"[C]onvicted servicemembers have a due process right to timely review and appeal of courts-martial convictions." *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006) (citations omitted). In *Moreno*, the CAAF established a presumption of facially unreasonable delay "where the action of the convening authority is not taken within 120 days of the completion of trial," "where the record of trial is not docketed by the [Court of Criminal Appeals (CCA)] within thirty days of the convening authority's action," or "where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." *Id.* at 142.[9]

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is

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[9] In *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020), this court adapted the *Moreno* thresholds for facially unreasonable delay to the new post-trial processing regime that went into effect in 2019. Specifically, *Livak* established an aggregated 150-day standard for facially unreasonable delay from sentencing to docketing with the CCA for cases referred to trial on or after 1 January 2019. *Id.* at 633. However, the original *Moreno* standards apply in Appellant's case.

distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted). Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

We review de novo an appellant's entitlement to relief for post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

2. Analysis

Appellant contends he is "due relief for post-trial delay," citing the 18-month *Moreno* standard for facially unreasonable appellate delay. *See Moreno*, 63 M.J. at 142. He specifies four particular periods of delay which he contends are the responsibility of either the Government or of this court. First, Appellant cites "the [G]overnment's loss of the record of trial," referring to the court reporter's loss of the audio recording of the arraignment of his original court-martial, which ultimately resulted in this court setting aside the findings and sentence from that proceeding. Second, Appellant cites the lapse of time from when his original court-martial was initially docketed with this court on 23 October 2019 until it issued its prior opinion on 21 July 2022. Third, Appellant cites the delay between this court's return of the record to TJAG and his arraignment for the rehearing on 31 January 2023, addressed in more detail in our analysis of the alleged violation of R.C.M.

707 *supra*. Fourth, Appellant cites the delay between his rehearing sentencing on 30 May 2023 and the docketing of the record with this court on 28 March 2024. Appellant does not allege any specific prejudice from the delays he cites.

As an initial matter, we note Appellant appears to analyze the entire period of time from his original sentencing on 20 June 2019 onward as one extended post-trial period to be measured against the *Moreno* standards for facially unreasonable delay, and in particular the 18-month appellate delay standard. We disagree. In *Moreno*, the CAAF stated it would "apply a presumption of unreasonable delay where appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the [CCA]." *Id*. This court previously rendered a decision on Appellant's appeal of his original court-martial, which resolved in his favor one of the issues he had raised to this court. *Matthew*, unpub. op. at *16. Therefore, we find there are two distinct post-trial and appellate periods for purposes of our *Moreno* analysis.

First we consider the post-trial and appellate delay preceding this court's prior opinion. The original convening authority took action on the sentence on 13 October 2019, less than 120 days from sentencing, and the record was docketed with this court on 23 October 2019, less than 30 days from action. Accordingly, there was no facially unreasonable post-trial delay at that point under *Moreno*, 63 M.J. at 142. However, this court did exceed the 18-month *Moreno* standard for appellate delay.[10] Because Appellant has not alleged

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[10] We assume for purposes of our analysis that this court's order 23 December 2020 order returning the record to TJAG for

qualifying prejudice under *Moreno*, and because we find none, a due process violation would exist only if the delay was so egregious as to negatively affect public perception of the fairness and integrity of the military justice system. *Toohey*, 63 M.J. at 362. We find it was not so egregious. Several factors contribute to this conclusion, including but not limited to the following. Appellant moved for and was granted eight enlargements of time in which to file his assignments of error. According to the defense filings, Appellant was released from confinement prior to the sixth motion for enlargement of time, submitted on 12 June 2020, well before he even submitted his original assignments of error. Accordingly, at no point has Appellant suffered oppressive incarceration as a result of appellate delay. In addition, over two months of delay was attributable to this court returning the record in an effort to correct the incomplete transcript; although this delay was not attributable to Appellant, remand was a reasonable measure to address a deficiency specifically raised by the Defense. Furthermore, this court's opinion set aside the findings and sentence in their entirety, leaving no sentence against which to award relief.

The next period of delay Appellant cites—the delay between this court's return of the record to TJAG and Appellant's arraignment for the rehearing—is not in fact a period of post-trial delay. At that point, Appellant's first appeal had been resolved in his favor, and his case was then in a pretrial posture preceding his rehearing. Delays during this phase are properly evaluated in light of pretrial speedy trial

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corrective action was not a "decision" on the case within the meaning of *Moreno*, 63 M.J. at 142.

requirements, such as the alleged R.C.M. 707 violation Appellant raised separately which we analyzed *supra*, rather than under *Moreno*. Accordingly, we find no violation of Appellant's right to timely post-trial and appellate review on this basis.

