IN THE UNITED STATES COAST GUARD
COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Evan K. GOODELL Seaman Recruit Machinery Technician (E-1) U. S. Coast Guard, Appellant	14 August 2019 APPELLANT'S REPLY BRIEF Dkt. 1466 Case No. CGCMG 0370 Before McClelland, Judge, Brubaker Tried at Norfolk, Virginia by a general court-martial convened by Commander CG Personnel Service Center, on 5 June and 7 September 2018.

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COAST GUARD COURT OF CRIMINAL APPEALS

Machinery Technician Seaman Recruit (MKSR) Evan Goodell submits the following reply to the government's answer and brief pursuant to Rule 17 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals.

I[1]

A. The government incorrectly interprets RCM 1103(f).

The government holds the position that "[a] summarized report is required for action under R.C.M. 1103(f)(1), not R.C.M. 1103(f)(2)." (Gov't Answer at 15.) This is incorrect.

Rule 1103(f) is structured thus:

> (f) Loss of notes or recordings of the proceedings. If, because of loss of recordings or notes, or other reasons, a verbatim transcript cannot be prepared when required by subsection (b)(2)(B) or (c)(1) of this rule, a record which meets the requirements of

[1] The government's answer does not address Assignments of Error I through III individually. Appellant replies in kind.

> subsection (b)(2)(C) [summary report] of this rule shall be prepared, and the convening authority may:
>
> (1) Approve only so much of the sentence that could be adjudged by a special court-martial, except that a bad-conduct discharge, confinement for more than six months, or forfeiture of two-thirds pay per month for more than six months, may not be approved; or
>
> (2) Direct a rehearing as to any offense of which the accused was found guilty if the finding is supported by the summary of the evidence contained in the record, provided that the convening authority may not approve any sentence imposed at such a rehearing more severe than or in excess of that adjudged by the earlier court-martial.

MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1103 (2016) [hereinafter MCM].

The requirement to prepare a summary report, contained in the first paragraph, unambiguously applies equally to approving a lesser sentence *and* ordering a rehearing under subordinate paragraphs (1) and (2). As such, the government's interpretation of the requirements set forth in R.C.M. 1103 is incorrect.

B. The government's construction of R.C.M. 1103 is irreconcilable with the plain language and structure of the rule.

The government asserts that "RCM 1103(f)(2) allows a Convening Authority to order a hearing where there is an 'incomplete record of proceedings, and therefore the findings and sentence from the hearing are incapable of being acted upon.'" (Gov't Answer at 11.) To support this assertion, the Government cited *United States v. Gaskins*. 72 M.J. 225, 230 (C.A.A.F. 2013.) Neither R.C.M. 1103 nor *United States v. Gaskins*, allow a convening authority to order a rehearing without first taking action.

First, contrary to the government's position, R.C.M. 1103(f) does not recognize a category of situations in which the findings and sentence are "incapable of being acted upon." (Gov't Answer at 11.) Rather, the rule treats all findings and sentences as requiring action. It demands that a summary report "shall be prepared." The convening authority then has two options—approve only that sentence allowed by Article 54 or direct a rehearing. The basis and history of R.C.M. 1103(f) confirm this position and preclude the government's interpretation.

Rule for Courts-Martial 1103(f) is based on paragraphs 82 (h) and (i) of the 1969 Manual for Courts-Martial. MCM, App. 21 at A21-84 (2016). The precursor rule contained two explicit statements essential to properly construing R.C.M. 1103. First, it explains the substantive effect of the lacking verbatim transcript: "The fact that such a record does not contain a verbatim transcript of all the proceedings may deprive the accused of his right under the code to a full appellate review of his case and, thus, be a proper reason for disapproving any sentence adjudged." Second, it explicitly refers to the provision for rehearing contained then in paragraph 92. Paragraph 92, in turn, begins thus: "If the convening authority disapproves the findings of guilty and the sentence of a court-martial he may, except when there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval." MCM, ¶ 92 (1969).

The government's claim that the convening authority need not act on findings before ordering a rehearing is counter to the plain language of the rule and its guiding history. It is also unsupported by military precedents.

United States v. Gaskins does not support the government's position. *Gaskins* addressed a missing documentary exhibit, not missing verbatim transcript. The CAAF explicitly premised its analysis on the inapplicability of R.C.M. 1103 to missing exhibits. 72 M.J. 225 (C.A.A.F. 2013).

Most importantly, the complete post-trial process was followed in *Gaskins*. To the extent that *Gaskins* has any bearing on this case, its disposition calls this Court to set aside the findings and sentence as well; that was the relief ordered by the Army Court in *Gaskins* and affirmed as correct by the CAAF.

