

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

UNITED STATES	)	No. ACM 40462
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Malik C. SIMMONS)	
Airman First Class (E-3))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 3 March 2023, Appellant was convicted by a general court-martial at Minot Air Force Base, North Dakota, of one specification of possessing child pornography in violation on Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.* The military judge sentenced Appellant to a dishonorable discharge, confinement for 11 months, reduction to the grade of E-1, and a reprimand. The record of trial was docketed with this court on 16 May 2023. Upon this court’s review of the record, we discovered Preliminary Hearing Officer (PHO) Exhibits 12–34 were missing from Volume 2 of the record.

“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). “Insubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record’s characterization as a complete one.” *Id.* “Whether an omission from a record of trial is ‘substantial’ is a question of law which [appellate courts] review *de novo*.” *United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000). Each case is analyzed individually to decide whether an omission is substantial. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Accordingly, it is by the court on this 18th day of May, 2023,

* References in this order to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

ORDERED:

Not later than **1 June 2023**, counsel for the Government shall **SHOW GOOD CAUSE** as to why this court should not remand the record for correction or take other corrective action.



FOR THE COURT



FLEMING E. KEEFE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES ANSWER
<i>Appellee</i>	)	TO ORDER TO SHOW CAUSE
)	
)	
v.)	
	)	Before Panel No. 1
Airman First Class (E-3))	
MALIK C. SIMMONS , USAF	)	No. ACM 40462
<i>Appellant.</i>)	

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

ISSUE PRESENTED

**WHETHER THIS COURT SHOULD REMAND THE
RECORD OF TRIAL BECAUSE IT OMITTS PRELIMINARY
HEARING OFFICER (PHO) EXHIBITS 12-34 FROM THE
RECORD OF TRIAL.**

STATEMENT OF THE CASE

On 3 March 2023, a military judge, sitting at a general court-martial at Barksdale Air Force Base, Louisiana, pursuant to his plea, of one charge and one specification of knowing and wrongful possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). (*Entry of Judgment*, 7 April 2023, ROT, Vol. 1). The military judge sentenced Appellant to confinement for eleven months, reduction to the grade of E-1, and to be discharged with a dishonorable discharge. (Id.)

STATEMENT OF FACTS

On 12 August 2022, the Preliminary Hearing Officer (PHO) held the preliminary hearing for this case to review the charge and specification. (*Preliminary Hearing Officer Report*, DD Form 457, dated 18 August 2022, ROT Vol. 2). On 15 August 2022, the PHO reviewed the contraband evidence in the case at the local Office of Special Investigations (OSI) detachment.

(Id.) The PHO exhibit list states that Exhibits 12 through 34 were sealed at the hearing. (Id.) The substitution page in the record of trial for exhibits 12-34 states the exhibits are contraband material not attached to the PHO Report and that they remain in OSI custody. (Id.) Other than the notation that the exhibits were sealed and not attached to the record, the PHO describes some of the exhibits in her analysis of the evidence in paragraph “m.” of the continuation pages of the preliminary hearing report. (Id.) The PHO determined from reviewing the evidence that it was evidence of child pornography, which supported probable cause for the charge and specification. (Id.) The exhibits themselves are not included in the record of trial.

ARGUMENT

APPELLANT’S RECORD OF TRIAL SHOULD BE REMANDED FOR CORRECTION.

Standard of Review

Whether the record of trial (ROT) 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 and Analysis

A PHO report under Article 32, UCMJ, including its attachments, is not required content of a record of trial under R.C.M. 1112(b). However, under R.C.M. 1112(f)(1)(A), the PHO report is among those items the United States is required to attach to the record of trial. When a record of trial “is missing an exhibit, this Court evaluates whether the omission is substantial.” 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)). While “[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)).

“[I]nsubstantial omissions should not prevent characterizing a record as complete.” *United States v. McCullah*, 11 M.J. 234, 237 (C.M.A. 1981) (internal quotation marks omitted). And if there is a substantial omission it “does not necessarily require reversal. Rather, an incomplete or non-verbatim record . . . raises a presumption of prejudice which the Government may rebut.” *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

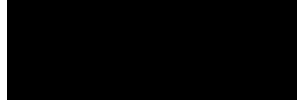
When exhibits to the PHO report are missing from the record, this Court has employed its authority under Rule for Court-Martial 1112(d) and returned the record of trial to the Chief Trial Judge for correction. *See United States v. Ort*, 2022 CCA LEXIS 521 (A.F. Ct. Crim. App. 31 Aug. 2022) (holding the record of trial would be returned to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d)).

Since the ROT is missing twenty-two PHO Report attachments that comprise the evidence of child pornography presented to the PHO, this Court should return the ROT to the military judge for correction. Trial counsel has located the twenty-two exhibits. This Court may return the original ROT to the military judge for correction under R.C.M. 1112 so “[t]he military judge may take corrective action by . . . reconstructing the portion of the record affected.” R.C.M. 1112(d)(2)-(3).

Since the appropriate relief is for this Court to remand Appellant’s case for corrective action under R.C.M. 1112(d) and this answer comes only 16 days after this Court docketed the case, Appellant will not be prejudiced by this course of action. Thus, this case should be returned to the military judge to correct the record in accordance with R.C.M. 1112(d).