Turning to the delay following Appellant's rehearing, Appellant was sentenced for a second time on 30 May 2023, and the convening authority took action on the rehearing 248 days later on 2 February 2024. This period significantly exceeded the 120-day *Moreno* standard for a facially unreasonable delay. In addition, Appellant's record was docketed with this court on 28 March 2024, 55 days after the convening authority took action, which exceeds the 30-day *Moreno* standard. Accordingly, we have considered the four *Barker* factors; but once again, because Appellant has not identified any cognizable prejudice and we perceive none, no due process violation exists unless the delay was so egregious as to impugn the fairness and integrity of the military justice system. *Toohey*, 63 M.J. at 362. As reasons contributing to the delay, the Government cites low paralegal manning in the servicing legal office; a complicated earlier court-martial that took priority in post-trial processing over Appellant's rehearing; and 61-day delay in delivering the record of trial to civilian trial defense counsel's overseas location due to armed conflict in the region. Although these cited reasons do not provide a complete or convincing explanation for the facially unreasonable delays, in the absence of prejudice to Appellant we do not find the delay so egregious as to constitute a due process violation.

Furthermore, recognizing our authority under Article 66, UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate in

this case even in the absence of a due process violation. *See United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). After considering the factors enumerated in *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude no such relief is warranted.

E. Incomplete Record

1. Additional Background

Upon reviewing the record, this court noted an apparent omission in the record the parties did not identify. At one point in the court-martial, trial counsel offered for the record Appellate Exhibit (AE) XI, the Government's response to the Defense's motion to dismiss the Charge and specification for the alleged R.C.M. 707 violation, which we have analyzed *supra*. After some initial confusion and clarification by the military judge, trial counsel identified AE XI as a 27-page document, including 21 pages of attachments. However, the version of AE XI contained in the original record consists of only the six-page government response, which lists nine attachments that are not included.

On 30 September 2024, this court issued an order to the Government to "show good cause as to why this court should not remand the record for correction under [R.C.M.] 1112(d), or take other corrective action." In response, the Government moved to attach a 1 October 2024 declaration from the superintendent of the Patrick SFB legal office with an electronic version of what he asserts to be the 27-page version of AE XI, including the attachments. The declaration states this version was provided via email to the Government Trial and Appellate Operations Division on 1 October 2024. The Government's response to the

show cause order asserts "there is no utility in returning the record for correction" at this point because this court can now review the missing attachments and "assess whether Appellant was prejudiced by their omission." The Government further contends additional "delay is unnecessary in this case especially considering Appellant alleged unreasonable post-trial delay in his assignments of error." Appellant did not oppose the Government's motion to attach or otherwise respond to the Government's response to the show cause order. This court granted the Government's motion to attach

2. Law

A complete record of the proceedings, including all exhibits, must be prepared for any general court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2); *see also* R.C.M. 1112(b)(6) (providing the record of trial shall include all exhibits). Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"[A] substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the [G]overnment must rebut." *United States v. Harrow*, 62 M.J. 649, 654 (A.F. Ct. Crim. App. 2006) (citation omitted), *aff'd*, 65 M.J. 190 (C.A.A.F. 2007). However, "[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of

similar sexually explicit material were included). We approach the question of what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). "In assessing either whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted). "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *Id.* (omission in original) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953))

3. Analysis

We begin with a clarification of the significance of this court granting the Government's motion to attach the declaration and purported correct version of AE XI. As we explained in similar circumstances in another case:

> We understand this to mean that we can consider the [attached matter] in deciding whether the Government has rebutted the presumption of prejudice on appeal. To be clear, we are not holding that the record of trial is now complete . . . . If the Government sought to make the record of trial complete, it should have requested our court order a certificate of correction.

United States v. King, No. ACM 39583, 2021 CCA LEXIS 415, at *29 (A.F. Ct. Crim. App. 16 Aug. 2021) (unpub. op.), *aff'd*, 83 M.J. 115 (C.A.A.F. 2023).

In the instant case, we find the omission was substantial. The missing attachments presumably formed part of the basis for the military judge's findings of fact in her ruling on the R.C.M. 707 motion to dismiss, which was itself significant for our analysis of Appellant's assignment of error. However, we find the presumption of prejudice has been rebutted under the circumstances of this case. The facts that control our resolution of the R.C.M. 707 issue—notably including *inter alia* that the record of trial was delivered to Patrick SFB on 3 October 2022—are established by other exhibits in the record. Accordingly, we are able to complete our Article 66, UCMJ, review, and Appellant has not been prejudiced by the omission.

