

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

No. ACM 40715

UNITED STATES
Appellee

v.

Daniel P. GOSSETT
Master Sergeant (E-7), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 28 October 2026

Military Judge: Matthew P. Stoffel.

Sentence: Sentence adjudged 20 April 2024 by GCM convened at Edwards Air Force Base, California. Sentence entered by the military judge on 23 July 2024: Bad-conduct discharge, confinement for 15 months, reduction to E-1, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Major Vanessa Bairos, USAF; Major Kate E. Lee, USAF; Major Donnell D. Wright, USAF; Mary Ellen Payne, Esquire.

Before DOUGLAS, MCCALL, and KUBLER, *Appellate Military Judges*.

Judge KUBLER delivered the opinion of the court, in which Senior Judge DOUGLAS and Judge MCCALL joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.3.

KUBLER, Judge:

Appellant speaks with two agents from the Air Force Office of Special Investigations (OSI). There, Appellant introduces the agents and now us to that stressful morning the case at hand was born.¹

“It’s just a regular day. I got up, [my wife, SG,] gave me the kids,” Appellant told the OSI agents, “and she was awake and I was like, okay, gotta get the day started. You know what I mean, it was like very—it was so run of the mill. I don’t know.” Appellant said, “I feel like it’s just because [my wife and I have been] arguing about so many things Maybe that added stress is what caused me to just, I don’t know, lose—lose my composure today.”

Then the video recording of the baby monitor shows Appellant “lose his composure” that stressful morning, 8 September 2023.²

Appellant enters the room with his bibbed-flailing-crying-six-month-old baby girl, bottle in one hand. Appellant puts the baby down on the changing table extended from the crib. He presses his thumbs down on the baby’s torso leaning in with his body weight once, pulls back—and then leans in and presses down again. Appellant removes the baby’s turquoise pants and takes off her gray onesie. Appellant pulls the onesie taut, one end in each hand and presses down on the baby’s throat with the onesie. *Silence*. The crying stops. Appellant tosses the onesie with an arc into the laundry basket. The baby cries again. “Shhush,” Appellant says. Appellant begins to dress the baby in a green onesie. As Appellant tries to wiggle the baby’s arms through the little sleeves the child cries louder. He stops, let’s go of the onesie, and removes his hands. Appellant leans in and presses his bare hands down on the baby’s throat. *Silence*. Crying stops. Appellant releases his hands and continues to dress the baby. She starts crying again. He leans in and says, “Shssh.” Appellant changes the diaper, finishes dressing the baby, and carries the child and the bottle out of the room.

A general court-martial convicted Appellant of child endangerment “by roughly handling and strangling [his six-month-old] child . . . which resulted in harm, . . . impeding breathing, along with bruising and red marks on [the] child’s neck and abdomen,” in violation of Article 119b, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 919b.³ The officer and enlisted members also

¹ Trial Counsel played Appellant’s videotaped interview with OSI (Prosecution Exhibit 3) for the members.

² Trial Counsel played the video recording of the baby monitor (Prosecution Exhibit 2) for the members.

³ The punitive articles are to the *Manual for Courts-Martial, United States* (2019 ed.). All other references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

convicted Appellant of two specifications of domestic violence for unlawfully strangling his six-month-old daughter with an article of clothing and unlawfully strangling her with his hands in violation of Article 128b, UCMJ, 10 U.S.C. § 928b.⁴ He was sentenced to a bad-conduct discharge, 15 months' confinement, a reduction to the grade of E-1, and a reprimand. The convening authority suspended the reduction in grade for 130 days and waived the automatic forfeitures for six months for the benefit of Appellant's wife and his dependent children.

Appellant says more to the agents, during his OSI interview.

"I can't even rationalize it to myself," Appellant said, "and I just feel like—was I just seeing red and I just—I don't know."

One OSI agent asked, "[W]hat happened while you were changing [your baby] whenever you went into the bedroom[?]"

"I don't know"—Appellant replied—"I don't know. I mean that. Like, I don't know, I feel like I wasn't there when it happened. And that the only way I knew, when I could fully understand, is when [my wife] confronted me and talked to me about what you mentioned that she saw."