Likewise, *United States v. Howard*, does not support the government's position. 35 M.J. 763 (A.C.M.R. 1992). In that case the R.C.M. 1103 process was followed. A non-verbatim record was prepared and then authenticated by the military judge. The staff judge advocate correctly advised the convening authority in writing and the convening authority took action. *Id*. at 764-65.

Neither case cited by the government supports its position that a rehearing can be ordered without preparing a summarized report and taking action on the findings it contains.

C. The absence of any record of trial preceding the convening authority's rehearing order is, and must be, presumptively prejudicial.

The government puts forth two arguments that no prejudice resulted from the failure to follow the process outlined in R.C.M. 1103 and 1107. The first is that appellant was not prejudiced because he was not found guilty of the offense of which he was previously acquitted.[2] (Gov't Answer at 16.) But rehearing a specification of which the accused was previously acquitted is only one aspect of the error in ordering a rehearing in this case. Appellant is now unable to achieve adequate appellate review under Article 66.

The harm is not limited by the finding of not guilty at the second trial. Stopping the analysis here ignores the denial of adequate appellate review due to the lack of a transcript at the first trial. The government relies on *United States v. Smead* to argue the error was cured by the

[2] Reaching this conclusion would require this Court to rely upon documents outside the record of trial.

subsequent finding of not guilty. *United States v. Smead*, however, is distinguishable from the case *sub judice*. In *Smead*, there was a complete record of trial in the first hearing and the case was returned to the convening authority for corrective action after for a breach in the pre-trial agreement. 38 M.J. 44 (C.A.A.F. 2009). Consequently, Smead could, and did, receive complete review of the record in his case. That is not possible here. As a result, the government's argument fails.

The second argument put forth by the government is that the presumption of prejudice typically applied to incomplete records under Article 54 should not apply here. This argument lacks the support of both legal authority and logic. The government argues that the presumption of prejudice applied by the CAAF in *United States v. Davenport* should not apply to this case. In *Davenport* there was an authenticated record that was incomplete, but here trial counsel neither reported results of trial nor prepared a summary report. While the decision in *Davenport* did distinguish between records that are incomplete and those that are so incomplete that they fail to satisfy Article 54, the distinction runs counter to the government's assertion. *United States v. Davenport*, 73 M.J 373 (C.A.A.F. 2014). Correctly viewed, the principle at work in cases like *Davenport* is that the greater the quantity and quality of the gap in the record, the greater the presumptively prejudicial effect. Because *no* record was prepared or authenticated in this case, the presumption of prejudice is *more* necessary than in *Davenport,* where it was just a single witness's testimony that was omitted.

Allowing the presumption of prejudice to turn on whether trial counsel shirks his Article 38(a) duty to prepare a record of trial injects a perverse mismatch in roles and incentives. As Chief Judge Darden of the C.M.A. observed "[s]ince the Government is charged with the responsibility for the preparation of a verbatim record, the burden of rebutting that presumption

[of prejudice] falls on it rather than the defense." *United States v. Boxdale*, 47 C.M.R. 351 (C.M.A. 1973). The prejudice that results from an incomplete record is that it "deprive[s] the accused of his right under the code to a full appellate review of his case." MCM ¶ 82(i) (1969).

There is no reason that the presumption of prejudice applied to an incomplete authenticated record should not apply to a scenario such as this, where the preparation and authentication of the record is ignored in its entirety. This Court cannot review the military judge's pre-trial motions with the record that Congress intended under Articles 54 and 66. The military judge's after-the-fact written ruling is an insufficient substitute for the transcript of the Article 39(a) session because the evidence and arguments underlying it are not preserved for this Court's review. Moreover, if the case was properly reheard, the rulings in the first case would not continue to apply.

That preparation of the record of trial is the trial counsel's non-discretionary duty underscores the inaptitude of testing for prejudice. Requiring the appellant to demonstrate prejudice on a record that trial counsel failed to produce is not only contrary to the CAAF's decision in *Davenport*; it is impossible, illogical, and fundamentally unfair.

Notwithstanding the difficulty of making a showing, MKSR Goodell was prejudiced in at least two ways. First, the rehearing occurred roughly three months after the initial hearing. The absence of a proper record of this precludes meaningful analysis of the delay. Second, MKSR Goodell was also prejudiced by having to plead guilty, provide sworn testimony in the second providence inquiry, and present a sentencing case in extenuation and mitigation a second time.

D. Waiver cannot be applied to the incomplete record because MKSR Goodell's pleas were involuntary.

The Government answer asserts that MKSR Goodell waived any objection to the rehearing by pleading guilty. (Gov't Answer at 10.) This is incorrect on two fronts. First, MKSR Goodell's pleas were not voluntary and incapable, therefore, or effecting waiver. Second, MKSR Goodell was excluded from the post-trial process, so waiver—either expressly or by operation law—cannot by applied.