F. Court-Martial Order

The 2 February 2024 court-martial order promulgating the results of the rehearing contains an error. The order incorrectly indicates Appellant pleaded "not guilty" to Specification 2 of the Charge, which was subsequently "Withdrawn and Dismissed with Prejudice." As described supra in relation to Appellant's assertion of double jeopardy, the military judge dismissed Specification 2 with prejudice prior to Appellant entering his pleas. Appellant did not enter a plea of "not guilty," and the specification was not "withdrawn." Accordingly, we direct correction of the court-martial order in our decretal paragraph.

III. CONCLUSION

We direct publication of a new court-martial order with the following corrections with regard to Specification 2 of the Charge: for the "Plea," delete "NG" and replace with "None;" and for the "Finding," delete "Withdrawn and Dismissed with Prejudice"

and replace with "Dismissed with Prejudice." The findings and sentence as approved 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) (2016 *MCM*). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

No. ACM 39796 (f rev)

UNITED STATES

Appellee

v.

Maxwell A. MATTHEW

Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Upon Further Review

Decided 21 July 2022

Military Judge: Shaun S. Speranza (arraignment);[1] Bryon T. Gleisner.

Approved sentence: Dishonorable discharge, confinement for 17 months, and reduction to E-1. Sentence adjudged on 20 June 2019 by GCM convened at Patrick Air Force Base, Florida.

For Appellant: Major Amanda E. Dermady, USAF; Robert Feldmeier, Esquire.

For Appellee: Lieutenant Colonel Brian C. Mason, USAF; Lieutenant Colonel Matthew J. Neil, USAF;

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[1] Judge Speranza is identified as the detailed military judge for Appellant's arraignment in a memorandum dated 22 January 2019. We explain the significance of this memorandum later in this opinion.

Major Alex B. Coberly, USAF; Mary Ellen Payne, Esquire.

Before JOHNSON, RICHARDSON, and CADOTTE, *Appellate Military Judges*.

Judge CADOTTE delivered the opinion of the court, in which Chief Judge JOHNSON joined. Judge RICHARDSON filed a separate dissenting opinion.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

CADOTTE, Judge:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas, of one specification of wrongful possession of child pornography on divers occasions in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and one specification of attempt to distribute child pornography on divers occasions in violation of Article 80, UCMJ, 10 U.S.C. § 880.[2,3] The

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[2] All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2012 ed.). Unless otherwise noted, all other references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.).

[3] Appellant was charged with one specification of wrongful distribution of child pornography in violation of Article 134, UCMJ, but entered a plea of guilty to the lesser included offense of attempt to distribute child pornography in violation of Article 80, UCMJ. After the Government informed the military judge of its intent to not go forward with proof on the greater offense, the military judge found Appellant not guilty of the wrongful

military judge sentenced Appellant to a dishonorable discharge, confinement for 17 months, and reduction to the grade of E-1.[4]

Appellant's case is before us for the second time. Appellant raised two assignments of error, one of which asserts the record of trial is incomplete. During our initial review of this case, we determined that the transcript for Appellant's arraignment was missing from the record of trial. As a result, pursuant to Rule for Courts-Martial (R.C.M.) 1104(d)(1), we returned the record of trial to the convening authority with direction to return it to the military judge who presided at Appellant's court-martial and was present at the end of the proceedings, for action consistent with R.C.M. 1104(d). *See United States v. Matthew*, No. ACM 39796, 2020 CCA LEXIS 486, at *2 (A.F. Ct. Crim. App. 23 Dec. 2020) (order). That judge was to determine whether the judge who presided over Appellant's arraignment could authenticate the arraignment transcript or whether a substitute authentication may be completed under R.C.M. 1104(a)(2)(B). *Id.* at *3–4. On 4 March 2021, the Government returned the record of trial without correction, stating, "An authenticated transcript of

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distribution of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934, but guilty in accordance with his plea.

[4] The convening authority deferred all mandatory forfeitures and reduction in grade from 14 days after the sentence was adjudged until date of action, pursuant to Article 57, UCMJ, 10 U.S.C. § 857. The convening authority also waived mandatory forfeitures for a period of six months, or release from confinement or expiration of term of service, whichever is sooner, from 14 days after sentence was adjudged to be paid to Appellant's spouse for the benefit of his children, pursuant to Article 58b, UCMJ, 10 U.S.C. § 858b.

Appellant's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." The case was then redocketed with this court.

We now turn to Appellant's assignments of error: (1) whether Appellant's plea to attempted distribution of child pornography was not provident because Appellant did not disclose specific intent; and (2) whether the record of trial is incomplete. We do not reach a decision on the first issue as a result of our resolution of the second. We find the record of trial is not verbatim. Consequently, we set aside the findings and sentence and return the case to The Judge Advocate General for return to an appropriate convening authority for action consistent with R.C.M. 1103(f).

