UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32731 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Tyrone GAMMAGE	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 23 June 2023 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 23d day of June, 2023,

ORDERED:

The above-styled case is referred to Panel 1 for appellate review.

FOR [redacted]
TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
	)	Before Panel No. 1
Airman (E-2), **TYRONE GAMMAGE,** United States Air Force *Appellant.*	)	No. ACM S32731 (f rev) 18 August 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Assignments of Error

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTACHMENTS TO THE STIPULATION OF FACT ARE NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

II.

WHETHER THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT TOLLS THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT WAS MISSING REQUIRED ITEMS UNDER R.C.M. 1112(B); 2) THIS COURT REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE RECORD IS STILL NOT COMPLETE AFTER OVER 400 DAYS.

Statement of the Case

On 17 May 2022, a military judge sitting as a special court-martial convicted Airman (Amn) Tyrone Gammage, consistent with his pleas in accordance with a plea agreement,[1] of one charge and one specification of failing to obey other lawful order, one charge and one specification of destroying nonmilitary property, one charge and two specifications of domestic violence, and one charge and one specification of disorderly conduct under Articles 92, 109, 128b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 909, 928b, and 934.[2] Record (R.) at 2, 8-10, 78. The military judge sentenced Amn Gammage to a bad-conduct discharge, confinement for six months, reduction to the grade of E-1, and forfeiture of $1,190 of pay per month for six months. R. at 104. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 1 June 2022.

On 5 May 2023, Amn Gammage assigned as error that his ROT was incomplete because it omitted the attachments to Prosecution Exhibit 1, the stipulation of fact. *United States v. Gammage*, No. ACM S32731, Order, dated 5 June 2023. On 30 May 2023, the Government agreed in its Answer that Amn Gammage's case should be returned for correction in accordance with R.C.M. 1112(d). *Id*. On 5 June 2023, this Court returned Amn Gammage's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for eight missing attachments to the stipulation of fact. *Id*. On 23 June 2023, Amn Gammage's case was docketed with this Court for further review with a Certificate of Correction, dated 21 June 2023.

[1] Appellate Exhibit III.
[2] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

Statement of Facts

At trial, the military judge admitted a stipulation of fact into evidence as Prosecution Exhibit (Pros. Ex.) 1. R. at 16. The stipulation of fact was a six-page document with eight attachments, contained on one disc. R. at 103, ROT, Vol. 1, Exhibit Index. The military judge announced the attachments on the record and instructed counsel "to follow along" and "make sure that I have gotten those right because they are not specifically detailed in your stipulation of fact." R. at 103. The military judge announced the attachments for the record:

> Attachment one is sufficiently described [No Contact Order, dtd 10 Jan 22, 1 pg].
>
> Attachment two, the Cash App payment screenshot, that was a one-page document containing one image, undated.
>
> Attachment three, the [C]ash [A]pp refund screenshot is also a one-page document with one image.
>
> Attachment four, the dormitory hallway video from 1 January 2022, that was playable on VLC media player. An overall length of 1 hour 4 minutes and 13 seconds.
>
> Photos of the MacBook and iPad, attachment five, that was a three-page document containing a total of 12 images. All of the images are black-and-white.
>
> Attachment six, Photos of CW's injuries, that was a three-page document containing 10 images in total. All of the images were black-and-white.
>
> Attachment seven, photos of CW's dorm room, that was a two-page document containing eight images. Again all of the images are black-and-white.
>
> . . .
>
> Attachment eight is a cellphone video from 24 Jan 22. It is playable on QuickTime or Media Player. It's overall length, 2 minutes and 20 [sic] seconds.[3]

[3] The military judge stated on the record that the video contained in Prosecution Exhibit 8 was 2 minutes and 26 seconds in length. ROT, Vol. 1, Open Sessions, dated 17 May 2022, 1 disc, "US v. Gammage FE WARR_20220517-1347_01d869f49d559d00.mp3" at 01:57-02:17.

Pros. Ex. 1 at 5; R. at 103-04. After announcing the attachments to Prosecution Exhibit 1, the military judge asked the parties, "was my articulation of what was attached to the stipulation of fact accurate? I want to hear from both sides." R. at 104. All parties agreed it was accurate. R. at 104.

As corrected, Prosecution Exhibit 1 has grown from six pages with one disc (R. at 103-04) to an eighteen-page document with two discs. *Compare* R. at 103-04 *with* ROT, Vol. 1, Pros. Ex 1. Prosecution Exhibit 1 now contains 7 paginated pages, between attachment 4 and attachment 8, which contain 26 images. ROT, Vol. 1, Pros. Ex. 1 at 11-17.

The Government introduced only three exhibits throughout the court-martial: Prosecution Exhibit 1, the stipulation of fact; Prosecution Exhibit 2, a personal data sheet; and Prosecution Exhibit 3, a record of non-judicial punishment. R. at 12-16, 79-80; Pros. Ex. 1-3. It also called only one witness, who briefly testified to his response as the unit's first sergeant, his perception of unit impact, and his opinion of Amn Gammage's potential for rehabilitation. R. at 81-90.

Argument

I.

THE RECORD OF TRIAL IS INCOMPLETE BECAUSE THE ATTACHMENTS TO THE STIPULATION OF FACT ARE NOT WHAT WAS ADMITTED DURING THE COURT-MARTIAL.

Standard of Review

"Whether a record of trial is complete is a question of law [appellate courts] review de novo." *United States v. Miller*, 82 M.J. 204, 207 (C.A.A.F. 2022) (internal citation omitted).

Law

Article 54(c)(2), UCMJ, requires that a "complete record of proceedings and testimony shall be prepared in any case" where the sentence includes a discharge. 10 U.S.C. § 854. The ROT in every general or special court-martial contains "any evidence or exhibits considered by

the court-martial in determining the findings or sentence" including "[e]xhibits, or, if permitted by the military judge, copies, photographs, or descriptions of any exhibits that were received in evidence." R.C.M. 1112(b)(6).

A substantial omission renders a ROT incomplete and raises a presumption of prejudice that the government must rebut. *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000) (citations omitted). A ROT that is missing exhibits may be substantially incomplete. *See United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000) (holding that the record was substantially incomplete for sentencing when all three defense sentencing exhibits were missing). "Insubstantial" omissions from a record of trial do not render the record incomplete. *See Henry*, 53 M.J. at 111 (holding that four missing prosecution exhibits were insubstantial omissions when other exhibits of similar sexually explicit material were included).