Appellant's trial defense counsel, concerned about Appellant's state of mind, requested an inquiry under Rule for Courts-Martial (R.C.M.) 706. The Rule for Courts-Martial 706 inquiry answers four questions. Of these four questions, Defense was primarily concerned with one: Was Appellant at the time of the conduct competent or "unable to appreciate the nature and quality or wrongfulness of his [] conduct?" See R.C.M. 706(c)(2)(C). The inquiry concluded that Appellant was both competent at the time of the conduct and competent to participate in his defense. The trial defense team's decision not to request an additional inquiry is the first issue Appellant raises.

Though his trial defense team requested and obtained a mental competency report, Appellant claims his trial defense counsel were ineffective when they failed to request a second mental competency examination pursuant to R.C.M. 706(c)(4).⁵ *United States v. Datav* makes clear defense counsel are not ineffective and "do not perform deficiently when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). All three of

⁴ The military judge granted a motion for a finding of not guilty under Rule for Courts-Martial 917 for another specification of domestic violence also involving Appellant's six-month-old daughter.

⁵ R.C.M. 706(c)(4), *Additional examinations*, states that "[a]dditional examinations may be directed at any stage of the proceedings as circumstances may require."

Appellant’s trial defense counsel explain they chose not to request a second mental competency examination based on advice from the forensic psychologist appointed as their expert consultant. The expert consultant’s professional opinion was that if he performed a second mental competency examination he was likely to reach conclusions similar to the existing report and make findings contrary to the defense strategy.⁶ Trial defense counsel chose to forego an additional mental competency examination that “could generate new adverse expert findings, strengthen the Government’s litigation position, diminish the Defense’s ability to challenge the Government’s mental health evidence, and negatively affect credibility arguments the Defense intended to advance” *See supra* n.5. The choice not to request a second mental competency examination based upon expert advice and the trial Defense’s risk evaluation is, we conclude a reasonable defense strategy—not ineffective assistance of counsel.

Appellant raises three other issues on appeal: (2) whether Appellant’s record of trial is substantially incomplete because Appellate Exhibit XXXVI does not match the description in the record; (3) whether Appellant is entitled to relief for post-trial delay; and (4) whether Appellant’s constitutional rights were violated when he was convicted without a unanimous verdict.

We carefully considered issue (4) and find it warrants neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also United States v. Anderson*, 83 M.J. 291, 302 (C.A.A.F. 2023) (holding court-martial defendants do not have a right to a unanimous guilty verdict).

As to the remaining issues, we find no error that materially prejudiced Appellant’s substantial rights, and we affirm the findings and sentence.

I. DISCUSSION

A. Ineffective Assistance of Counsel

1. Additional Background

Dr. AR, a forensic psychologist and expert consultant, advised the Defense on a second mental competency examination. Dr. AR reviewed Appellant’s medical and mental health materials along with the full mental competency report prepared by the Government and gathered additional information relevant to Appellant’s psychological functioning from interviews. Dr. AR informed the Defense that if he conducted further examination of Appellant, it was his

⁶ This court granted a government motion to attach trial defense counsel declarations from Major SRF, Major AJ, and Mr. MJ, responsive to claims of ineffective assistance of counsel. Mr. MJ attached a declaration prepared by the forensic psychologist, Dr. AR, to his own declaration.

opinion that he would not find any exculpatory information, he would shore up and confirm the findings in the Government's report, and he would undermine the Defense's strategy to challenge the adequacy and the conclusions of the mental competency report. Dr. AR found fault with the mental competency examination conducted by the Government and testified to his view on that inquiry while avoiding doing his own examination or having the Defense request a second mental competency examination that would validate those findings.

After interviewing Dr. AR, the Senior Trial Counsel raised a concern that Appellant's trial defense counsel may put Appellant's competency to stand trial at issue and the issue was addressed on the record by the judge. The military trial judge summarized the discussion with the defense team and the parties, "[D]efense counsel made clear that while—if and when they decide to put on a case, and if and when the topic of the earlier R.C.M. 706 inquiry became relevant, they were not challenging the accused's competency to stand trial at any stage to include where we sit today." The judge added, "They just wanted to be clear that whatever shortcomings that they would be putting forward with regard to that report, it did not refer to issues with the accused's competency." The military judge provided his own observations up to that point stating that Appellant "has appeared to engage with his—both detailed and civilian defense counsel. It appears that he has been tracking everything that has gone on every time we've been in session and has been an active participant in his own defense by consulting with his attorneys as necessary."

