United States Air Force
Court of Criminal Appeals

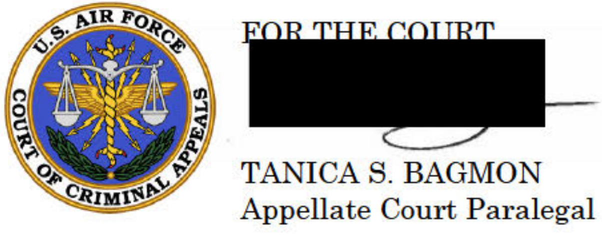
UNITED STATES	)	**No. ACM S32719 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Damien K. WELSH	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

The above styled case was re-docketed with this court by the Appellate Records Branch on 30 November 2022.

Accordingly, it is by the court on this 30th day of November, 2022,

ORDERED:

That the Record of Trial in the above styled matter is referred to Panel 1 for appellate review.



TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**MERITS BRIEF**
v.	)	Before Panel No. 1
Staff Sergeant (E-5) **DAMIEN K. WELSH,** United States Air Force *Appellant.*	)	Case No. ACM S32719 (f rev) Date filed: 29 January 2023

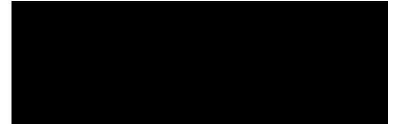
TO THE HONORABLE, THE JUDGES OF THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS:

Submission of Case Without Specific Assignment of Error

The undersigned appellate defense counsel attests that he, on behalf of Appellant, carefully examined the record of trial in this case. Appellant does not admit the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits upon return from remand with no additional specific assignment of error during this stage of appellate processing.[1]

[1] Appellant specifically preserves and maintains the other assignment of error raised in his initial brief to this Court. This Honorable Court did not reach Appellant's other assignment of error, specifically, an issue personally raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), prior to remanding Appellant's case back to the Chief Trial Judge, Air Force Trial Judiciary.

Respectfully Submitted,



THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 29 January 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Panel No. 1
	)	
Staff Sergeant (E-5)	)	No. ACM S32719
DAMIEN K. WELSH	)	
United States Air Force	)	8 September 2022
Appellant	)	

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

Assignment of Error[1]

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE AND RAISES A PRESUMPTION OF PREJUDICE BECAUSE IT DOES NOT CONTAIN EIGHT ATTACHMENTS TO THE STIPULATION OF FACT?

Statement of the Case

On 24 August 2021, Staff Sergeant (SSgt) Damien K. Welsh was tried by special court-martial at Aviano Air Base, Italy (Aviano). Record (R.) at 1. Pursuant to SSgt Welsh's plea in accordance with a plea agreement, the military judge found him guilty of Specifications 1, 2, and 5[2] of the Charge of assault consummated by a battery upon a spouse, in violation of Article 128, Uniform Code of Military Justice (UCMJ), and an Additional Charge and Specification of assault consummated by a battery upon a spouse, in violation of Article 128, UCMJ. R. at 86; *see also* Appellate Exhibit (App. Ex.) I. Also pursuant to the plea agreement, the government moved to

[1] Staff Sergeant Damien K. Welsh raises a separate issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

[2] The military judge excepted the words "on divers occasions" from Specification 5 and found SSgt Welsh not guilty of the excepted words. R. at 86.

withdraw and dismiss with prejudice Specifications 3 and 4 of the Charge. R. at 114; *see also* App. Ex. I.

Neither the government nor the defense called any witnesses to testify during presentencing proceedings. However, the defense presented an oral and written unsworn statement from SSgt Welsh. R. at 93-94; Defense Exhibit (Def. Ex.) C. The military judge also received a victim impact statement from A.W.[3], SSgt Welsh's former wife. R. at 111; Court Exhibit (Ct. Ex.) A. The military judge sentenced SSgt Welsh to confinement for a total of 95 days[4], forfeiture of $400.00 pay per month for three months, reduction to the grade of E-1, a bad-conduct discharge, and a reprimand. R. at 112-13. The convening authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, dated 4 October 2021.

Statement of Facts

At trial, the government introduced a stipulation of fact into evidence as Prosecution Exhibit (Pros. Ex.) 1. R. at 19. The stipulation of fact was a seven-page document that also contained eight attachments. Pros. Ex. 1 ¶ 35. According to the stipulation of fact, the attachments consisted of photos of bruises to the victim, A.W. and audio recordings of conversations between SSgt Welsh and A.W. *Id*. The stipulation of fact repeatedly referenced the attachments throughout that document. *Id*. ¶¶ 10, 12, 13, 15, 21.

In conducting a colloquy with SSgt Welsh prior to admitting Pros. Ex. 1 into evidence, the military judge noted that the stipulation of fact contained attachments and that all parties were stipulating to the admissibility of both the stipulation of fact and its attachments. R. at 18-19.

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[3] A.W. was a servicemember on active duty at the time of the offense and sentencing.