The threshold question is whether the missing exhibits are substantial, either qualitatively or quantitatively. *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014). Omissions may be quantitatively insubstantial when, considering the entire record, the omission is "so unimportant and so uninfluential . . . that it approaches nothingness." *Id.* (citing *United States v. Nelson*, 3 C.M.A. 482, 13 C.M.R. 38, 43 (C.M.A. 1953)). This Court analyzes whether an omission is substantial on a case-by-case basis centered around the facts of each individual proceeding. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

This Court has held that evidence found elsewhere in the record can defeat a finding of incompleteness. *See United States v. Dipippo*, No. ACM S32299, 2016 CCA LEXIS 117, *6-7 (A.F. Ct. Crim. App. 26 Feb. 2016) (unpub. op.) (finding the Government reconstituted the ROT when trial counsel provided an affidavit stating the DVD attached to the first endorsement within the pretrial allied papers in the ROT was the same as the one supposed to be attached to the stipulation of fact). However, this Court has also recently found in a guilty plea context, the

omission of two attachments to the stipulation of fact (an interview recording and a transcript of the recording) was substantial error, even when fuller versions of the missing recording and transcript were present elsewhere in the ROT. *United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, *8-9 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.). This Court explained it could not know which time hacks were relied upon by the military judge in an abridged version of the recording, and regarding the transcript, the reviewer "has to carve the applicable [16] pages out of a larger [59 page] document." *Id*. This Court determined this omission was substantial as the "Appellant's confession and admission to AFOSI provided key evidence and information referred to within the stipulation of fact. Furthermore, trial counsel referred to the attachments in argument." *Id*.

An incomplete record may be returned to the military judge for correction. R.C.M. 1112(d)(2); *e.g.*, *United States v. Welsh*, No. ACM S32719, 2022 CCA LEXIS 631, at *2-3 (explaining R.C.M. 1112(d) provides for correction of a record of trial found to be incomplete or defective after authentication and returning the ROT for correction after finding the absence of eight attachments to the stipulation of fact substantial); *Mardis*, unpub. op. at *9-10. R.C.M. 1112 (d)(2) states "[a] superior competent authority may return a [ROT] to the military judge for correction under this rule. The military judge shall give notice of the proposed correction to all parties and permit them to examine and respond to the proposed correction."

Analysis

The plain language of R.C.M. 1112(b)(6) requires the inclusion of "any evidence or exhibits considered by the court-martial in determining the findings or sentence." The attachments to the stipulation of fact were admitted into evidence as part of Prosecution Exhibit 1 and were considered by the military judge in findings and sentencing. R. at 16, 103.

While Prosecution Exhibit 1 and its attachments are now printed and paginated (ROT, Vol. 1, Pros. Ex. 1), this is not what was entered into evidence at trial. To begin, the military judge described the attachments were contained on a disc. R. at 103. Next, the military judge described attachments 5, 6, and 7 as three separate attachments. R. at 103-04. Pages 11-17 of Prosecution Exhibit 1 appear to coincide with attachments 5, 6, and 7 of Prosecution Exhibit 1 based on their location in the order of attachments and the fact that they contain black and white images, however, they do not match what was described by the military judge. *Compare* ROT, Vol. 1, Pros. Ex. 1 *with* R. at 103-04. The military judge's description of attachments 5, 6, and 7 provided that the photos were organized by subject. R. at 103-04. Attachment 5 depicted photos of a MacBook and iPad, while Attachment 6 depicted photos of C.W.'s injuries, and Attachment 7 depicted photos of CW's dorm room. R. at 103-04. In total, these three attachments amounted to 8 pages and 30 images. R. at 103-04.

In comparison, what is now in the record as Prosecution Exhibit 1 is not organized as described by the military judge and agreed to by the parties. *Compare* ROT, Vol. 1, Pros. Ex. 1 *with* R. at 103-04. It also amounts to only 7 pages and 26 images, which is one page and 4 images short of what the military judge considered. ROT, Vol. 1, Pros. Ex. 1 at 11-17. Further, pages 11-17 of Prosecution Exhibit 1 contain a secondary pagination, which provides the page number out of 7 pages. *Id*. This pagination was not described by the military judge. *Compare* ROT, Vol. 1, Pros. Ex. 1 *with* R. at 103-04. It is reasonable to presume the military judge would not have needed to describe these pages for the record had this pagination existed on the attachments that the military judge reviewed. But, as made clear by the military judge's description and the parties' agreement, the attachments contained in pages 11-17 of Prosecution Exhibit 1 are not what was admitted at trial.

This Court cannot meaningfully complete its duties under Article 66, UCMJ, and appellate defense counsel cannot meaningfully complete her duties under Article 70, UCMJ, because neither can be certain that the attachments present in the ROT are the attachments that were admitted at trial. 10 U.S.C. §§ 866, 870; *Cf. United States v. Tate*, 82 M.J. 291, 298 (C.A.A.F. 2022) (holding that the Army Court of Criminal Appeals could not perform its Article 66, UCMJ, function without knowing exactly what aggravating evidence the military judge considered, where the military judge relied upon unrecorded testimony).

Article 54(c)(2), UCMJ, requires a complete record of proceedings in "any case of a sentence of death, dismissal, discharge, confinement for more than six months, or forfeiture of pay for more than six months." The failure to provide the attachments to the stipulation of fact that were admitted at trial in the ROT qualifies as a substantial omission which renders the ROT incomplete. This substantial omission creates a presumption of prejudice which is not remedied elsewhere in the ROT and warrants relief.

This Court should take the opportunity to remedy this prejudicial omission from the record of trial by remanding this case for the record to be speedily corrected and to ensure the correct attachments are included in accordance with R.C.M. 1112(d)(2). *See United States v. Manzano Tarin*, No. ACM S32734, Order, dated 27 June 2023 (finding "a discrepancy as to what attachments to the stipulation of fact were admitted during Appellant's court-martial as compared to the attachments contained in the ROT" when the number of pages in the ROT did not match the number of pages stated on the record).

While R.C.M. 1112(d)(3) provides a military judge may take corrective action (to reconstruct the portion of the record affected, dismiss the affected specification, reduce the sentence, or declare a mistrial as to the affected specifications), if the record is incomplete, this Court is not limited by R.C.M. 1112(d)(3). If the record cannot be corrected, this Court should

grant meaningful relief by disapproving and setting aside the bad-conduct discharge, or in the alternative, disapprove his adjudged forfeitures. This remedy is appropriate and is not unprecedented: where a record was substantially lacking, the CAAF disapproved a punitive discharge. *See Stoffer*, 53 M.J. at 27. This result would send the appropriate message regarding the importance of accuracy and completeness when it comes to records of trial.

WHEREFORE, Amn Gammage requests this Honorable Court remand this case pursuant to R.C.M. 1112 and, if the record cannot be completed, disapprove the bad-conduct discharge, or in the alternative, disapprove his adjudged forfeitures.