Regarding the first, the record fails to indicate the convening authority withdrew the charges and re-referred them to a new general court-martial. Consequently, the government's analogy to waiver of objections to improper referral under R.C.M. 905(e) is inapt. Similarly, *United States v. Sewell*, an unreported decision cited by the government, addressed portions of the record from a preceding referral of the case to General Court-Martial that did not reach trial on the merits. No. 201300432, (N-M.C.C.A. 2013). The missing portion of the record in *Sewell* was limited to litigation of pretrial issues waived by R.C.M. 905(e). Here, on the other hand, the deficient record implicates former jeopardy. While double jeopardy protection can be waived by a guilty plea, that waiver is premised in the voluntariness of the plea. *See United States v. Broce,* 488 U.S. 563, 574 (1989) (explaining that a voluntary and intelligent plea relinquishes double jeopardy claim). MKSR Goodell's guilty plea was not voluntary: it was obtained by the convening authority's improper application of military authority under Article 90 to prohibit MKSR Goodell from contacting his son.

Secondly, the complete omission of the post-trial process following the first hearing of this case also precludes waiver because the defense was entirely excluded from participating in the post-trial process heading to the rehearing. The defense was precluded from submitting R.C.M. 1107 matters by the staff judge advocate's failure to prepare written advice and provide it to the defense. The exclusion of the defense from the process makes waiver is impossible.

E. Relief.

The Army Court in *United States v. Steele*, cited in the government's answer, points out that the 2014 amendment to Article 60 creates a "do-loop" wherein one law requires the convening authority to take an action that another law prohibits. No. 20170303 (A.C.C.A. 2019) In light of the convening authority's inability to effectuate the requirements of Article 54 in this case, MKSR Goodell hereby requests this Court disprove the portion of the sentence that extends to a bad-conduct discharge and confinement beyond six months.

IV.

A. A *sub rosa* agreement is one that is not contained in the written agreement.

The government argues that the unwritten agreement to rescind the MPO then in place was permissible because it was within "the parties [*sic*] understanding of the impact of the order contained in the pretrial agreement." (Gov't Answer at 21.) By labeling rescission an "impact," not a term, the government argues it is "not an agreement, *sub rosa*, or otherwise." (Gov't Answer at 21.) This rhetorical contortion is contrary to the R.C.M. 705 requirement for a complete written agreement and unsupported by any citation to authority. As such, this Court should decline to adopt the government's position.

V.

A. MKSR Goodell had to accept the pre-trial agreement if he wanted to exercise his parental visitation rights under state law.

The government answer argues "[i]f Appellant thought he was being impermissibly coerced he could have declined to enter into the agreement." (Gov't Answer at 22.) This claim fails to account for the staff judge advocate's resolute refusal to process MKSR Goodell's Article 138 request for redress to the convening authority. (Appendices A, B, & C.)

B. MKSR Goodell was barred by the staff judge advocate from challenging the lawfulness of the MPO.

The government argues that this Court should countenance the convening authority's leverage of MPOs in plea negotiations because "Appellant does not directly challenge the lawfulness of the order." This is incorrect. MKSR Goodell challenged the lawfulness of this order by requesting redress under Article 138 and in an assignment of error in *Goodell I.* Both the staff judge advocate and this Court have, so far, refused to consider his challenges. (Appendices A, B, & C.); *United States v. Goodell* 78 M.J. 585 (C.G.C.C.A. 2019).

Similarly, the government argues "[i]f [MKSR Goodell] really believed the orders so wronged him he could have exercised his right to plead not guilty and challenged their appropriateness directly." This too is incorrect. MKSR Goodell complied with the over-broad MPO and was thus not charged with violating it. The charges did not address the MPO and contesting them would not have put the lawfulness of the order before a military judge.

Conclusion

MKSR Goodell's guilty plea was not voluntary; it was the product of a course of conduct by the convening authority that demonstrated to MKSR Goodell he could not rely on the procedures in the UCMJ for a fair trial. While revisions to Article 60 may have put the convening authority between a legal rock and a hard place, the wholesale departure from the Rules of Court-Martial was not the right way out. *See United States v. Steele*, No. 20170303 (A.C.C.A. 2019). The trial counsel's failure to produce any record of the first trial forecloses this Court from fulfilling its mandated Article 66 review.

WHEREFORE, MKSR Goodell requests this honorable Court disprove the portion of the sentence that extends to a bad-conduct discharge and confinement beyond six months, or in the

alternative, disapprove the findings and sentence produced by MKSR Goodell's involuntary plea.

DATE: 14 August 2019

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was delivered by email to the Court and opposing counsel on 14 August 2019.

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