[4] The military judge sentenced SSgt Welsh to be confined for 15 days for Specification 1 of the Charge, 15 days for Specification 2 of the Charge, 40 days for Specification 5 of the Charge, and for 25 days for the Specification of the Additional Charge, with all sentences to confinement to run consecutively. R. at 112-13.

During presentencing arguments, trial counsel referred to these attachments, urging the military judge to consider the audio recordings contained in attachments 2 and 3 to Pros. Ex. 1. R. at 99. Specifically, trial counsel quoted a comment purportedly made by SSgt Welsh on the audio recording contained in attachment 2. *Id*. Trial counsel also argued that SSgt Welsh had a "matter-of-fact tone" during the conversation that was depicted in attachment 2. *Id*. Further, trial counsel directed the military judge's attention to the audio recording on attachment 3, stating "[t]o add insult to her injuries, listen to attachment three." *Id*. at 100. Outside of these comments, the transcript does not appear to provide any more details concerning what specific information was contained in the attachments, such as the length of the audio recordings or the content of the conversations contained in the recordings.

The record of trial was certified on 28 October 2021. ROT, Vol. 2, Certification of Record of Trial. However, the record of trial does not appear to contain the eight attachments to the stipulation of fact, which was admitted into evidence as Pros. Ex. 1. *See* ROT, Vol. 2.

Argument

I.

THE RECORD OF TRIAL IS INCOMPLETE AND RAISES A PRESUMPTION OF PREJUDICE BECAUSE EIGHT ATTACHMENTS TO THE STIPULATION OF FACT, WHICH THE GOVERNMENT ADMITTED AS AN EXHIBIT AT TRIAL, ARE NOT INCLUDED IN THE RECORD.

Standard of Review

"[W]hether the record of trial is incomplete [is] a question of law which [courts] will review *de novo*." *United States v. Henry*, 53 M.J. 108, 110 (C.A.A.F. 2000) (emphasis in original). This Court "must approach the question of what constitutes a substantial omission on a case-by-case basis." *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999).

Law

A "special court-martial shall keep a separate record of the proceedings in each case brought before it." Article 54(a), UCMJ. "In accordance with regulations prescribed by the President, a complete record of proceedings and testimony shall be prepared in any case" involving, among other things, a discharge. Article 54(c)(2), UCMJ. Pursuant to the Rules for Courts-Martial (R.C.M.), the "record of trial in every general and special court-martial shall include" the exhibits that were received in evidence. R.C.M. 1112(b).

"The requirement that a record of trial be complete and substantially verbatim in order to uphold the validity of a verbatim record sentence is one of jurisdictional proportion that cannot be waived." *Henry*, 53 M.J. at 110. "In assessing [] whether a record is complete . . . the threshold question is 'whether the omitted material was 'substantial,' either qualitatively or quantitatively.'" *United States v. Davenport*, 73 M.J. 373, 377 (C.A.A.F. 2014) (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." *Henry*, 53 M.J. at 111.

Analysis

The record of trial is not complete because the omission of all eight of the attachments to Pros. Ex. 1 (the stipulation of fact) from the record is substantial. Moreover, this substantial omission creates a presumption of prejudice. Accordingly, without the inclusion of these attachments, this Court cannot properly evaluate the propriety of SSgt's Welsh's sentence and, as a result, this Court should disapprove SSgt Welsh's bad-conduct discharge.

The omission from the record of the attachments to the stipulation of fact is substantial qualitatively. Specifically, the missing attachments appear to contain evidence that is significant to this Court's duty to assess whether SSgt Welsh's sentence is correct in law and fact, as well as

the appropriateness of that sentence, pursuant to Article 66(d), UMCJ. The stipulation of facts is indisputably critical evidence in a guilty plea. Here, the stipulation of fact contained numerous references to the missing attachments. Pros. Ex. 1 ¶¶ 10, 12, 13, 15, 21. While the stipulation of fact generally describes the attachments as either photos of A.W.'s bruises or audio conversations between SSgt Welsh and A.W., no specific details are provided. For example, the stipulation of fact mentions that A.W. recorded two portions of a conversation that she had with SSgt Welsh, but there are no details about the content of those conversations. *See* Pros. Ex. 1 ¶ 12. Without access to these missing attachments, this Court cannot conduct a proper inquiry into the correctness or appropriateness of SSgt Welsh's sentence.

The substantial nature of the omission of these attachments from the record is further underscored by the fact that trial counsel not only referred to the attachments in presentencing arguments, but specifically urged the military judge to consider them. Trial counsel encouraged the military judge to listen to the audio recordings that were contained in attachments 2 and 3 in support of trial counsel's argument that SSgt Welsh had "hedged his apology" to A.W. and that he had "arrogance in his voice." R. at 99-100.

