UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 39903 (reh)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Jesus MARTINEZ	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 14 November 2024, the Government moved to attach several documents including:

> (1) a chronology of events from Appellant's sentence rehearing on 21 November 2022 until the record of trial was mailed from Fairchild Air Force Base (AFB) to the general court-martial convening authority on 21 September 2023 (Chronology);
>
> (2) a declaration by Major (Maj) CP, the Fairchild AFB Deputy Staff Judge Advocate (DSJA), "certify[ing]" the accuracy of the chronology (Maj CP Declaration);
>
> (3) four appellate exhibits (AEs) the Government had "discovered" are "missing" from the record of trial which "explain some of the delay in post-rehearing processing" (AEs XVI, XVII, XVIII, and XIX); and
>
> (4) a declaration by Lieutenant Colonel (Lt Col) JM, the Fairchild AFB Staff Judge Advocate (SJA), "certify[ing]" the four appellate exhibits as "authentic copies" from the legal office's "records" (Lt Col JM declaration).

The four appellate exhibits include a post-trial defense motion to "correct the sentence credit [Appellant] received," dated 2 March 2023 (AE XVI); the Government's response to the defense motion, dated 8 March 2023 (AE XVII); the Defense's reply to the Government's response, dated 21 March 2023 (AE XVIII); and the military judge's ruling on the motion, dated 8 May 2023

(AE XIX).* The Government's 14 November 2024 motion to attach asserts, "The declarations of the SJA and DSJA for Fairchild AFB address the post-trial processing of Appellant's case and are, thus, relevant and necessary to resolve and disprove Appellant's claim that the United States deprived him of speedy post-trial processing." *See United States v. Jessie*, 79 M.J. 437, 444 (C.A.A.F. 2020) (holding the Courts of Criminal Appeals may "consider affidavits . . . when doing so is necessary for resolving issues raised by materials in the record").

On 21 November 2024, Appellant responded and requested this court deny the motion to attach. Specifically with regard to the "missing" exhibits, Appellant contends "[t]he Government's failure to include all appellate exhibits is a substantial omission that renders the [record of trial] substantially incomplete and warrants remand for a correction."

On 26 November 2024, this court issued an order to the Government to show good cause as to why the court should not return the record for correction. The Government filed its response on 9 December 2024. The Government contended, *inter alia*, the omission of AEs XVI–XIX was not prejudicial to Appellant, who was not raising the military judge's post-trial ruling as an error, and this court could complete its Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866, review without returning the record for correction.

"A substantial omission renders a record of trial 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). "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.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (quoting *United States v. Nelson*, 13 C.M.R. 38, 43 (C.M.A. 1953)).

Rule for Courts-Martial (R.C.M.) 1112(b) provides, *inter alia*, the "record of trial in every general and special court-martial shall include . . . [e]xhibits . . . ." R.C.M. 1112(d)(2) provides, in part:

> A record of trial is complete if it complies with the requirements of subsection (b). . . . A superior competent authority may return a record of trial to the military judge for correction under this rule. The military judge shall give notice of the proposed

* We note AE XIX, the military judge's ruling, ordered the Defense "to affirmatively state whether or not it intends to submit any new matters to the convening authority in light of the [military judge's] decision. The [D]efense's statement will be marked at [sic] Appellate Exhibit XX." The record does not contain such a statement marked as Appellate Exhibit XX.

> correction to all parties and permit them to examine and respond to the proposed correction. . . .

We are not persuaded the Government has rebutted the presumption of prejudice arising from the substantial omission of AEs XVI–XIX from the record.

Accordingly, it is by the court on this 16th day of December, 2024,

ORDERED:

The Government's Motion to Attach dated 14 November 2024 is **GRANTED IN PART** and **DENIED IN PART**. The motion is granted with respect to the Chronology and the Maj CP Declaration identified above; it is denied with respect to Appellate Exhibits XVI, XVII, XVIII, and XIX and the Lt Col JM Declaration identified above.

The record of trial in Appellant's case is returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to account for Appellate Exhibits XVI, XVII, XVIII, and XIX, and any other portion of the record that is determined to be missing or defective hereafter, after consultation with the parties. *See* Article 66(g), UCMJ, 10 U.S.C. § 866(g); R.C.M. 1112(d)(2)–(3). Thereafter, the record of trial will be returned to this court for completion of its appellate review under Article 66, UCMJ, 10 U.S.C. § 866.

The record of trial will be returned to the court not later than **24 January 2025** unless a military judge or this court grants an enlargement of time for good cause shown.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court