All three trial defense counsel provided affidavits responsive to the claim that they were ineffective in not requesting a second inquiry under R.C.M. 706. Mr. MJ explained, "[I]t was my professional judgment that a second inquiry reaching conclusions similar to the Government's prior R.C.M. 706 findings would materially undermine the defense strategy of attacking the adequacy, reliability, methodology, and conclusions of the Government's R.C.M. 706 process and mental health-related evidence." He also described a further concern "that an additional inquiry could generate new adverse expert findings, strengthen the Government's litigation position, diminish the Defense's ability to challenge the Government's mental health evidence, and negatively affect credibility arguments that the Defense intended to advance before the military judge and members." For these reasons the civilian defense counsel, Mr. MJ, described this as "a deliberate strategic decision made after consultation with Dr. [AR] and after consideration of the potential risks and benefits to the Defense."

2. Law

We review allegations of ineffective assistance de novo. *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing *United States v. Mazza*, 67 M.J. 470, 474 (C.A.A.F. 2009)).

The burden is on the appellant to demonstrate both deficient performance and prejudice. *Dataus*, 71 M.J. at 424 (citations omitted). “[C]ourts ‘must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’” *Id.* (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)) (additional citation omitted). “Scrutiny of counsel’s performance should be highly deferential.” *United States v. Metz*, 84 M.J. 421, 428 (C.A.A.F. 2024) (citing *Strickland*, 466 U.S. at 689). “We will not second-guess the strategic or tactical decisions made at trial by defense counsel.” *Mazza*, 67 M.J. at 475 (internal quotation marks and citation omitted). With respect to prejudice, a “reasonable probability” of a different result is “a probability sufficient to undermine confidence in the outcome” of the trial. *Dataus*, 71 M.J. at 424 (citing *Strickland*, 466 U.S. at 694) (additional citation omitted).

3. Analysis

The Defense executed their trial strategy to criticize the mental competency report conducted by the Government and avoided proving the conclusions contained therein accurate. This allowed Dr. AR to apply his expertise and testify extensively about shortcomings in the government report, but never have to admit that he would have very likely come to the same ultimate conclusion even if those shortcomings were addressed. By not doing a second examination, he maintained the ability to say he had concerns all the while knowing some extra work—strategically avoided—would have brought him to the same result. The Defense’s use of this “eat your cake and have it too strategy”⁷ we find both reasonable and effective. The choice not to request a second mental competency examination based upon expert advice and the trial defense counsel’s risk evaluation is, we conclude, a reasonable defense strategy—not ineffective assistance of counsel. *See Dataus*, 79 M.J. at 424.

Accordingly, we find Appellant has not demonstrated he is entitled to relief for his claim of ineffective assistance of counsel.

B. Incomplete Record

Appellant asserts that the record of trial is substantially incomplete because 11 pages are missing from Appellate Exhibit XXXVI. Based on our review of the 147-page version of Appellate Exhibit XXXVI that should have originally been in the record but was only provided by the Government during appellate review, the 136-page version originally placed in the record of trial, the

⁷ You can’t eat your cake and have it too; the original phrasing of the proverb, more logical and less familiar, dates back to 1546 in John Heywood’s book of colloquial Elizabethan sayings: “Would ye both eat your cake and have your cake?” BRYAN A. GARNER, *GARNER’S MODERN ENGLISH USAGE* 980 (4th ed. 2016).

transcript, and the ruling on the motion for speedy trial, we conclude the missing 11 pages is an insubstantial omission which requires no relief.

1. Law

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) (citing *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000)).

“In assessing [] whether a record of trial is complete . . . the threshold question is ‘whether the omitted material was “substantial,” either qualitatively or quantitatively.’” *Davenport*, 73 M.J. at 376 (citing *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)).