The emphasis that trial counsel attributed to these attachments in presentencing arguments demonstrates the substantial nature of their omission for a number of reasons. First, similar to the references in the stipulation of fact to the missing attachments, this Court cannot meaningfully assess a number of potential issues as part of its Article 66, UCMJ, review—such as the propriety of trial counsel's presentencing argument and reference to the attachments or whether SSgt Welsh's sentence is appropriate—without these missing attachments. Second, the fact that trial counsel emphasized these attachments in presentencing arguments distinguishes SSgt Welsh's case from other cases where this Court has held that exhibits missing from the record of trial were

not substantial. *See United States v. Lovely*, 73 M.J. 658, 676 (A.F. Ct. Crim. App. 2014) (holding that the absence of a defense exhibit from the record of trial was not substantial and did not render the record of trial incomplete where, among other things, trial defense counsel did not mention the exhibit during his sentencing argument).

Further, the omission of the attachments from the record of trial is substantial quantitatively. The sentencing proceedings in this case were brief. The government introduced only four exhibits. R. at 19, 85, 88-90. Critically, the only exhibit that contained substantive evidence of SSgt Welsh's crime that was relevant to the military judge's sentencing determination was Pros. Ex. 1—the stipulation of fact.[5] Nor did the government call any witnesses to testify.

Thus, given the fact that very little evidence was presented during the sentencing proceedings, the attachments to the stipulation fact gained added significance under the unique circumstances of this case. The omission of this substantial evidence from the record of trial prejudices SSgt Welsh by inhibiting this Court's ability to assess the correctness and appropriateness of his sentence. *See United States v. Stoffer*, 53 M.J. 26, 27 (C.A.A.F. 2000) (holding that the omission of three defense exhibits from the record was substantial as to sentencing and disapproving bad-conduct discharge as a remedy for the prejudicial omission).

Given the substantial nature of the missing attachments, this Court cannot adequately undertake its required Article 66, UCMJ, review, nor can it properly address the other issue personally raised by SSgt Welsh. This Court should remedy this prejudicial omission from the record of trial by remanding this case for the record to be completed with the missing attachments.

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[5] Pros. Ex. 2 was a stipulation of expected testimony from SSgt A.W. that was admitted after the providence inquiry, but before the military judge issued findings. R. at 85-86. However, prior to announcing the sentence, the military judge stated that he "did not consider [Pros. Ex. 2] for sentencing purposes." R. at 112. Pros Exs. 3 and 4 consisted of SSgt Welsh's Enlisted Performance Reports and personal data sheet, respectively. R. at 88, 90.

Upon remand, if the record cannot be completed, this Court should disapprove and set aside the bad-conduct discharge.

WHEREFORE, SSgt Welsh respectfully requests that this Honorable Court remand the case for the record to be completed or, if the record cannot be completed, disapprove the bad-conduct discharge.[6]

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

[6] While not raised as an assignment of error, SSgt Welsh also notes that the Charge Sheet included in the record of trial does not reflect that Specifications 3 and 4 of the Charge were withdrawn and dismissed with prejudice, nor does the charge sheet indicate that the military judge excepted the words "on divers occasions" from Specification 5. ROT, Vol. 1, Charge Sheet.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 8 September 2022.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Staff Sergeant (SSgt) Damien K. Welsh, through appellate defense counsel, personally requests that this Honorable Court consider the following matter:

II.

SSGT WELSH'S SENTENCE, SPECIFICALLY THE ADJUDGED BAD-CONDUCT DISCHARGE, IS INAPPROPRIATELY SEVERE.

Additional Facts

SSgt Welsh and A.W. married in December 2016 in the middle of SSgt Welsh's one-year short tour to Korea. Pros. Ex. 1. But, as A.W. readily admitted, their marriage quickly set off on a "confusing and an emotional roller coaster that no one, not even myself, will ever understand." Ct. Ex. A.

After getting married, the couple had no time to grow into their marriage together as SSgt Welsh immediately returned to Korea and eventually transferred to Aviano in September 2017. Pros. Ex. 1 at 1. A.W. herself was deployed to the Middle East and did not arrive in Aviano until May 2020. *Id*. A.W.'s arrival began their first prolonged co-habitation as a married couple in their nearly four-year marriage, albeit during the middle of a worldwide pandemic. *Id*.

Shortly after joining each other in Italy, SSgt Welsh and A.W. began to engage in verbal arguments. Pros. Ex. 1 at 2. Their marriage would vacillate between times of happiness and contentment to "times of anger and frustration." *Id*. Most of the arguments would begin by A.W. interrupting SSgt Welsh or by A.W. "intentionally act[ing] in a manner to annoy SSgt Welsh because she felt as though he was not paying attention to her or was not spending enough time with her." *Id*.

In September 2020, after an argument between the two, A.W. actually slapped SSgt Welsh's face with her hand. *Id*. The couple had recurring arguments during this period. *Id*. These arguments would often have a common theme: A.W. would want to talk about an issue they were experiencing while SSgt Welsh wanted to isolate himself until emotions were not so high. *Id*. In fact, SSgt Welsh told A.W. that he did not like to be touched when he was angry. *Id*. Despite knowing this, on one occasion, A.W. held onto SSgt Welsh during a verbal altercation "in an attempt to get him to focus on her so they could talk through the issue at hand." *Id*.