I. BACKGROUND

At his court-martial, Appellant pleaded guilty to possessing and attempting to distribute child pornography on divers occasions between on or about 30 August 2015 and 19 October 2017 while stationed at Barksdale AFB, Louisiana, and Patrick AFB. On 22 January 2019, Judge Speranza, the Chief Circuit Military Judge for the Eastern Circuit, issued a memorandum with the subject of "Confirmation of 'Arraignment and Initial Trial Dates.'" In the memorandum, Judge Speranza detailed himself to the arraignment set to take place on 25 January 2019, and detailed Judge Gleisner to preside over the trial. This is the only document in the record that refers to Judge Speranza.

The ROT does not include a session on 25 January 2019 containing Appellant's arraignment. Appellate Exhibit I, a scheduling order containing a summary of

an R.C.M. 802 scheduling conference on 25 January 2019, indicates the parties and Judge Gleisner discussed, *inter alia*, "Arraignment. (25 Jan 19)," "Expected Motions. (IAW scheduling order)," and "Expected Pleas and Forum. (TBD)." At trial on 19 June 2019, Judge Gleisner engaged in the following colloquy with Appellant regarding Appellant's arraignment:

> MJ: You were previously arraigned on 25 January 2019. Do you recall that [Appellant]?
>
> [Appellant]: Yes, Your Honor[.]
>
> MJ: And at that time your rights to counsel were explained to you. Would you like me to re-advise you of your rights to counsel?
>
> [Appellant]: No, Your Honor.
>
> MJ: Do you have any questions about your rights to counsel?
>
> [Appellant]: No, Your Honor.
>
> MJ: And by whom do you wish to be represented?
>
> [Appellant]: Major [K], Mr. [S] and Mr. [G].
>
> MJ: And by them alone?
>
> [Appellant]: Yes, Your Honor.
>
> . . . .
>
> MJ: And [Appellant], I'm going to go ahead and talk to you a little bit about your forum rights. Your forum rights were explained to you during the 25 January 2019 arraignment. Would you like me to re-advise you of your forum rights?
>
> [Appellant]: No, Your Honor.

MJ: Excuse me?

[Appellant]: No, Your Honor.

MJ: Thank you.

So, do you understand the choices that you had with your regards to forum?

[Appellant]: Yes, Your Honor.

MJ: And by which type of court do you wish to be tried?

[Appellant]: By judge alone, Your Honor.

In its response to Appellant's assignments of error, the Government requested that if this court is inclined to find prejudicial error, we should return the record "to the convening authority for appropriate action under R.C.M. 1104(d)." On 23 December 2020, this court ordered the ROT be "returned to the convening authority, who will return it to the military judge who presided at Appellant's court-martial and was present at the end of the proceedings, for action consistent with R.C.M. 1104(d)." It was further ordered that "[i]f authentication of the arraignment transcript cannot be obtained, the ROT will be returned to our court with an explanation from the Government as to why it cannot comply with this order."

On 14 January 2021, in compliance with this court's order, the Government provided notice stating, "An authenticated transcript of Appellant's arraignment cannot be obtained because the audio recording of the hearing has been lost and no alternatives can be located." We now address the issue of the missing arraignment transcript.

During Appellant's court-martial Judge Gleisner never addressed or acknowledged that the audio

recording of the 25 January 2019 hearing was lost. It does not appear that Judge Gleisner was aware that the audio recording was lost, and he did not attempt to take any corrective actions.

II. DISCUSSION

Appellant asserts that the record of trial (ROT) is incomplete because it "contains omissions of the transcript of at least one [Article 39(a), UCMJ, 10 U.S.C. § 839(a),] session, containing Appellant's arraignment." Appellant further argues that "if the [ROT] cannot be made accurate, the only appropriate remedy is for this [c]ourt to affirm only a nonverbatim record sentence and disapprove Appellant's punitive discharge and adjudge only six months confinement." In support of his argument Appellant cites the version of R.C.M. 1114(a) found in the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).[5] During our initial review of this case, we determined that the transcript for Appellant's arraignment was missing from the ROT. We ordered the ROT returned to the convening authority for correction; however none was made. As the record has not been corrected, we find the record to be substantially nonverbatim.

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[5] Appellant's reference to the version of R.C.M. 1114(a) in the 2019 *MCM* is inapposite because the charge was referred to general court-martial on 20 December 2018. *See* Executive Order 13825, § 3(d) (8 Mar. 2018):

> Except as otherwise provided in this order, the [Military Justice Act of 2016] shall not apply in any case in which charges are referred to trial by court-martial before January 1, 2019. Except as otherwise provided in this order, proceedings in any such case shall be held in the same manner and with the same effect as if the MJA had not been enacted.