CONCLUSION

WHEREFORE, the United States respectfully requests this Court to return the case to the military judge for correction.



OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force



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 to the Air Force Appellate Defense Division on 1 June 2023 via electronic filing.



OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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United States Air Force



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,)	
<i>Appellee</i>)	
	)	UNITED STATES' RESPONSE TO
v.	)	COURT ORDER
)	
Airman First Class (E-3)	)	Panel 1
MALIK C. SIMMONS, USAF)	
<i>Appellant</i>	)	No. ACM 40462

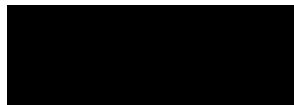
**TO THE HONORABLE, THE JUDGES OF
THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS***Supplemental Statement of the Case*

On 16 May 2023, Appellant's record of trial was docketed with this Court. During the Court's initial review of the record, it discovered Preliminary Hearing Officer (PHO) Exhibits 12-34 were missing from Volume 2 of the record. (*Show Cause Order*, dated 18 May 2023.) All of the missing PHO exhibits are labeled as contraband in the PHO report and reportedly contain child pornography presented at the PHO hearing as the basis of the charges against Appellant.

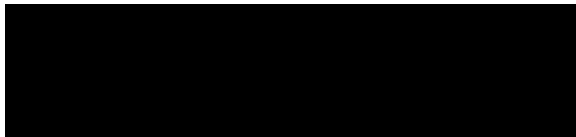
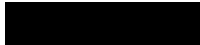
In its decree, the Court ordered the case returned to the Chief Trial Judge of the Air Force for return to the military judge for correction of the record pursuant to R.C.M. 1112(d)(2). (*Remand Order*, dated 5 June 2023). Upon compliance with these actions, this Court ordered the record returned for completion of appellate review under Article 66, UCMJ, 10 U.S.C. § 866. (Id.) The Court ordered the record returned no later than **30 June 2023**. (Id.) (emphasis in original). At the same time, this Court directed appellate government counsel to "inform the court in writing not later than **22 June 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." (Id.) (emphasis on original).

Status of the Record of Trial

On 14 June 2023, the detailed court reporter coordinated with government trial counsel at Minot AFB, North Dakota, on correcting the record of trial to include the missing PHO exhibits. The missing exhibits have been identified by trial counsel in OSI's possession; however, trial defense counsel is currently unable to review the exhibits to confirm they are the PHO exhibits submitted at the hearing. Trial defense counsel is currently TDY to Maxwell AFB, Alabama for the Advanced Trial Advocacy Course, 20-23 June 2023, and is otherwise geographically separated from the evidence at his normal duty station, Ellsworth AFB, South Dakota. Trial counsel and trial defense counsel are coordinating on the review of the contraband evidence. Once the evidence is certified by both counsel, the Government will return the record with corrections as soon as it is able. While undersigned counsel is cautiously optimistic the record can be returned to the Court prior to the 30 June 2023 deadline, the Government submits this status update in an abundance of caution.



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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 22 June 2023.



OLIVIA B. HOFF, 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,	)	UNITED STATES' MOTION
<i>Appellee</i>	)	FOR ENLARGEMENT OF TIME
	)	(FIRST) OUT OF TIME
v.)	
)	
Airman First Class (E-3))	
MALIK C. SIMMONS	)	Before Panel No. 1
USAF,)	
<i>Appellant.</i>	)	No. ACM 40462

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

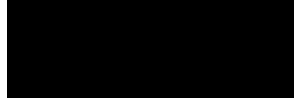
Pursuant to Rule 23.3(m)(1) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time out of time of 14 days, until 14 July 2023, to provide the exhibits requested in this Court's remand order, dated 5 June 2023.

This case was docketed with the Court on 16 May 2023. This is the United States' first request for an enlargement of time, and, as of the date of this request, 45 days have elapsed since this Court's order. On the date requested, 59 days will have elapsed.

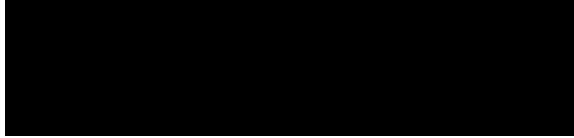
The justification for this enlargement of time of 14 days is due to issues obtaining the requested exhibits, which contain child pornography, from the local Office of Special Investigations (OSI) detachment at Minot AFB, North Dakota. The Chief of Military justice at the base relayed to appellate government counsel that process was being slowed by the OSI detachment's attempts to comply with internal policy for making reproductions of child pornography. This motion is being filed out of time because the undersigned counsel only became aware of the need for a delay yesterday.

The United States believes that the sealed exhibits will be able to be mailed by 5 July 2023. However, to be safe with the approaching holiday, a 14-day extension is necessary to ensure compliance with this Court's order.

For these reasons, the United States respectfully requests an enlargement of time of 14 days, until 14 July 2023, to return the record to this Court.



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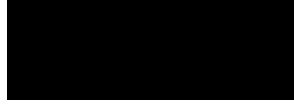


MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force



CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate
Defense Division on 30 June 2023.



OLIVIA B. HOFF, Capt, USAF
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Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