This same dysfunctional pattern continued and culminated with the incidents in December 2020 which led to the charged offenses. On 15 December 2020, while SSgt Welsh was playing video games, A.W. blocked his view of the computer screen "for the express purpose of annoying him." *Id*. She then grabbed SSgt Welsh's headphones, threw them on the ground, and turned off the screen. *Id*. SSgt Welsh responded by telling her to leave the room, pushing her with his hand, and grabbing her to throw her out of the room. *Id*. During this process, A.W. grabbed SSgt Welsh's leg. Pros Ex. 1 at 3. He tried to pull away, but she would not let go. *Id*. He yelled at her, but she did not let go. He finally shook his leg to try to get her to let go, but she did not. *Id*. When A.W. continued to refuse to let go of SSgt Welsh's leg, he responded by striking her with his foot in the chest. *Id.*

Similarly on 31 December 2020, after a night of drinking in which A.W. had consumed six glasses of wine, SSgt Welsh, believing she was intoxicated, got into an argument with her about her ability to drive to respond to an airman in her unit who was locked out of his room. Pros Ex. 1 at 3-4. During this argument, when SSgt Welsh tried to make a call, A.W. grabbed his phone out of his hand and dropped it on the ground. Pros. Ex. 1 at 4. SSgt Welsh yelled at A.W. to get out of his room. *Id*. When she refused, he responded by pushing her out of his room. *Id*. A.W.

then slapped SSgt Welsh's head, and he responded by pushing her into the living room where he ultimately grabbed her around the neck with his hands. *Id*.

After these events, A.W. and SSgt Welsh divorced in July 2021. Pros. Ex. 1 at 2. SSgt Welsh then took responsibility for his actions by entering into a plea agreement to plead guilty to certain specifications in August 2021. App. Ex. I. During trial, in his unsworn statement, SSgt Welsh specifically expressed his remorse by apologizing to A.W.:

> I know what I did was wrong. It was unacceptable. It was a failure of my commitment to our marriage. I regret that I cannot be the man you wanted me to be, that you hoped I would become. It is something I will live with for the rest of my life.

R. at 94.

Even in her victim impact statement, A.W. agreed that their marriage was dysfunctional and that their relationship was not normal, admitting that they "would get into arguments about stupid things." Ct. Ex. A. Yet A.W. still recognized the rehabilitative potential within SSgt Welsh, stating that "[d]espite Damien's actions, he has a good heart. He wants to help other people and I hope he can learn from his mistakes, make new goals, and eventually be in a happy relationship one day." *Id*.

Standard of Review

The standard of review for sentence appropriateness is de novo. *United States v. Lane*, 64 M.J.1, 2 (C.A.A.F. 2006).

Law

Appellate courts have "not only the power but also the independent duty to consider the appropriatenes" of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of

the entire record, should be approved." Article 66(d)(1), UCMJ. "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See*, *e.g. United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Sentence appropriateness is assessed by considering the appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

Analysis

SSgt Welsh's sentence, in particular the adjudged bad-conduct discharge, is inappropriately severe. As SSgt Welsh admitted at trial, his conduct relating to the charged offenses was unacceptable. R. at 94. Accordingly, he took responsibility for his actions, pleaded guilty to the charge of assault consummated by a battery upon a spouse, admitted his wrongdoing, and expressed his remorse by apologizing to his former wife, A.W. *Id*. at 11, 94. SSgt Welsh's guilty plea, particularly when considered in conjunction with A.W.'s acknowledgment that he had a good heart and ultimately wanted to help other people, *see* Ct. Ex. A, should have been weighed in his favor in determining an appropriate sentence for him.

Instead, the military judge imposed a bad-conduct discharge, which was "greater than necessary" to promote justice under the unique circumstances of this case. Article 56(c), UCMJ. SSgt Welsh had a right to have his sentence be determined by an "individualized consideration ... on the basis of the nature and seriousness of the offense and the character of the offender." *United*

States v. McNutt, 62 M.J. 16, 19-20 (C.A.A.F. 2005) (internal citation omitted). The imposed sentence failed to provide the required individualized consideration here. A review of the unique circumstances of the offense and SSgt Welsh's character demonstrates that a bad-conduct discharge is inappropriate here.

First, there were significant extenuating circumstances present in this case. SSgt Welsh and A.W. suffered from a tragically dysfunctional marriage, which A.W. described as a "roller coaster." Ct. Ex. A. Their marriage started out in a difficult position due to the inherent stresses of being married to a fellow servicemember. Although they were married in late 2016, due to deployments and assignments at separate bases, the couple were not able to spend any significant time together until A.W. arrived at Aviano nearly four years later in May 2020. Pros. Ex. 1 at 1. But what should have been a significant step in their marriage still resulted in stress. The couple began their co-habitation oversees in the middle of a global pandemic, separated from any family support with the added isolation caused by various lockdowns. These unique challenges created a difficult, volatile situation for both A.W. and SSgt Welsh and contributed to SSgt Welsh exhibiting unacceptable conduct that was inconsistent with his character and record of service.