We agree with Appellant that the ROT is incomplete and that it constitutes a nonverbatim record. However, we disagree with Appellant as to the appropriate remedy. Instead, we set aside the findings and sentence and return the case to The Judge Advocate General for return to an appropriate convening authority for action consistent with R.C.M. 1103(f) as stated in the decretal paragraph.

A. Law

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

A complete record of the proceedings and testimony shall be prepared in each general court-martial where the adjudged sentence includes, *inter alia*, a discharge or, if the adjudged sentence does not include a discharge, any other sentence which exceeds that which may be adjudged at a special court-martial. Article 54, UCMJ, 10 U.S.C. § 854. "[T]he record of trial shall include a verbatim transcript of all sessions except sessions closed for deliberations and voting 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 [ ] [a] bad-conduct has been adjudged." R.C.M. 1103(b)(2)(B); *see United States v. Gaskins,* 72 M.J. 225, 230 (C.A.A.F. 2013).

R.C.M. 1103(f), *Loss of notes or recordings of proceedings*, states:

> If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of subsection (b)(2)(C) of this rule shall be prepared, and 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. 1104(d)(2), *Procedure*, states:

> 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. The military judge or summary court-martial shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction before authenticating the certificate of correction. All parties shall be given

> reasonable access to any original reporter's notes or tapes of the proceedings.

R.C.M. 904 states in its entirety that an "[a]rraignment *shall* be conducted in a court-martial session and *shall* consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." (Emphasis added).

Whether an omission from a record of trial is substantial is a question of law we review de novo. *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). "Verbatim" for the purposes of a court-martial transcript does not mean word for word, but that the transcript be substantially verbatim. *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 8 (C.M.A. 1982)). "[T]he threshold question is whether the omitted material was substantial, either qualitatively or quantitatively." *Id.* (internal quotation marks omitted) (quoting *Lashley*, 14 M.J. at 9). "Omissions are quantitatively substantial unless 'the totality of omissions . . . becomes so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.'" *Id.* (alteration in original) (quoting *United States v. Nelson*, 3 C.M.A. 482, 13 C.M.R. 38, 43 (C.M.A. 1953)). We must approach the question of what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams,* 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted).

Nonverbatim transcript errors are not tested for prejudice:

> if there is not a verbatim transcript, there is also no "complete record." R.C.M. 1103(b)(2)(D). However, while in the case of most incomplete

> records prophylactic measures are not prescribed, and the missing material or remedy for same are tested for prejudice, where the record is incomplete because the transcript is not verbatim, the procedures set forth in R.C.M. 1103(f) control.

Davenport, 73 M.J. at 377 (citation omitted).

"If a military judge fails to cure a substantial omission and a nonverbatim transcript results, R.C.M. 1103(f)[ ] is triggered and the remedy lies within the sole discretion of the convening authority." *United States v. Tate*, __ M.J. __, No. 21-0235, 2022 CAAF LEXIS 381, at *21 (C.A.A.F. 23 May 2022).

B. Analysis

The military judge's sentence which includes a dishonorable discharge and confinement for 17 months requires that the transcript be verbatim. R.C.M. 1103(b)(2)(B). In order for the transcript to be verbatim, it must include "all proceedings including sidebar conferences, arguments of counsel, and rulings and instructions by the military judge." R.C.M. 1103(b), Discussion; *see also Tate*, 2022 CAAF LEXIS 381, at *8. After our initial review, we granted the Government's requested relief and returned the record for correction. The record was returned to us with the Government's explanation the record could not be corrected for the reason stated above. As a result, the transcript before us does not include the initial Article 39(a), UCMJ, session, arraigning the Appellant on 25 January 2019. While the record contains references to this initial Article 39(a) session, this initial session is missing from the record. The record before us does not include Appellant being advised of his right to counsel or forum rights, R.C.M.

903(a), as he declined to be re-advised of those rights by Judge Gleisner.

Considering the threshold question—whether the omitted material was qualitatively or quantitatively substantial—we find the omission resulting from the lost audio recording to be quantitatively substantial. *See Tate*, 2022 CAAF LEXIS 381, at *8–9 (citations omitted). The omission is not "so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness." *Davenport*, 73 M.J. at 377 (quoting *Nelson*, 3 C.M.A. at 486). The omitted matter includes the arraignment, which is a significant event in the progress of a court-martial with certain requirements. *See* R.C.M. 707(b)(1); R.C.M. 904; *United States v. Doty*, 51 M.J. 464, 465 (C.A.A.F. 1999). In addition, we are unable to review the sufficiency of Appellant's advisement of his rights to counsel and forum selection, as well as any other matters that might have arisen in the 25 January 2019 Article 39(a) session.