“A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut 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 110–11 (citations omitted).

“[O]missions are qualitatively substantial if the substance of the omitted material 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.” *Davenport*, 73 M.J. at 377 (internal quotation marks and 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.” *Davenport*, 73 M.J. at 377 (citation omitted).

In *Henry*, the United States Court of Appeals for the Armed Forces (CAAF) found omission of four prosecution exhibits insubstantial. 53 M.J. at 111. The CAAF found the four missing exhibits—offered to prove the appellant possessed explicit literature—superfluous because evidence in the record established the same point. They therefore found the four omitted exhibits “insubstantial omissions from th[e] record of trial and [did] not affect its completeness.” *Id.*

In *United States v. Hull*, this court held 14 pages missing from an appellate exhibit used during motion practice insubstantial. No. ACM 39214, 2018 CCA LEXIS 386, at *38 (A.F. Ct. Crim. App. 14 Aug. 2018) (unpub. op.). The omitted pages were discussed on the record while impeaching witnesses, but the omitted material was not a matter “directly related to the sufficiency of the Government’s case on the merits and had no bearing on the crux of [the a]ppellant’s defense” *Id.* The court therefore concluded the omission was insubstantial. *Id.* at *35. The court also held “the omission [did not] in any way limit[the

court's] ability to conduct a complete review in accordance with Article 66, UCMJ, [10 U.S.C. § 866,]" *Id.* at *39.

2. Analysis

The Government moved this court to attach the 147-page version of Appellate Exhibit XXXVI that should have been in the record of trial to assist in our review of this matter. We granted the motion to attach and consider that exhibit along with the attached declaration from Captain (Capt) KO, Chief of Litigation, 412th Test Wing, Edwards Air Force Base, California, providing additional details as to the exhibit. *See United States v. Jessie*, 79 M.J. 437, 442–43 (C.A.A.F. 2020). Comparing the 147-page version to the answers provided to questions about the document at trial assures us this is the correct document. Capt KO's declaration noted the date this file was created matched the day it was discussed at trial. Additionally, the final pages of this document have a second set of page numbers below the first with page numbers 1–136—the vestige of the exhibit in its original form—before being expanded to the 147-page version. We are convinced this attachment is the 147-page exhibit that should have been marked as Appellate Exhibit XXXVI. We can now look at the document to assess whether the absence of this version in the record is substantial.

Comparing Appellate Exhibit XXXVI in the record of trial with the 147-page version that should have been placed in the record of trial, shows the difference between these two versions is insubstantial and requires no relief. The last 136 pages of the two versions are identical, narrowing our focus to the first 11 pages not in the record of trial. The first five pages of the eleven consist of a trial chronology with two columns that are fully contained at reduced size and in a table format on the first three pages of the exhibit that is in the record of trial further narrowing our focus to pages 6–11. Those six pages are emails between the parties and the military judge about routine matters that are—with great respect to the parties sending and receiving them—so insignificant in nature as to approach nothingness. *See Davenport*, 73 M.J. at 377. The military judge's ruling on the defense motion to dismiss on Article 10, UCMJ, 10 U.S.C. § 810, grounds, Appellate Exhibit XLIX, has four pages of essential findings of fact. We do not need the six pages to review the ruling, and Appellant is not challenging that ruling on appeal.

Applying the principles set forth in the law section, this omission is insubstantial. The six pages of emails are not “related directly to the sufficiency of the Government's evidence on the merits” and are therefore not qualitatively substantial. *Davenport*, 73 M.J. at 377. The six pages of emails are emails between the parties and the court which describe the proposed approach to motion practice. The emails concern routine matters with acknowledgments and courtesies that add nothing of substance to our review. The content of these six

pages is so insignificant that they offer no way to readily summarize them making them quantitatively insubstantial. This is especially so since the emails in large part planned what actually occurred in motion practice and was captured on the record. If the motion practice was the play (which we have seen), these six pages would be the playbill and given the fact that the play or in this case motion practice is in the record, we have no use for the playbill. Here, these six pages of planning, acknowledging emails, “the totality of omissions . . . [is] so unimportant and so uninfluential when viewed in the light of the whole record, that it approaches nothingness.” *Id.* As noted in *Hull*, unpub. op. at *39, nothing about these omissions in any way limits our ability to complete a full review under Article 66, UCMJ. The omissions are both quantitatively and qualitatively insubstantial. “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.