Moreover, the adjudged sentence is inappropriately severe because the permanent stigma attached to a bad-conduct discharge is an unduly harsh punishment given the unique facts and circumstances of this case. The imposition of a punitive discharge will have permanent effects on SSgt Welsh's future, including his legal rights, economic opportunities, and social acceptability, that are disproportionate to the conduct at issue here. *See United States v. Soriano*, 20 M.J. 337, 342 (C.M.A. 1985) (noting the "long established view of this Court that Congress and the President intended this punishment to be severe and to be treated as severe by those who impose sentences at courts-martial.").

While his conduct was unacceptable, SSgt Welsh's actions were limited to isolated instances that occurred in a confusing, difficult, and extremely stressful time both in his life and in his dysfunctional marriage with A.W. As trial defense counsel explained in presentencing arguments, SSgt Welsh's charged conduct did not involve a situation where he initiated unwarranted conduct with an innocent bystander. R. at 103, 106. Rather, as the stipulation of fact illustrates, each of these incidents began with A.W. initiating a verbal argument, often "intentionally act[ing] in a manner to annoy SSgt Welsh," Pros Ex. 1 at 2, and were elevated with A.W. engaging SSgt Welsh physically. Pros. Ex. 1 at 2-4.

Without question, SSgt Welsh's response to the conflict A.W. initiated was unacceptable. SSgt Welsh owned up to his mistakes and admitted his wrongdoing on multiple occasions during trial. But the setting in which this conduct occurred provides context on the circumstances of SSgt Welsh's charged offenses and demonstrates that a bad-conduct discharge is an inappropriate sentence where his actions arose in the middle of difficult and highly stressful situations. A punitive discharge is inappropriate here where it will unfairly characterize an otherwise successful service record. *See* Pros Exs. 3 and 4. Nor should SSgt Welsh continue to be burdened with the stigma of a punitive discharge, which will remain a continuing obstacle as he tries to advance in his civilian life, for conduct that occurred in a limited, but tragically stressful window of his marriage to A.W.

Finally, the imposition of a bad-conduct discharge is not necessary to promote good order and discipline or to provide adequate deterrence under the unique circumstances of this case. SSgt Welsh's expiration of term of service date was 1 September 2021, just a matter of weeks after his trial. R. at 72. Thus, his career was over regardless of the imposition of the punitive discharge. Moreover, the multiple convictions for assault consummated by a battery upon a spouse will serve

as a lasting reminder of his crimes. These convictions will specifically deter him from any future misconduct and provide general deterrence to the rest of the Air Force, such that a bad-conduct discharge is not only unnecessary, but inappropriate.

WHEREFORE, SSgt Welsh respectfully requests that this Honorable Court exercise its authority under Article 66, UCMJ, to modify his sentence, and at minimum, disapprove the imposition of a bad-conduct discharge.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) **DAMIEN K. WELSH** United States Air Force *Appellant.*	)))))))))	ANSWER TO ASSIGNMENT OF ERROR Before Panel No. 1 No. ACM S32719 11 October 2022

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

ISSUES PRESENTED

I.

WHETHER THE RECORD OF TRIAL IS INCOMPLETE AND RAISES A PRESUMPTION OF PREJUDICE BECAUSE IT DOES NOT CONTAIN EIGHT ATTACHMENTS TO THE STIPULATION OF FACT?

II.

SSGT WELSH'S SENTENCE, SPECIFICALLY THE ADJUDGED BAD-CONDUCT DISCHARGE, IS INAPPROPRIATELY SEVERE.[1]

STATEMENT OF CASE

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

STATEMENT OF FACTS

Appellant pled guilty at a special court martial on 24 August 2021 to one charge and three specifications, as well as an additional charge and specification, of assault consummated by battery upon a spouse in violation of Article 128, Uniform Code of Military Justice (UCMJ).

[1] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

The military judge sentenced him to 15 days confinement for Charge I, Specification 1; 15 days confinement for Charge I, Specification 2; 40 days confinement for Charge I, Specification 5; and 25 days confinement for the Additional Charge, all to run consecutively for a total of 95 days confinement. (ROT, Vol. 1, Entry of Judgment, dated 27 October 2021). Additionally, the military judge sentenced him to forfeiture of pay in the amount of $400.00 per month for three months, reduction in grade to E-1, a bad conduct discharge, and a reprimand. (Id.)

After an extensive colloquy in which Appellant stated in his own words why he was guilty of each element of each crime, the military judge accepted Appellant's guilty plea. (R. at 80). Additionally, the Stipulation of Fact signed and submitted by both parties discussed the incidents to which Appellant was pleading guilty. (Pros. Ex. 1.) Other incidents corresponding to the Charge I, Specifications 1, 2, and 5, and the Additional Charge were described throughout the Stipulation of Fact. The government also introduced a Stipulation of Expected Testimony by SSgt A.W., the named victim in the case, who explained the circumstances surrounding each incident to which Appellant was pleading guilty. (Pros. Ex. 2.)

During sentencing, SSgt A.W. submitted a victim impact statement in which she described the fear that Appellant caused her to have.