The Government argues that even if it is assumed that the transcript in this case is not substantially verbatim, then the Government may rebut a presumption of prejudice. The Government's answer contends there is an "absence of any presumed or actual prejudice" to Appellant. As we have determined the record is incomplete because the transcript is not verbatim, contrary to the Government's argument, we do not test for prejudice, and "the procedures set forth in R.C.M. 1103(f) control." *Davenport*, 73 M.J. at 377 (citation omitted).

Our esteemed dissenting colleague contends that "had the trial judge in Appellant's case known that the initial Article 39(a) session would not be transcribed,

his reference to that session and his repetition of what commonly transpires at such a session could be considered a combination of two remedial actions: reconstruction and 'starting anew.'" We do not find the trial judge took any action which qualifies as remedial action, let alone, a combination of remedial actions.

Unlike our colleague, we do not find the missing Article 39(a) session was reconstructed when Appellant agreed with Judge Gleisner that he had been arraigned. *See Tate*, 2022 CAAF LEXIS 381, at *12. Appellant's acknowledgement of his arraignment falls significantly short of a reconstruction of the record. Appellant's responses fail to contain the level of detail necessary to reconstruct the record as we are left with significant questions as to the parties present, and the duration and content of the missing Article 39(a) session. It is not surprising that Judge Gleisner's questioning of Appellant lacks sufficient detail to reconstruct the record as he was unaware that anything was amiss with the record.

Likewise, if we assume "starting anew" was an available remedy, we do not find, as our colleague does, Judge Gleisner "started anew." *See Id.* at *13–14. Contrary to any apparent intent to "start anew," Judge Gleisner relied upon advisements to Appellant which occurred in a previous Article 39(a) session and he did not fully re-advise Appellant of his various rights. We also find it significant that Judge Gleisner did not express he was disregarding the initial Article 39(a) session and starting the trial over from the beginning. In order to "start anew," a military judge must, at a minimum, announce he is calling the judicial equivalent of a mulligan. *See id.* Judge Gleisner never expressed he was taking remedial action in the form of reconstruction or "starting anew"

to account for the lost recording. Unlike our colleague, we do not find the record supports recasting what took place at trial as remedial action.

When faced with the loss of a recording which prevents the preparation of a verbatim transcript, under the state of the law reflected in the 2016 *Manual for Courts-Martial* and applicable in this case, a convening authority enters into a catch-22 scenario. The Court of Appeals for the Armed Forces (CAAF) recently addressed this conundrum in *Tate*. 2022 CAAF LEXIS 381, at *21–23. After finding a nonverbatim transcript, resulting from the failure of the court's recording device during the appellant's sentencing hearing, was not properly remedied, the CAAF stated:

> Despite the discretionary language of R.C.M. 1103(f) (2016 ed.), Article 60(c)(4)(A), UCMJ, 10 U.S.C. § 860(c)(4)(A) (2012 & Supp. IV 2013-2017) presents a procedural limitation. Article 60(c)(4)(A), UCMJ, states, "the convening authority . . . may not disapprove, commute, or suspend in whole or in part an adjudged sentence of confinement for more than six months or a sentence of dismissal, dishonorable discharge, or bad conduct discharge." As a result, we set aside Appellant's sentence and remand to [T]he Judge Advocate General of the Army for return to an appropriate convening authority for action consistent with R.C.M. 1103(f) (2016 ed.).

Id. at *22–23; *see also United States v. Steele*, ARMY 20170303, 2019 CCA LEXIS 95 (A. Ct. Crim. App. 5 Mar. 2019) (unpub. op.) (setting aside the sentence and returning the record for action consistent with

R.C.M. 1103(f) due to substantial omission from the verbatim record during sentencing proceedings).

The nonverbatim transcripts in *Tate* and *Steele* were limited to the sentencing phase of the trial. However, when faced with a nonverbatim record resulting from an omission that affected findings, in addition to sentencing, our sister court set aside all of the findings of guilty and the sentence before returning the case to the convening authority for action consistent with R.C.M. 1103(f)(2). *United States v. Bruner*, ARMY 20190276, 2020 CCA LEXIS 267, *8–9 (A. Ct. Crim. App. 12 Aug. 2020) (unpub. op.), *rev. denied*, ___ M.J. ___, No. 22-0053, 2022 CAAF LEXIS 308 (C.A.A.F. 26 Apr. 2022). We are similarly faced with an omission which is not limited to the sentencing proceedings. Considering the circumstances in this case, we find the appropriate remedy is to set aside the findings and sentence and return to the case to The Judge Advocate General for return to an appropriate convening authority for action consistent with R.C.M. 1103(f).