II.

THE GOVERNMENT'S SUBMISSION OF AN INCOMPLETE RECORD OF TRIAL WITH THIS COURT DOES NOT TOLL THE PRESUMPTION OF POST-TRIAL DELAY UNDER *UNITED STATES V. MORENO*, 63 M.J. 129 (C.A.A.F. 2006), AND ITS PROGENY, WHEN: 1) THE GOVERNMENT'S ORIGINAL SUBMISSION TO THIS COURT WAS MISSING REQUIRED ITEMS UNDER R.C.M. 1112(B); 2) THIS COURT REMANDED THE RECORD OF TRIAL BACK TO THE GOVERNMENT FOR CORRECTION; AND 3) THE RECORD IS STILL NOT COMPLETE AFTER OVER 400 DAYS.

Standard of Review

This Court reviews claims challenging the due process right to a speedy post-trial review and appeal *de novo*. *United States v. Anderson*, 82 M.J. 82, 85 (C.A.A.F. 2022) (citing *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

A special court-martial "shall" keep a separate record of each case. R.C.M. 1112(a). The record "shall" include, *inter alia*, "exhibits that were received in evidence" and the court reporter must certify the record of trial as complete. *Id*. at (b)(6), (c). This Court should view these directives alongside *Moreno's* mandate, which compelled the Government to docket "the [ROT]" at a Court of Criminal Appeals (CCA) within 30 days of action to avoid a presumption of facially

unreasonable delay. Because of changes to the *Manual for Courts-Martial*, this Court updated that standard in *United States v. Livak*, finding a "150-day threshold appropriately protects an appellant's due process right to timely post-trial and appellate review and is consistent with our superior court's holding in *Moreno*." 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

This Court should find that the Government fails to meet its *Moreno* and *Livak* deadline if the ROT it submitted for docketing does not comport with statutory and regulatory requirements. As articulated in Issue I, the Government has still not filed a complete ROT in this case and as such, the presumption of an unreasonable delay should apply and it now exceeds 400 days. This is true even though Appellant had to ask for extensions of time: "[R]esponsibility for this portion of the delay [Appellate Defense delay] and the burden placed upon appellate defense counsel initially rests with the Government. The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent *and timely* representation." *Moreno*, 63 M.J. at 137 (emphasis added). Moreover, this Court often *sua sponte* orders that a case be remanded for correction allowing for correction at any earlier stage (*see e.g., United States v. Simmons*, No. ACM 40462, Order, dated 5 June 2023 (ordering remand for correction within 20 days of docketing, based on this Court's discovery that 23 exhibits were missing from the Preliminary Hearing Officer's Report)) but the Government, which is responsible for the completeness of the record, could do the same. Nothing precludes the Government's representatives, such as in the Government Trial and Appellate Operations Division, from reviewing Appellant's record for completeness when they are docketed with this Court.

The Government's failure to meet *Livak's* deadline of 150 days triggers an analysis of the four non-exclusive factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972). The *Barker* factors are: "(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." *Id*. at 133 (citation omitted). When

examining the reason for the delay this Court determines "how much of the delay was under the Government's control [and] assess[es] any legitimate reasons for the delay…." *Anderson*, 82 M.J. at 86 (finding "no indication of bad faith on the part of any of the Government actors").

The second *Barker* factor addresses the reasons for the delay. If this Court rules that an incomplete ROT can toll *Livak's* presumption of unreasonable delay, then this four-part test will not be triggered by a delay so long as the Government is able to docket *any* ROT within the required 150 days. This, in turn, means that the Government will never have to explain the reasons it submitted an incomplete record under the second *Barker* factor. Furthermore, if this Court rules that an incomplete ROT tolls *Livak's* presumption of unreasonable delay, then the first *Barker* factor—the length of the delay—will never increase beyond the original, incomplete docketing date.

A ruling that allows the Government to docket an incomplete ROT to toll the presumption of unreasonable delay will incentivize it to submit incomplete records for docketing merely to meet processing deadlines. Thus, the Government would essentially have two choices when compiling records in future cases. One option would be that the Government could exercise due care in ensuring it compiles a complete and accurate record, to include searching for any missing documents from the outset. However, this approach may extend the time the Government needs to submit the record for docketing, thereby risking a missed deadline and affording potential relief to an appellant.

In the alternative, the Government could hastily compile the record with little regard for accuracy, or even intentionally submit a record known to be either replete with errors or incomplete, with the full understanding that it will never have to justify its actions provided it meets its initial processing standard. Without impugning the motives and morals of Government representatives as a whole, one can easily foresee a scenario where accuracy is afforded less

attention than timeliness, resulting in additional post-trial delays that would require this Court—as it has here—to issue an order for correction.

Considering the purpose of *Moreno* to ensure timely appellate review through the exercise of "institutional vigilance" in post-trial processing, this Court should hold the Government accountable for its incomplete processing of the record to date and, in doing so, uphold *Moreno*'s intent by encouraging governmental vigilance. 63 M.J. at 143. This Court's intervention here would safeguard Appellants' right to timely appellate review, reaffirm the Government's statutory and regulatory obligations to compile complete ROTs, and allow this Court to complete its duties under Article 66, UCMJ, and allow appellate defense counsel to complete her duties under Article 70, UCMJ. *See* 10 U.S.C. §§ 866, 870; *Cf. Tate*, 82 M.J. at 298 (holding that the Army CCA could not perform its Article 66, UCMJ, function without knowing exactly what aggravating evidence the military judge considered, where the military judge relied upon unrecorded testimony).

Finally, this Court has authority under Article 66, UCMJ, to grant sentence relief for excessive post-trial delay without a showing of actual prejudice under Article 59(a), UCMJ. 10 U.S.C. §§ 859, 866; *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002) (citation omitted); *see also United States v. Harvey*, 64 M.J. 13, 25 (C.A.A.F. 2006). Over 400 days have passed since Appellant's court-martial and despite already receiving one opportunity to correct Appellant's record, his record remains incomplete. This demonstrates neglect or gross indifference by the Government, when this Court has already once intervened in this case and it is reflective of the multitude of records that this Court has remanded for incompleteness. *See, e.g., United States v. Portillos*, No. ACM 40305, Order, dated 1 August 2023; *United States v. Manzano Tarin*, No. ACM S32734, Order, dated 27 June 2023; *United States v. Hubbard*, No. ACM 40339, Order, dated 15 June 2023; *United States v. Simmons*, No. ACM 40462, Order, dated 5 June 2023; and *United States v. Goodwater*, No. ACM 40304, dated 31 May 2023. The regular docketing of

incomplete records leads to unnecessary and unreasonable delay which adversely affects the public's perception of the fairness and integrity of the military justice system. Amn Gammage requests this Court recognize this impact and grant him meaningful relief by disapproving his bad-conduct discharge, or in the alternative disapproving his adjudged forfeitures. This will send the appropriate message regarding the importance of diligent completion of records of trial.