> "I would look for his car before I went anywhere, but then I just started avoiding going places altogether…I have extreme anxiety now. I have scars on my knees constantly reminding me of being thrown on the ground. Loud noises, yelling, big crowds, and people fighting can cause me to start shaking. Sometimes wearing a mask is uncomfortable because all I remember is the feeling of something around my neck, not being able to breath [sic]."

(Court Ex. A ¶ 5).

ARGUMENT

I.

THE RECORD IS SUBSTANTIALLY COMPLETE AND THERE WAS NO PREJUDICE TO APPELLANT.

Standard of Review

Whether a record of trial is complete is a question of law that is reviewed de novo. United States v. Davenport, 73 M.J. 373, 376 (C.A.A.F. 2014).

Law

A complete record of proceedings, including all exhibits and a verbatim transcript, must be prepared for any general or special court-martial that results in a punitive discharge or more than six months of confinement. Article 54(c)(2), UCMJ. Appellate courts understand that inevitably records will be imperfect, and therefore review for substantial omissions. *See* United States v. Lashley, 14 M.J. 7, 8 (C.M.A. 1982). A substantial omission renders a record 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)(citing United States v. McCullah, 11 M.J. 234, 237 (C.M.A. 1981)). Insubstantial omissions do not raise a presumption of prejudice or affect the record's characterization as complete. Id. A substantial omission may not be prejudicial if the appellate courts are able to conduct an informed review. United States v. Simmons, 54 M.J. 883, 887 (N-M. Ct. Crim. App. 2001); *see also* United States v. Morrill, ARMY 20140197, 2016 CCA LEXIS 644, at *4-5 (A. Ct. Crim. App. 31 October 2016) (unpub. op.) (finding the record "adequate to permit informed review by this court and any other reviewing authorities") (citation omitted).

In Henry, the Court of Appeals for the Armed Forces (CAAF) held that omission of "an accused's personnel record" was insubstantial. 53 M.J. at 111 (citing United States v. Harper, 25

M.J. 895 (A.C.M.R. 1988)). CAAF then considered the omission of four prosecution exhibits to be insubstantial, partially because the court was able to determine the contents of the exhibits from the record. Id.

Analysis

Appellant argues that the omission of the attachments to Prosecution Exhibit 1 is substantial and therefore prejudicial to him. The Government acknowledges the original ROT does not include any of the eight (8) attachments to Prosecution Exhibit 1. However, at the outset, no remedy is warranted because the missing evidence has been provided through a motion to attach contemporaneous with this filing. Further, even assuming error, there is no prejudice to Appellant. The findings and sentence in Appellant's case should be affirmed without further action. Finally, should this Court disagree, the appropriate remedy is to return the ROT to the military judge for correction, under R.C.M. 1112(d)(2).

A. Appellant suffered no prejudice.

Even if the Court assumes the omission of the attachments to Prosecution Exhibit 1 is a substantial omission, reassessment of Appellant's sentence is not required; instead, it merely "raises a presumption of prejudice which the Government may rebut." United States v. Abrams, 50 M.J. 361, 363 (C.A.A.F. 1999). In United States v. King, this Court addressed rulings missing from the record, but recognized three areas in which Appellant might experience prejudice from the incomplete record: 1) at trial; 2) during clemency, and 3) on appeal. (2021 CCA LEXIS 415, at *12 (A.F. Ct. Crim. App. 16 August 2021) (unpub. op.). Here, Appellant was not prejudiced at any of these steps, and the presumption of prejudice has been rebutted.

At trial, Appellant was not prejudiced by the omitted evidence because of his pleas and the accompanying providence inquiry and the availability of the attachments to Appellant. The

military judge conducted a thorough colloquy with Appellant on his pleas and also considered the evidence contained in SSgt E.W.'s Stipulation of Expected Testimony. Thus, no prejudice occurred at trial.

As for the clemency phase, Appellant did not identify or raise any issue with the omitted attachments when he submitted his clemency request and, as a result, he was not prejudiced. (*Convening Authority Decision on Action*, 28 October 2020, ROT, Vol 1). For that reason, during the clemency stage, Appellant did not suffer any prejudice, and the presumption of prejudice has been rebutted.

Lastly, Appellant has suffered no prejudice on appeal because, since the missing attachments have been provided, this Court can conduct its duties under Article 66, UCMJ. This case is like King, where this Court determined the Government had successfully rebutted the presumption of prejudice when it provided the Court with the missing rulings and the Court could conduct its Article 66 review. 2021 CCA LEXIS, at *16. In the current case, undersigned counsel has provided the missing attachments through a contemporaneous motion to attach, and this Court can conduct its review with the full record. Therefore, any presumption of prejudice has been rebutted.

Since the Government has rebutted any presumption of prejudice, Appellant's claim should be denied, and his sentence should be affirmed.