III. CONCLUSION

The findings and sentence are **SET ASIDE**. The record of trial is returned to The Judge Advocate General for return to an appropriate convening authority for action consistent with R.C.M. 1103(f).

RICHARDSON, Judge (dissenting):

I disagree with my esteemed colleagues in the majority that the transcript in this case is not substantially verbatim. I would find the military judge effectively remedied the omission. Therefore, I respectfully dissent.

I. DISCUSSION

A. Substantial Omission

1. Law

"In assessing either whether a record is complete or whether a transcript is verbatim, the threshold question is 'whether the omitted material was substantial, either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (citation omitted) (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)).

When the record is incomplete due to a nonverbatim record, we do not test for prejudice; "the procedures in R.C.M. 1103(f) control." *Id.* (citing *United States v. Gaskins*, 72 M.J. 225, 230–31 (C.A.A.F. 2013)).[1]

2. Background and Analysis

We do not know with certainty whether the initial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session of Appellant's court-martial was ever recorded. We know from reviewing the record that this session was not transcribed and made part of the record of trial, and the Government has failed to cure this deficiency.[2]

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[1] Rule for Courts-Martial (R.C.M.) 1103(f) placed limits on the scope of a sentence the convening authority could approve in a case with a non-verbatim transcript. *See Manual for Courts-Martial, United States* (2016 ed.). R.C.M. 1103 was revised and renumbered R.C.M. 1112; those changes apply to cases with offenses referred *after* 1 January 2019, so do not apply to Appellant's case. *See* Executive Order 13,825, § 5, 83 Fed. Reg. 9889 (8 Mar. 2018). Notably, the limitations in R.C.M. 1103(f) are no longer present. *See Manual for Courts-Martial, United States* (2019 ed.).

[2] I come to this conclusion even though the record of trial includes documents indicating that on 20 September 2019, the assistant

Without the transcript of the initial Article 39(a) session we do not know: who besides Appellant and a military judge was present; who Appellant wanted to represent him at the arraignment; and whether any parties were qualified, certified, and sworn. Those are important facts to state for the record, but they are insubstantial in this context. I conclude that the omission of a transcript of the initial Article 39(a) session was not substantial and was remedied by the trial judge.

The record indicates that on 25 January 2019, at the initial Article 39(a) session: (1) Appellant was advised of his rights to counsel; (2) Appellant was advised of his forum rights; (3) Appellant deferred entry of pleas; (4) Appellant deferred entry of forum; (5) no exhibits were admitted;[3] and (6) Appellant was arraigned. The same day as the arraignment, the trial judge held a conference with counsel to discuss expected issues in the case, and summarized this conference in Appellate Exhibit I, his scheduling order. In this order, the trial judge set due dates for motions and other milestones. Neither at this conference nor at trial did Appellant or the Government refer to anything else of substance occurring at this initial Article 39(a) session. The charge sheet in this case was not amended in any way.

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trial counsel certified that he reviewed the transcript in this case and "determine[d] it to be accurate and complete;" and on 27 September 2019, the trial judge "authenticate[d] the Record of Trial in accordance with [R.C.M.] 1104."

[3] All appellate, prosecution, and defense exhibits in the record of trial were marked, offered, or admitted during the court-martial beginning in June 2019, and those exhibits are identified consecutively beginning with "I," "1," and "A," respectively.

During the initial *trial* Article 39(a) session, the Government announced the convening orders—and asserted they would be inserted at that point in the record; that the charges were properly referred to the court for trial and were served on Appellant on 16 January 2019; the five-day statutory waiting period had expired; who was present; who detailed trial counsel and assistant trial counsel; whether trial counsel and assistant trial counsel were qualified, certified, and sworn; and that no member of the Prosecution had acted in any manner which might tend to disqualify them in the court-martial. The military defense counsel announced by whom he was detailed; that he was qualified, certified, and sworn; and that he had not acted in any manner which might tend to disqualify him in Appellant's court-martial. One of the civilian defense counsel announced that he and Appellant's other civilian defense counsel were members in good standing with their state bars and neither acted in any manner which may tend to disqualify them. The military judge swore in the assistant trial counsel and both civilian defense counsel. The military judge asserted he was not aware of any grounds for challenge against him, and allowed the trial counsel to question him about the nature of his relationship with the civilian defense counsel. The military judge announced that "[c]ounsel on both sides appear to have the requisite qualifications and all personnel required to be sworn have been sworn."