WHEREFORE, Amn Gammage requests this Court grant disapprove his bad conduct discharge, or in the alternative disapprove his adjudged forfeitures.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 18 August 2023.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Airman (E-2) **TYRONE GAMMAGE** United States Air Force *Appellant*.	))))))))))	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No.1 No. ACM S32731 (f rev) 11 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

The United States withdraws its previous motion for enlargement of time, dated 11 September 2023, in the above captioned case. The footnote explaining that the signing, non-attorney would be supervised was previously omitted from the now withdrawn motion. The footnote has been added to this motion.

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 7-day enlargement of time to respond to the assignments of error outlined in the Appellant's brief. This case was initially docketed with this Court on 11 July 2022. This Court remanded the case, and it was re-docketed with the Court on 23 June 2023. Since initially docketing this case, Appellant has been granted seven enlargements of time. Appellant filed his brief with this Court on 18 August 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 428 days have elapsed since the initial docketing date. The United States' response in this case is currently due on 18 September 2023. If the enlargement of time is granted, the United States' response will be due on 25 September 2023, and 442 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. The individual assigned to this case is a civilian, legal extern, a full-time law student, who began working on this case last week. Responding to Appellant's brief is also the extern's first assignment on behalf of JAJG. The record of trial for this case is two volumes, and the trial transcript is over 100 pages. Appellant has raised two assignments of error, issues of which require a thorough review of prosecution exhibits, a Certificate of Correction, and the timeline at issue. The JAJG extern has finished reviewing the record of trial and has begun writing the brief in this case, but additional time is necessary to provide a fully responsive brief to assist the Court in its Article 66 review. This is the JAJG legal extern's priority assignment, and thus only a small enlargement of time is requested. Due to current workload, there is no other attorney at JAJG who could file a brief sooner.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]
ABIGAIL E. THOMAS
Appellate Government Extern[1]
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

[redacted]
JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel

[1] As a civilian extern, Ms. Thomas as a signing, non-attorney will be supervised at all times during the appellate process, and undersigned counsel assumes responsibility for the content of the filing pursuant to this Court's Rules of Practice and Procedure, Rule 14(c).

Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 11 September 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) **TYRONE GAMMAGE,** United States Air Force, *Appellant*.	)))))))))	**OPPOSITION TO UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 1 No. ACM S32731 (f rev) 11 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant hereby opposes the United States's motion for an enlargement of time. *United States v. Gammage*, No. ACM S32731 (f rev), United States Motion for Enlargement of Time (First), dated 11 September 2023.

The United States asserts a "civilian, legal extern, a full-time law student" is the individual assigned to this case and "no other attorney at JAJG . . . could file a brief sooner." *Id.* at 1. This assertion is troubling because this Court's rules require "[c]ounsel in any case before the Court shall be a member in good standing of the bar of a federal court or the highest court of a state, territory, commonwealth, or possession of the United States." Rule 9. While the Associate Chief of the Government Trial and Appellate Operations Division and an appellate government counsel join in signing this motion, the impression is that an extern's schedule—*not* that of the supervisory attorney—is driving the delay. The crucial individual is the attorney, not the extern. This Court allows unlicensed individuals to file before this Court, but it does so with the understanding that the unlicensed individual will be supervised (*see* Rule 14.1(c)), and that the supervising attorney will have also reviewed and be able to attest to the contents of the filing. If no other attorney is

available to review the record and file a brief sooner, will the unlicensed individual be supervised, and can the supervising attorneys attest to the contents of the filing? As portrayed in the United States' motion, the answer is no.

Separately, the United States fails to demonstrate good cause as it asserts its workload is the reason for the delay but fails to explain *counsel's* other duties since the assignment of error brief was filed, as required by Rule 23.3(m)(5). The United States explains the assigned legal extern began working on this case last week, but Appellant's brief was filed on 18 August 2023. This explanation by the Government does not account for *counsel's* workload nor does it address the entire period in which the Government has had Appellant's brief.

Appellant asserted in his brief that the Government should be held to account for its neglect or gross indifference in returning an incomplete record when this Court has once already intervened. *United States v. Gammage*, No. ACM S32731 (f rev), Brief on Behalf of Appellant, dated 18 August 2023, at 12-13. The Government's motion will only lengthen the delay Appellant has suffered and it will lead to additional delay, due to undersigned counsel's upcoming preauthorized leave. The Government's brief is currently due on 18 September 2023. Undersigned counsel has been preauthorized to take leave in the local area 18-20 September 2023 and has anticipated completing and filing Appellant's reply brief during this time, despite her leave status. The Government now requests to file its answer on 25 September 2023. Undersigned counsel will be on preauthorized leave OCONUS from 21 September through 5 October 2023. Therefore, if this motion is granted, undersigned counsel will be forced to move for an enlargement of time to file Appellant's reply brief. To avoid this unnecessary delay and given the Government's failure to explain *counsel's* other duties since the assignment of error brief was filed, as required by Rule 23.3(m)(5), this Honorable Court should deny the requested enlargement of time for lack of good cause shown.

WHEREFORE, Appellant respectfully requests that this Honorable Court deny the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 11 September 2023.

[redacted]
SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32731 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tyrone GAMMAGE	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 11 September 2023, counsel for the Government submitted a Motion for Enlargement of Time (First) requesting an additional seven days to respond to the assignments of error outlined in Appellant's brief. The Government claims the good cause for the enlargement of time is due to "[t]he individual assigned to this case is a civilian, legal extern, a full-time law student, who began working on this case [a week prior]." The Government claims that due to the current workload, there is no other attorney at the Appellate Government Division who could file a brief sooner.

Appellant opposes the motion and cites Rule 9 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals which requires "[c]ounsel in any case before the Court shall be a member in good standing of the bar of a federal court or the highest court of a state, territory, commonwealth, or possession of the United States." Appellant's counsel claims the "impression" of the Government's motion "is that an extern's schedule—*not* that of the supervisory attorney—is driving the delay."

The court has considered the Government's motion, Appellant's opposition, case law, and the Joint Rules of Practice and Procedure. The court agrees with appellate defense counsel's assertion that counsel of record must be a member in good standing of a bar of a federal court or the highest court of a state. Externs do not satisfy this requirement, and because they are only practicing under supervision of an attorney admitted to practice before this court, their schedules are not relevant to this court's consideration of the motion. However, given the assignments of error raised, as well as the seven enlargements of time provided to Appellant, the Government's seven-day request is not unreasonable.