B. Even if Appellant suffered prejudice from the omission, the appropriate remedy is remand for correction.

Should this Court determine that prejudicial error occurred, the appropriate remedy is found in R.C.M. 1112(d)(2). This Rule establishes the procedure for correcting a record after certification. The Rule authorizes a "superior competent authority" to "return a record of trial to the military judge for correction." (Id.) The military judge may then reconstruct the portion of

the record affected. R.C.M. 1112(d)(3)(A). Therefore, should this Court find prejudicial error, the record of trial should be returned to the military judge for appropriate action. But the United States reaffirms its position that such action is unnecessary because the missing documents have been provided through the Motion to Attach, and there is no prejudice to Appellant.

II.

SSGT WELSH'S SENTENCE, SPECIFICALLY THE ADJUDGED BAD-CONDUCT DISCHARGE, IS PROPER AND NOT INAPPROPRIATELY SEVERE.[2]

Additional Facts

As part of his plea agreement, Appellant accepted possible confinement of 15 days minimum and 240 days maximum *each* for Charge I, Specifications 1, 2, and 5, and the Additional Charge and Specifications to run consecutively. (App. Ex. I ¶ 3). Each confinement period could run consecutively but could not exceed 8 months. (Id.) Additionally, Appellant agreed that if he was found guilty of the named charges and specifications, "the military judge may sentence [him] to a bad conduct discharge." (App. Ex. I ¶ 4).

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (citation omitted). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

Law

Sentence appropriateness is assessed "by considering the particular appellant, the nature

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[2] Appellant has raised this issue under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Although this Court has great discretion to determine whether a sentence is appropriate, the Court has no authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988). A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.).

Analysis

Appellant argues that the sentence in his case was inappropriately severe, specifically the bad conduct discharge. (App. Br. at 12). However, the government disagrees for three reasons. First, Appellant received the benefit of a plea agreement. (App. Ex. I). This alone is "some indication of the fairness and appropriateness of his sentence." Perez, 2021 CCA LEXIS at *7. Pursuant to the plea agreement, the convening authority agreed to dismiss two of the specifications Appellant initially faced. (ROT, Vol. 1, Entry of Judgment, dated 27 October 2021). A plea agreement that dismisses specifications is a "benefit" an appellant receives when accepting responsibility. *See* United States v. Matichuk, No. ACM S32611, 2020 CCA LEXIS 278, at *6-7 (A.F. Ct. Crim. App. 19 August 2020) (unpub. op.).

Second, Appellant received well below the maximum punishment that was authorized for these offenses. The maximum punishment for four specifications of assault consummated by a

battery of a spouse is two years confinement per specification, or a total of eight years confinement if adjudicated consecutively. Manual for Courts-Martial, United States part IV, para. 77d(2)(f) (2019 ed.). As part of Appellant's plea agreement, the maximum punishment agreed upon was, in essence, eight months confinement with the acknowledgement that Appellant could receive a bad conduct discharge. (App. Ex. I ¶ 4). Ultimately, the military judge determined an appropriate sentence was 95 days confinement for all charges and specifications, forfeiture of $400.00 in pay per month for three months, reduction in grade to E-1, a bad conduct discharge, and a reprimand. (ROT, Vol. 1, Entry of Judgment, dated 27 October 2021). The sentence was well within the maximum available and agreed upon punishment given Appellant's pleas of guilty. Appellant was ultimately sentenced to only a small portion of the maximum term of confinement allowed and agreed upon.

Third, Appellant's sentence is appropriate because it is proportional to the severity of his offenses against his wife. During the plea colloquy, Appellant admitted to pushing SSgt A.W. such that she hit a wall, grabbing her by the wrist and physically throwing her out of the room, and hitting her in the chest with his foot. (R. at 17). He also admitted to strangling her with his hands. (R. at 18).

In her unsworn statement during trial, SSgt A.W. recounted her fear of the Appellant, stating,

> I would look for his car before I went anywhere, but then I just started avoiding going places altogether…I have extreme anxiety now. I have scars on my knees constantly reminding me of being thrown on the ground. Loud noises, yelling, big crowds, and people fighting can cause me to start shaking. Sometimes wearing a mask is uncomfortable because all I remember is the feeling of something around my neck, not being able to breath [sic].

(Court Ex. A ¶ 5).

However, Appellant does not consider the impact on SSgt A.W. in his plea for leniency. Instead, Appellant's argument focuses on four reasons related to him for why the sentence is inappropriately severe. First, he argues that "there were significant extenuating circumstances" in this case, including the fact that he and SSgt A.W. had a "tragically dysfunctional marriage." (App. Br. at 13). SSgt A.W. confirms this in her Stipulation of Expected Testimony. However, a dysfunctional marriage does not provide justifiable grounds for Appellant to commit assault consummated by battery against his spouse. No amount of dysfunction justifies assault, and Appellant's circumstances were no different.

Second, Appellant argues that the stigma attached to a bad conduct discharge makes it inappropriately severe, and that the incidents to which he pled guilty were isolated. This is plainly incorrect. Appellant's argument would hold muster if he had pled guilty to one incident. But he was convicted of four incidents of assault consummated by battery against a spouse, which qualify them as a pattern. For a pattern of assault, a bad conduct discharge is appropriate regardless of the stigma Appellant may have to face as a result. The stigma of a bad conduct discharge is part of the reason such a characterization is even given in cases involving criminal misconduct. It is meant to serve as a punishment.