Accordingly, we find the omission insubstantial, the record of trial complete, and the claim as one that requires no relief.

C. Post-Trial Delay

Appellant requests relief for post-trial delay because his case was docketed with this court 215 days after sentencing, which is facially unreasonable under *United States v. Livak*, 80 M.J. 631 (A.F. Ct. Crim. App. 2020). In *Livak*, we established a 150-day standard from the day an appellant is sentenced to docketing with this court, beyond which we consider facially unreasonable delay. *Id.* at 633.

We also analyze whether relief is warranted for the untimely appellate review under *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006). In *Moreno*, one of the presumptions of facially unreasonable delay established by the CAAF is when “appellate review is not completed and a decision is not rendered within eighteen months of docketing the case before the Court of Criminal Appeals.” *Id.* at 142. We render this opinion more than 22 months after docketing, creating a presumption of unreasonable delay. *Id.*

As in this case where we find a facially unreasonable delay for both docketing and appellate review, 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). We analyze each of the four factors to determine whether that factor weighs in favor of the Government or an appellant and balance those factors to determine if there has been a due process violation. *Id.*

The CAAF identified three types of cognizable prejudice for purposes of the right to timely post-trial review: (1) oppressive incarceration; (2)

“particularized anxiety or concern that is 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).

Independent of an appellant’s due process rights, the Courts of Criminal Appeals have authority to “provide appropriate relief if [an appellant] demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered” 10 U.S.C. § 866(d)(2); see *United States v. Valentin-Andino*, 85 M.J. 361 (C.A.A.F. 2025).

We review de novo an appellant’s entitlement to relief for post-trial delay. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 135).

While the length of the delay exceeded the *Livak* and *Moreno* standards for facially unreasonable delay—docketed 125 days after sentencing, and this opinion rendered 22 months after docketing—we find it is not an egregious delay as to impugn “the fairness and integrity of the military justice system.” *Toohey*, 63 M.J. at 362. Although the record contains gaps in chronology prior to docketing with the court, we do not find institutional negligence. The *Moreno* delay included fourteen (14) requests by Appellant for enlargements of time that amounted to 560 days from the docketing of the case to being fully briefed. Additionally, the allegation of ineffective assistance of counsel required the Government to request additional time, granted by this court, to gather and submit responsive affidavits from the trial defense team. Then, the Government needed additional time to incorporate this information into its answer to Appellant’s assertion. Thus, our delay in rendering this opinion is in part the result of 14 requests for enlargements of time by Appellant and the Government’s time required to respond to Appellant’s assertions on appeal.⁸

Further, we have considered the *Barker* factors and find no violation of Appellant’s due process rights. We do not discern from the record that he suffered particularized anxiety or concern, nor that his grounds for appeal were impaired by the delay. As such, we do not find Appellant suffered cognizable prejudice.

⁸ We note that on 23 October 2026 Appellant moved this court for leave to file “notice asserting his right to speedy appellate review.” As this opinion is released while the motion was still in the opposition period, it is now moot.

Viewing the post-docketing phase as a whole, in the absence of prejudice, and having carefully considered the *Barker* factors and the reasons for delay, we do not find a violation of Appellant’s constitutional due process rights.

Independent of an appellant’s due process rights, the Courts of Criminal Appeals have authority to provide “appropriate relief” if an appellant has “demonstrate[d] error or excessive delay” in the processing of his court-martial and after the entry of judgment has occurred. Article 66(d)(2), UCMJ; *see also Valentin-Andino*, 85 M.J. at 367 (holding that “although it is within a Court of Criminal Appeal’s discretion to place its reasoning about Article 66(d)(2)[, UCMJ,] relief on the record, it is not required to do so.”). We do not find this case warrants relief for post-trial delay.

II. CONCLUSION

The findings as entered are correct in law. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to the substantial rights of the Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d) (*Manual for Courts-Martial, United States* (2019 ed.)). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court