Accordingly, it is by the court on this 15th day of September, 2023,

ORDERED:

The Government's Motion for Enlargement of Time (First) for an additional seven days is **GRANTED**. Government must provide its response **not later than 25 September 2023**.

However, Appellee is advised to ensure that future requests provide justification based on the counsel admitted before this court, and more specifically, good cause relating to the schedules of those specific counsel of record.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No.1
Airman (E-2),	)	
TYRONE GAMMAGE	)	
United States Air Force	)	No. ACM S32731 (f rev)
Appellant.	)	
	)	25 September 2023

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

ISSUES PRESENTED

I.

WHETHER THE RECORD OF TRIAL IS COMPLETE WHEN A CERTIFICATE OF CORRECTION WAS FILED WITH MISSING ATTACHMENTS FROM THE RECORD.

II.

WHETHER THE PRESUMPTION OF UNREASONABLE POST- TRIAL DELAY WAS TOLLED WHEN THE RECORD OF TRIAL WAS DOCKETED IN ACCORDANCE WITH UNITED STATES V. MORENO, 63 M.J. 129 (C.A.A.F. 2006) AND UNITED STATES V. LIVAK, 80 M.J. 631 (C.A.A.F. 2020) STANDARDS, BUT WAS LATER FOUND TO BE INCOMPLETE.

STATEMENT OF THE CASE

The United States generally accepts Appellant's statement of the case.

STATEMENT OF FACTS

Appellant pleaded guilty, in accordance with a plea agreement, to various charges. (*Entry of Judgment*, 8 June 2022, ROT, Vol. 1.) He pleaded guilty to failing to obey a lawful order in

violation of Article 92, UMCJ, when he contacted the victim, C.W., via electronic messages and sent her cash via the application CashApp. (Id.) He destroyed C.W.'s personal laptop and tablet in violation of Article 109, UCMJ, and he committed disorderly conduct in violation of Article 134, UCMJ. (Id.) Appellant also pleaded guilty to domestic violence when he suffocated C.W. with a pillow, bit her neck, shoved her, pulled her hair, struck her in the face, and restrained her wrists and neck with his hands in violation of Article 128b, UCMJ. (Id.) In exchange for his guilty plea, the convening authority agreed he could not be adjudged confinement of greater than six months for Charges I, II, and III and could not be adjudged confinement of greater than one month for Charge IV; the total time of confinement could not exceed six months. (App. Ex. III.) The military judge was required to adjudge a bad conduct discharge. (Id.)

As part of his plea agreement, Appellant agreed to enter a reasonable stipulation of fact. (Id.) The stipulation of fact was six pages and included eight attachments which were provided to the court on a disc. (Pros. Ex. 1, R. at 103.) But when reviewed by this Court under Article 66, the eight attachments to the stipulation of fact were not included in the record of trial. These attachments to the stipulation of fact were missing from the record of trial (ROT): (Attachment 1) no contact order, a one page document, dated 10 January 2022; (Attachment 2) CashApp payment screenshot, a one page document, undated; (Attachment 3) CashApp refund screenshot, a one page document, undated; (Attachment 4) dormitory hallway video, approximately one hour and four minutes, dated 1 January 2022; (Attachment 5) photographs of a MacBook and iPad, a three page document containing twelve images, undated; (Attachment 6) photographs of C.W.'s injuries; a three page document containing ten images, undated; (Attachment 7) photographs of C.W.'s dorm room, a two page document containing eight images, undated; and (Attachment 8) cellphone video, approximately two minutes and twenty

seconds, dated 24 January 2022. (Pros. Ex. 1, R. at 102-103.) Because the attachments were missing, this Court remanded the ROT for correction.

On 20 June 2023, the eight missing attachments were added to the ROT through a Certificate of Correction. The substantive portions of the stipulation of fact provided in the Certificate of Correction are identical to the stipulation of fact in the original ROT. Then eight attachments totaling 11 pages were provided after the signature page and attachment list. (Pros. Ex. 1 at 7-18). The attachments attached in the Certificate of Correction stipulation of fact were: the no contact order, dated 10 January 2022, a one page document (Pros. Ex. 1 at 7); a CashApp payment screenshot, undated and one page in length (Pros. Ex. 1 at 8); a CashApp refund screenshot, undated and one page in length (Pros. Ex. 1 at 9); the dormitory hallway video, dated 12 January 2022 (Pros. Ex. 1 at 10, one disc); 26 black and white photos of a MacBook and iPad, C.W.'s injuries, and C.W.'s dorm room (Pros. Ex. 1 at 11-17); and a cell phone video, dated 24 January 2022 (Pros. Ex. 1 at 18, one disc). The black and white photos appear to be twelve images of the MacBook and iPad, six photos of C.W.'s injuries, and eight photos of C.W.'s dorm room. The Certificate of Correction combined what was listed as attachments five through seven on the attachment list (Pros. Ex. 1 at 6) into one document that is seven pages long. The following chart compares the attachments to the stipulation of fact as described by the military judge on the record to the attachments as provided in the Certificate of Correction.

Description of Prosecution Exhibit 1, Provided by the Military Judge in the Original Record of Trial	**Prosecution Exhibit 1, in the Current Record of Trial after a Certificate of Correction was Agreed to by all Parties and Signed by the Military Judge**
Attachment 1: No Contact Order[1]	**Pros. Ex. 1 at 7:** No Contact Order
Attachment 2: Cash App Payment Screenshot; one page, one image, undated	**Pros. Ex. 1 at 8:** Cash App Payment Screenshot; one page, one image, undated
Attachment 3: Cash App Refund Screenshot; one page, one image	**Pros. Ex. 1 at 9:** Cash App Refund Screenshot; one page, one image
Attachment 4: Dormitory Hallway Video; 1 January 2022, 1 hour 4 minutes and 13 seconds	**Pros. Ex. 1 at 10:** Dormitory Hallway Video; 1 January 2022, 1 hour 4 minutes and 13 seconds
Attachment 8: Cell Phone Video; 24 January 2022, 2 minutes and 26 seconds[2]	**Pros. Ex. 1 at 18:** Cell Phone Video; 24 January 2022, 2 minutes and 26 seconds.
Photographs	**Photographs**
Attachment 5: Photos of the MacBook and iPad; 3 pages, 12 images	**Pros. Ex. 1 at 11-17:** Photos of the MacBook and iPad, 12 images Photos of C.W.'s Injuries, ***6 images*** Photos of C.W.'s Dorm Room, 8 images
Attachment 6: Photos of C.W.'s Injuries; 3 pages, ***10 images***	
Attachment 7: Photos of C.W.'s Dorm Room; 2 pages, 8 images	
Total Images: 30	**Total Images: 26**

[1] The military judge did not specifically address this attachment on the record, but he stated, "attachment 1 is sufficiently described." (R. at 103).