Third, Appellant states that "the imposition of a bad-conduct discharge is not necessary to promote good order and discipline or to provide adequate deterrence under the unique circumstances of this case," considering that his term of service expired on 1 September 2021, a few weeks after his court martial. (App. Br. at 14). However, the fact that he is no longer in the military as a result of his court martial is the exact tool that commanders can use to preserve good order and discipline. Appellant also claims that multiple convictions for assault will serve to deter him in the future but provides no explanation or evidence showing why that is, in fact,

the case. As a result, Appellant's argument for leniency is not persuasive, and the bad conduct discharge should be upheld.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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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 October 2022.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Staff Sergeant (E-5) **DAMIEN K. WELSH,** United States Air Force, *Appellant.*	**REPLY BRIEF** Before Panel No. 1 No. ACM S32719 Filed on: 18 October 2022

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

Appellant, Staff Sergeant (SSgt) Damien K. Welsh, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 11 October 2022 [hereinafter Gov. Ans.]. SSgt Welsh stands on the arguments in his initial brief, filed on 8 September 2022 [hereinafter App. Br.], but submits additional arguments for the issue listed below.

I.

THE RECORD OF TRIAL CONTAINS A SUBSTANTIAL OMISSION AND MUST BE REMANDED FOR CORRECTION BECAUSE EIGHT ATTACHMENTS TO THE STIPULATION OF FACT, WHICH WAS ADMITTED AS AN EXHIBIT AT TRIAL, ARE NOT INCLUDED IN THE RECORD.

The government acknowledges, as it must, that the record of trial does not include eight attachments to the stipulation of fact, which was admitted at trial as Prosecution Exhibit (Pros. Ex.) 1. Gov. Ans. at 4. The government also does not seriously dispute SSgt Welsh's contention that the omission of these attachments are quantitatively and qualitatively substantial. Gov. Ans. at 4-6. Rather, the government argues that even assuming that the omission of the attachments to Pros. Ex. 1 constituted a substantial omission, no remedy is warranted in this case because the

government provided the missing evidence in a motion to attach that was filed contemporaneously with the government's answer. Gov. Ans. at 4.

The government's argument should be rejected. The government's attempt to correct this substantial omission in the record of trial by including the missing attachments in a motion to attach filed in this Court is not the proper vehicle to address this omission. The proper method to correct a substantial omission in the record of trial is to remand the case and return the record of trial to the military judge for correction pursuant to Rules for Courts-Martial (R.C.M.) 1112(d). *See United States v. Mardis*, No. ACM 39980, 2022 CCA LEXIS 10, at *9 (A.F. Ct. Crim. App. 6 Jan. 2022) (unpub. op.). In *Mardis*, a case similar to the facts present here, several attachments to the stipulation of fact were omitted from the record of trial on appeal. *Id*. at *3-4. This Court granted the government's motion to attach, which included declarations from trial counsel concerning what was contained in the missing attachments, as well as the evidence that trial counsel attested was contained in the attachments that were admitted at trial but omitted from the record of trial. *Id*. at *4-5.

After reviewing the record, including the documents contained in the government's motion to attach, this Court held that the omissions were substantial and returned the record of trial for correction. *Id*. at *8-9. Relevant here, this Court noted that, while it considered the attachments to trial counsel's declaration to determine if the omission of the attachments from the record of trial was substantial, it "did not consider the exhibits as a means to complete the record." *Id*. at *7. Similarly, in *United States v. Perez*, No. ACM S32637, 2021 CCA LEXIS 285 at *3-4 (A.F. Ct. Crim. App. 14 Jun. 2021), six attachments to the stipulation of fact that was admitted as Pros. Ex. 1 at trial were not included in the original record of trial on appeal. This Court returned the

record of trial to the Chief Trial Judge, Air Force Trial Judiciary for correction of the record pursuant to R.C.M. 1112(d). *Id*.

In the same fashion as *Mardis* and *Perez*, this Court should return the record of trial for correction pursuant to R.C.M. 1112(d) to complete the record of trial with the missing attachments to Pros. Ex. 1. The missing attachments to Pros. Ex. 1 are substantial—a fact that the government does not dispute. Without the missing attachments, this Court cannot adequately undertake its required review pursuant to Article 66, Uniform Code of Military Justice.

Notably, as an alternative argument, the government recognizes that the procedure established in R.C.M. 1112(d) for correcting the record of trial is a possible remedy in this case. Gov. Ans. at 5. Yet the government maintains its position that no corrective action is necessary because the missing attachments were provided in the motion to attach. Gov. Ans. at 6. As noted above, this Court should reject the government's position. A motion to attach is not the proper procedure for correcting a substantial omission from the record of trial. A remand is necessary in this case for the record to be completed with the missing attachments.

WHEREFORE, SSgt Welsh respectfully requests that this Honorable Court remand the case for the record of trial to be completed.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 18 October 2022.

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