Immediately afterwards, the military judge ascertained from Appellant that he did not want to be re-advised of his rights to forum, and that he understood his choices regarding forum. Appellant elected to be tried by military judge. Before approving Appellant's request, the military judge ascertained

that Appellant's choice was voluntary, and that he understood he was giving up the right to be tried by a court composed of members. The military judge then called on Appellant for pleas, and Appellant's counsel entered his pleas of guilty, including to a lesser-included offense.

In my view, the trial judge remedied the omission in the transcript by conducting an Article 39(a) session that covered most of what normally occurs at an arraignment session, and the parties proceeded as if there were no errors with Appellant's arraignment. Defects in the arraignment may be waived.[4] In *United States v. Lichtsinn*, 32 M.J. 898, 899 (A.F.C.M.R. 1991), the military judge called upon the accused for pleas, but did not direct the reading of the charges as required by R.C.M. 904. "The parties clearly proceeded as if there had been an arraignment, a formal plea was entered, and there was no objection to the defective process at trial." *Id.* In this case, Appellant was arraigned on 25 January 2019. On 19 June 2019, at the initial trial Article 39(a) session, the military judge called on Appellant for pleas, as is done during an arraignment. While the trial judge did not ensure the charges were read, or obtain Appellant's waiver, such "error in the arraignment process" may be waived. *Id.* In the present case, even if the arraignment was deficient, Appellant waived the errors at trial and proceeded "as if there had been an arraignment." *Id.* That the transcript of

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[4] *See Garland v. Washington*, 232 U.S. 642, 646–47 (1914) (holding errors in arraignment may be waived and do not warrant reversal when other due process requirements are met, and opining a contrary holding would be an unnecessary "technical enforcement of formal rights").

Appellant's initial arraignment is not in the record of trial is insubstantial.

While we cannot know how long the initial Article 39(a) session was, we know the duration of the initial trial Article 39(a) session. The beginning of the trial to when pleas were entered comprise 10 pages of the 171-page transcript—this includes marking appellate exhibits. I have no reason to believe the un-transcribed Article 39(a) session was significantly longer. What we would expect to happen at an initial Article 39(a) session happened at trial, and what did not happen at trial, Appellant waived any error therefrom.

B. Remedy

1. Law

In *United States v. Tate*, the CAAF considered whether the transcript of the appellant's trial was verbatim when the "court's recording device had failed to capture the previous day's sentencing proceedings" and the military judge purported to start the sentencing proceedings "anew." __ M.J. __, No. 21-0235, 2022 CAAF LEXIS 381, at *3–4 (C.A.A.F. 23 May 2022). The CAAF employed a two-part analysis: "First, . . . decide whether the transcript was substantially verbatim" and "if it is not, . . . decide whether the military judge's remedy upon discovering the recording malfunction was proper and sufficient such that it resulted in a substantially verbatim transcript." *Id.* at *7. "In the absence of any guidance from the Rules, military courts have long authorized three potential solutions when court recording devices fail: (1) declaring a mistrial; (2) reconstructing the record of trial; and (3) starting anew." *Id.* at *2. In *Tate*, the CAAF found the military judge did not

actually start anew; he announced he would not consider aggravation testimony that was not presented in the unrecorded portion, but did not state what that testimony was.

2. Background and Analysis

Had the trial judge in Appellant's case known that the initial Article 39(a) session would not be transcribed, his reference to that session and his repetition of what commonly transpires at such a session could be considered a combination of two remedial actions: reconstruction and "starting anew." The bulk of the initial trial Article 39(a) session—as described in great detail above—was starting anew. The reconstruction was when Appellant agreed with the trial judge that Appellant had been arraigned, had been notified of his rights to counsel, and had been notified of his forum choices. In Appellant's case, the initial Article 39(a) session was of no consequence. Arraignment has legal effects, but those were not, and are not, at issue in this case.

But because a session of low significance *in this case* was not transcribed, the majority reads the law to require this court conclude the transcript is not substantially verbatim, and return the case to the convening authority and authorize a rehearing on findings and sentence. I am not convinced *Davenport* and *Tate* require this result. No rulings, argument, testimony, evidence, or anything else material to Appellant's case is missing from this record of trial. Appellant pleaded guilty and satisfied the military judge that he was in fact guilty of the offenses to which he pleaded guilty. If the initial Article 39(a) session had not happened, and Appellant's trial progressed as if it had, I am confident we would find the record was

complete and there was no prejudicial error to Appellant's substantial rights. In this case, the trial judge's actions were remedial in effect and "sufficient such that it resulted in a substantially verbatim transcript." *See Tate*, 2022 CAAF LEXIS 381, at *7. Therefore, I respectfully dissent.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court