[2] The transcript erroneously states the video was "2 minutes and 20 seconds" long (R. at 103-104), but the military judge stated on the record that the video in Prosecution Exhibit 1, Attachment 8 was 2 minutes and 26 seconds. (ROT, Vol. 1, Open Sessions, dated 17 May 2022, 1 disc, "US v. Gammage FE WARR_20220517-1347_01d869f49d559d00.mp3" at 01:57-02:17).

On the record Prosecution Exhibit 1 contained six pages and one disc. (R. at 103-104). The disc contained all eight attachments listed on the stipulation of fact. (Id.) Upon correction, the attachments were printed, and the videos were provided on individual discs to the Court rather than copying them all onto one disc as described on the record. But the documents, images, and videos are all present except for four photographs of C.W.'s injuries.

ARGUMENT

I.

THE RECORD OF TRIAL IS COMPLETE BECAUSE THE FOUR MISSING IMAGES IN THE CERTIFICATE OF CORRECTION ARE INSUBSTANTIAL OMMISSIONS, WHICH DO NOT LEGALLY RENDER A RECORD OF TRIAL INCOMPLETE.

Standard of Review

Whether a record of trial is incomplete is a question of law that the Court reviews de novo. United States v. Henry, 53 M.J. 108, 110 (C.A.A.F. 2000).

Law

"We have the discretion under Article 66, UCMJ, to determine whether to apply waiver or forfeiture in a particular case, or to pierce waiver or forfeiture in order to correct a legal error." United States v. Jackman, 2020 CCA LEXIS 273, *13 (A.F. Ct. Crim. App. 21 August 2020) (unpub. op.) (internal citations omitted). Waiver is the intentional relinquishment or abandonment of a known right. United States v. Jones, 78 M.J. 37, 44 (C.A.A.F. 2018). Appellant's affirmative abandonment of a right "extinguishes his right to complain about their admission on appeal." United States v. Ahern, 76 M.J. 194, 198 (C.A.A.F. 2017). "[F]orfeiture is the failure to make the timely assertion of a right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). A forfeited right is reviewed for plain error. United States v. LeBlanc, 74

M.J. 650, 660 (A.F. Ct. Crim. App. 2015) (en banc). If a right is forfeited, Appellant must show "(1) there was an error; (2) [the error] was plain or obvious; and (3) the error materially prejudiced a substantial right." LeBlanc, 74 M.J. at 660 (quoting United States v. Scalo, 60 M.J. 435, 436 (C.A.A.F. 2005)).

Under R.C.M. 1112(b)(6), all record of trial should include "[e]xhibits . . . that were received in evidence." When a record of trial "is missing an exhibit, this Court evaluates whether the omission is substantial" to determine a record's completeness. United States v. Lovely, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2021) (citing Henry, 53 M.J. at 111). An omission is qualitatively substantial when it is "related directly to the sufficiency of the Government's evidence on the merits,' and 'the testimony could not ordinarily have been recalled with any degree of fidelity.'" United States v. Davenport, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting United States v. Lashley, 14 M.J. 7, 9 (C.M.A. 1982). Additionally, "[o]missions 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. (quoting United States v. Nelson, 3 C.M.A. 482, 13 (C.M.A. 1953).

The Court of Appeals for the Armed Forces has also ruled when the substance of missing exhibits is corroborated by other exhibits of the same type on the record, the omission is insubstantial and therefore does not raise a presumption of prejudice nor affect a record's characterization as complete. *See* Henry, 53 M.J. at 111 (holding four missing exhibits were insubstantial omissions when the goal of Prosecution's exhibits to show appellant possessed explicit literature was shown through other evidence on the record); *see also* United Sates v. Gaskins, 72 M.J. 225 (C.A.A.F. 2013).

Analysis

A. Appellant waived any objection to the corrected version of Prosecution Exhibit 1 when the military judge asked if any party objected to the corrections.

As a threshold matter, Appellant waived this issue when he was given the opportunity to review the corrected Prosecution Exhibit 1 in the Certificate of Correction, and he approved the corrections. The military judge would not have moved forward with the Certificate of Correction if Appellant had failed to review or failed to respond to the military judge's instructions to review the corrected exhibit. The military judge stated in the certificate of Correction:

> The above correction for the record in this case is accurate and complete and the requirements of R.C.M. 112(d) have been met. All parties are given notice of the proposed corrections and given an opportunity to examine and respond to the proposed corrections. No party requested access to any court reporter notes or recordings of the proceedings and ***no party objected to the corrections***."

(*Certificate of Correction,* dated 20 June 2023). The military judge asked trial defense counsel if they objected to the certificate of correction, and they did not. (Id.) This was an affirmative relinquishment of a known right. And this Court should decline to review the issue on appeal. Further, this Court should decline to pierce waiver because, as described below, the error addressed by Appellant is insubstantial and does not constitute a legal error worthy of piercing waiver.

If this Court determines Appellant did not affirmatively abandon his right and rather failed to timely assert his right to object to the corrected Prosecution Exhibit 1, this Court should view the issue under a plain error standard of review. Appellant must show (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced a substantial right. LeBlanc, 74 M.J. at 660. In this case an error did occur, four photos of

C.W.'s injuries were missing from the corrected stipulation of fact. *Compare* (R. at 103-104) *with* (Pros. Ex. 1.)But six other photos of C.W.'s injuries were available in the record. (Pros. Ex. 1.) The four missing photos were duplicative of other photos in the record. Thus, their omission did not prejudice to Appellant, and Appellant did not articulate how the missing photos materially prejudiced his substantial rights when the injuries were documented.

B. The record is complete even though four photos were not included in the corrected version of Prosecution Exhibit 1.

Appellant argues that the record is not yet complete, even after the Certificate of Correction was filed. (App. Br. at 9). According to Appellant, the omitted four images render the ROT incomplete, and this Court should therefore disapprove of the bad-conduct discharge or his adjudged forfeitures. (Id.) Not only should Appellant be barred from objecting to the ROT's completeness because he reviewed the corrected record and did not object to it, but his argument is flawed because the four omitted images are insubstantial omissions and do not affect the ROT's completeness.

The record here is complete because it was returned to the military judge, corrected, and the missing attachments were provided. The government agrees four photos are missing in the corrected version of Prosecution Exhibit 1, but they are duplicative of other photos documenting C.W.'s injuries in the record and thus are insubstantial omissions.

The key question in determining whether a ROT is complete is whether an omission is substantial; courts have *not* required records to fully match what was admitted during the court-martial to be considered complete, only "a substantial omission renders a record of trial incomplete." Henry, 53 M.J. at 111. Courts employ a qualitative and quantitative analysis where an omission must be "related directly to the sufficiency of the Government's evidence on the merits" and "could not ordinarily have been recalled with any degree of fidelity" to be

qualitatively substantial. Id. The omissions cannot be "quantitively 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.; Davenport, 73 M.J. at 377. Because the only disparity here between the Certificate of Correction and the ROT is four missing images depicting C.W.'s injuries, which are shown in six other images attached to Prosecution Exhibit 1, the omission should be viewed as insubstantial.

Prosecution Exhibit 1 does differ from the description at trial due mainly to variations in organization. The Certificate of Correction does not separate images into attachments and instead combines all images on pages eleven to seventeen of the stipulation of fact. (Pros. Ex. 1.) But the few omissions are neither qualitatively nor quantitively significant, as required by Davenport. 73 M.J. at 377. The four missing photos of C.W.'s injuries are not "related directly to the sufficiency of the Government's evidence on the merits." Thus, the missing images cannot be qualitatively substantial under Davenport – because the evidence on the merits is sufficiently demonstrated through Appellant's guilty plea inquiry, the substantive paragraphs of the stipulation of fact, and the other images of C.W.'s injuries attached to the stipulation of fact. Moreover, the images were able to be recalled with a high degree of fidelity because the legal office acquired the images and provide them to the Court upon remand thus failing Davenport's second prong used to determine qualitative significance. *See* Id.

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. But the missing photos should be viewed as quantitatively insubstantial. The omitted images are unimportant and uninfluential because each category of image described in the record of trial and at issue – MacBook and iPad, C.W.'s injuries, and C.W.'s dorm room – is

accounted for in the Certificate of Correction. Specifically, eight images are provided depicting the dorm room, twelve depict damaged technology, and six showed C.W.'s injuries.

"Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." Henry, 53 M.J. at 111. Thus, this Court should follow CAAF's precedent in finding the omission insubstantial and view the ROT as complete.

Additionally, the variation in organization between the military judge's description of Prosecution Exhibit 1's attachments and the Certificate of Correction is unimportant, and Appellant has cited no case law where this Court has ruled different pagination or organization renders a ROT incomplete. Each attachment described in the ROT was accounted for in the corrected version of Prosecution Exhibit 1. Such a slight adjustment in organization and four omitted images are neither qualitatively nor quantitatively substantial and should therefore be considered an insubstantial omission, which "do[es] not raise a presumption of prejudice or affect that record's characterization as a complete one." Henry, 53 M.J. at 111.

This Court should find Appellant waived the issue. If this Court considers the matter, the insubstantial omission of four images in the ROT and insignificant change in organization of Prosecution Exhibit 1 in the Certificate of Correction are insufficient to demonstrate an incomplete record. Because the ROT is complete, Article 54(c)(2), UCMJ, is satisfied and relief is not appropriate.

II.

THE RECORD IS CURRENTLY COMPLETE, AND THE PRESUMPTION OF UNREASONABLE POST-TRIAL DELAY IS TOLLED SO LONG AS IT WAS DOCKETED WITHIN THE UNITED STATES V. LIVAK, 80 M.J. 631 (C.A.A.F. 2020) 150 DAY TIMEFRAME – EVEN IF IT IS LATER FOUND INCOMPLETE.

Standard of Review

This Court reviews *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 United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law

This Court applies an aggregate standard threshold to ensure appellants' due process rights to timely post-trial and appellate review are protected. Livak, 80 M.J. at 633. To avoid unreasonable delay, an entire period from the end of trial to docketing on appeal must be within 150 days. Id. at 633-634. Additionally, in Moreno, the CAAF held a presumption of unreasonable post trial delay should be applied when appellate review is not complete, and a decision is not rendered within 18 months of docketing before the Court of Criminal Appeals. *See* Moreno, 63 M.J. at 142. When evaluating whether a case has been docketed within the appropriate timeframe, this Court has not required the ROT to be complete and without errors to stop the clock. *See* United States v. Muller, No. ACM 39323 (rem), 2021 CCA LEXIS 412 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). Moreover, this Court held so long as a record is docketed withing the 150-day Livak standard, an appellant is not entitled to unreasonable post-trial delay when the record is later found to be incomplete. 80 M.J. at 633.

When a case does not meet either the 150-day Livak standard or the 18-month Moreno standard, the delay is presumptively unreasonable. *See* Moreno, 63 M.J. at 135 (citing Barker v.

Wingo, 407 U.S. 514, 530 (1972)). When a delay is presumptively unreasonable, courts apply a balancing test determine whether a due process violation occurred, which includes: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice, which considers preventing oppressive pretrial incarceration, minimizing anxiety of the accused, and limiting the possibility of an impaired defense. Id. All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, the delay is so egregious that tolerating it would 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).

Analysis

A. The Government met the 150-day Livak standard, and the 18-month Moreno standard has not been violated, so the presumption of post-trial delay was tolled.

Appellant argues "the Government has still not filed a complete ROT in this case and as such, the presumption of an unreasonable delay should apply and it now exceeds 400 days." (App. Br. at 10.) But the presumption of post-trial delay was tolled when the case was first docketed 11 July 2022, 56 days after sentencing and well within the Livak 150-day window. 80 M.J. at 633. Tolling the presumption of post-trial delay does not require the ROT to be without errors, and the ROT here was therefore adequately docketed and its incompleteness discovered after docketing does not warrant relief. Muller, 2021 CCA LEXIS 412 at 13.

Moreover, this case is well within the eighteen-month timeframe established in Moreno. 63 M.J. at 142. despite the remand, four months remain before a presumption of unreasonable

post trial delay should be applied. Only 14 months have passed since initial docketing, and sufficient time remains for the Court to meet its 18-month deadline under Moreno. Any prejudice to Appellant is speculative at this point.

B. No due process violation has occurred, and Appellant has not been prejudiced by a post trial delay.

Even if this Court were to find a presumption of unreasonable delay, there was no due process violation under the Barker factors. As discussed above, the government met the 150-day Livak standard, and the eighteen-month Moreno requirement has not been violated as of the date of this filing. Livak, 80 M.J. at 633; Moreno, 63 M.J. at 142. Thus, any delay should not be considered unreasonable under the first Barker factor. *See* Barker, 407 U.S. at 530.

Relevant to the second factor – reasons for the delay – Appellant requested seven enlargements of time accounting for 298 days of the 400 days. Although Appellant repeatedly highlighted the number of days since docketing, he failed to mention the time attributable to his requests for enlargements of time. (App. Br. at 1, 9, 10, 12). The rest of the delay is attributable to the government (this includes the remand and the seven-day enlargement of time). But as discussed above, the ROT was not incomplete after the remand. Thus, the second Barker factor favors the government. Id.

Appellant did not assert his right to timely review, and the third factor therefore weighs against him. Id.

Finally, considering the lack of evidence showing an oppressive pretrial or anxiety experienced by appellant, and his detailed guilty pleadings showing a fully functioning defense, the fourth factor weighs against Appellant because he was not prejudiced. Id. Because of the lack of prejudice, the other three factors must be "so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system" – a

threshold which cannot be met here considering the many procedures in place to ensure thorough review of ROTs and protect due process rights. Toohey, 63 M.J. at 362.

The Air Force procedures in place are comprehensive. DAFI 51-201 contains several measures to ensure ROTs are reviewed multiple times and provided a final review by JAJM. *Administration of Military Justice*, Department of the Air Force Instruction 51-201. Specifically, paragraph 20.52.3 states incomplete ROTs should not be submitted to JAJM and will be returned to the legal office when they are incorrectly submitted. The Judge Advocate General has designated JAJM as the "superior competent authority" responsible for designating ROTs as incomplete and ordering corrections. DAFI 51-201, ¶ 21.15.2. Thus, several preventive measures are in place to avoid incomplete records being docketed with the Court. But, despite these great efforts to ensure complete ROTs are submitted, some records are not sufficiently corrected by JAJM and are mistakenly docketed with the Court. Appellant's experience demonstrates one of the few cases when a once incomplete ROT slips through the cracks of an otherwise comprehensive policy scheme to ensure ROTs are complete and timely submitted.

In summary, the presumption of post trial delay was tolled and Appellant did not experience any prejudice. Thus, this Court should deny this assignment of error.

CONCLUSION

This Court should affirm the findings and sentence of the lower court by finding the ROT is complete, and the presumption of unreasonable post trial delay was tolled.

[redacted]

ABIGAIL E. THOMAS[3]
Appellate Government Extern
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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FOR

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MARY ELLEN PAYNE
Associate Chief
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United States Air Force
[redacted]

[3] As a civilian extern, Ms. Thomas as a signing, non-attorney was always supervised during the appellate process, and undersigned counsel assumes responsibility for the content of the filing pursuant to this Court's Rules of Practice and Procedure, Rule 14(c).

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 25 September 2023.

JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Airman (E-2) **TYRONE GAMMAGE**, USAF *Appellant*	)))))))))	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE Before a Special Panel No. ACM S32731 (f rev) 10 October 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Pursuant to this Court's order, "[t]he Government will inform the court in writing not later than 10 October 2023 of the status of the Government's compliance with this order, unless the record of trial has already been returned to the court by that date." (*Order*, dated 29 September 2023.) The United States hereby provides notice of status of compliance.

This Court returned this case to "the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for the four missing photographs to Attachment 6 of the stipulation of fact." (Id.) As of the date of this notice, the parties anticipate the record of trial will be returned to the court no later than 13 October 2023.

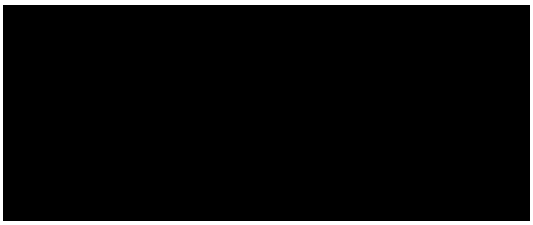
WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's compliance with its 29 September 2023 order.

[redacted]
JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

[redacted]
MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 10 October 2023.



JOCELYN Q. WRIGHT, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME FOR REPLY BRIEF**
v.	)	
	)	Before Panel No. 1
Airman (E-2) **TYRONE GAMMAGE,** United States Air Force,	)	No. ACM S32731 (f rev)
Appellant.	)	25 September 2023

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Pursuant to Rules 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Airman (Amn) Tyrone Gammage, Appellant, hereby moves for an enlargement of time to file a reply brief to the Government's answer, filed 25 September 2023. Appellant's reply is currently due on 2 October 2023. Appellant respectfully requests an enlargement of time for a period of 14 days, which will end on 16 October 2023. The record of trial was docketed with this Court on 23 June 2023. From the date of docketing to the present date, 94 days have elapsed. On the date requested, 115 days will have elapsed.

There is good cause for this enlargement of time. Undersigned counsel is on leave overseas until 5 October 2023 and will not have access to her government email or Appellant's file when she is on leave. Moreover, due to a family day and holiday, undersigned counsel does not anticipate returning to the office until 10 October 2023. Undersigned counsel requests 14 days (which equates to 5 duty days, including the day undersigned counsel returns to the office) to ensure she has enough time to return from leave, thoroughly review the Government's answer, discuss the Government's answer with Appellant, and draft and receive edits to Appellant's reply.

On 17 May 2022, a military judge sitting as a special court-martial convicted Amn Gammage, consistent with his pleas in accordance with a plea agreement,[1] of one charge and one specification of failing to obey other lawful order, one charge and one specification of destroying nonmilitary property, one charge and two specifications of domestic violence, and one charge and one specification of disorderly conduct under Articles 92, 109, 128b, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 909, 928b, and 934.[2] R. at 2, 8-10, 78. The military judge sentenced Amn Gammage to a bad-conduct discharge, confinement for six months, reduction to the grade of E-1, and forfeiture of $1,190 of pay per month for six months. R. at 104. The Convening Authority took no action on the findings or sentence. Convening Authority Decision on Action, dated 1 June 2022.

On 5 May 2023, Amn Gammage assigned as error that his ROT was incomplete because it omitted the attachments to Prosecution Exhibit 1, the stipulation of fact. Order, dated 5 June 2023. On 30 May 2023, the Government agreed in its Answer that Amn Gammage's case should be returned for correction in accordance with R.C.M. 1112(d). *Id*. On 5 June 2023, this Court returned Amn Gammage's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for eight missing attachments to the stipulation of fact. *Id*. On 23 June 2023, Amn Gammage's case was docketed with this Court for further review.

The record of trial consists of five appellate exhibits, three prosecution exhibits, and four defense exhibits. The transcript is 105 pages. Appellant is not confined, is aware of his right to a timely appeal, and agrees with this necessary request for an extension of time.

[1] Appellate Exhibit III.
[2] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

WHEREFORE, Amn Gammage respectfully requests this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

[redacted]

SAMANTHA P. GOLSETH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 25 September 2023.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
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