

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,
Appellee,

v.

JACOB A. GRANT
Airman Basic (E-1),
United States Air Force,
Appellant.

Crim. App. No. ACM S32804

USCA Dkt. No. 26-0291/AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Issues Presented

1. Whether the Air Force Court of Criminal Appeals erred in finding that Appellant was subject to the personal jurisdiction of the court-martial where his term of service expired prior to trial, he received his DD 214, and the Air Force failed to place an administrative hold on him.

2. Whether this Court should overrule *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989), and its progeny, or at least clarify that line of precedent, to the extent they require the consideration of the three *King* factors to cases involving an expiration of term of service.

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice, (UCMJ).¹ This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ.

Statement of the Case

On April 10-11, 2024, a special court-martial composed of a military judge sitting alone tried Appellant, Jacob A. Grant, at Kunsan Air Base, South Korea. R. at 1, 154. Consistent with Appellant's pleas, the military judge found him guilty of one charge and three specifications of wrongful broadcast of an intimate visual image, in violation of Article 117a, UCMJ, 10 U.S.C. § 917a. R. at 132; Entry of Judgment (EOJ). The military judge sentenced Appellant to a bad-conduct discharge, 90 days

¹ Unless otherwise noted, all other references to the UCMJ, Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) reflect the *Manual for Courts-Martial, United States* (2019 ed.) (hereinafter *2019 MCM*).

of total confinement, and a reprimand. R. at 190, EOJ. The convening authority took no action on the findings or the sentence. Convening Authority Decision on Action.

On July 17, 2026, the Air Force Court issued an unpublished opinion which affirmed the findings and the sentence. Appendix. Relevant here, the lower court rejected Appellant's claim that he was not subject to the personal jurisdiction of the special court martial. *Id.* at 3-6. The Air Force Court recognized that Appellant's expiration of term of service (ETS) date occurred *prior* to his court-martial. *Id.* at 3. The lower court also accepted that the Appellant received his DD 214, had received his paycheck covering the period up to his ETS, and that the Air Force failed to place an administrative hold on him before his court-martial. *Id.* at 3-4.

Despite these unique facts, the Air Force Court applied the three factor criteria that this Court has applied in non-ETS cases to determine when a servicemember is effectively discharged for jurisdictional purposes. *Id.* at 5; *see United States v. Hart*, 66 M.J. 273, 275-77 (C.A.A.F. 2008) (discussing the application of the factors in the context of an early discharge). After finding that all three criteria had not been met, the Air Force Court then considered the totality of circumstances and held that the circumstances showed that Appellant was still in the Air Force at the time of his court-martial. *Id.* at 5-6. Notably, the Air Force Court concluded that the Appellant believed he was still in the Air Force at the time of his court-martial and largely relied on this belief in determining the legal

question of whether the Air Force had personal jurisdiction over Appellant at the time his court-martial. *Id.* at 6.

Statement of Facts

A. Background

In 2020, Appellant and BD began a non-exclusive, intimate relationship. Prosecution Exhibit (Pros. Ex.) 1 at 1. During Appellant's deployment from December 2020 to July 2021, BD sent him nude images and videos. Pros. Ex. 1 at 2. BD knew Appellant had saved the images and videos to his phone, and she later communicated to him to not share the images and videos with anyone else. Pros. Ex. 1 at 2.

After returning from deployment, Appellant and BD continued their relationship and, on occasion, consensually recorded sex acts on each other's phones. Pros. Ex. 1 at 2. In March 2022, Appellant and BD ended their relationship on good terms. Pros. Ex. 1 at 2. In October 2022, Appellant received nonjudicial punishment for a violation of Article 117a, UCMJ, for broadcasting intimate images of BD on his Instagram social media account. Pros. Ex. 1 at 2.

Later in January 2023, BD discovered videos of herself in various stages of undress or engaging in sex acts on other social media accounts, specifically, Reddit, Twitter, and Snapchat. Pros. Ex. 1 at 2-4. BD then contacted the Air Force Office of Special Investigations. Pros. Ex. 1 at 4. Appellant subsequently was

charged with three specifications of wrongful broadcast of an intimate visual image relating to depictions found on the three social media accounts. Pros. Ex. 1 at 4-6.

B. Appellant's term of service expired prior to his court-martial and no administrative hold was placed on him.

The charge and specifications were preferred on Appellant on June 28, 2023. Ruling: Jurisdiction over the accused, May 6, 2024 ("Ruling")² at 1. The charge and specifications were originally referred to a general court-martial, R. at 5, and were later withdrawn, but not dismissed. Ruling at 1. The charge and specifications were re-referred to a special court-martial on April 2, 2024. Ruling at 1.

Appellant's court-martial occurred on April 10-11, 2024. R. at 1, 154. Appellant was arraigned on April 10, 2024. R. at 12. But Appellant's ETS was prior to his trial on March 28, 2024. R. at 101; *see also* Ruling at 2. The Air Force never placed a hold on Appellant. Ruling at 2. An official DD Form 214 was issued for and received by Appellant via email for the completion of his term of service, with a separation date of March 28, 2024. Appellate Exhibit (App. Ex.) IV.

The military judge discovered both that Appellant's term of service had expired and that no hold had been placed on him prior to his ETS during the *Care*³ inquiry. R. at 101. The record developed during the *Care* inquiry evidenced several consequences Appellant encountered because of his separation. For example,

² This post-trial ruling was included as an attachment to the EOJ.

³ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Appellant was unable to log into Air Force systems at the time of trial with his common access card (CAC). R. at 119, 121. Appellant had applied for a new CAC after his ETS, but he was denied because he was displayed in Air Force systems as either “separated or out-processing.” *Id.* at 130. Appellant was then issued a temporary CAC that expired in three months. *Id.* He also completed the transition assistance program and was medically out-processed. *Id.* at 123. Moreover, Appellant received his final paycheck and was in a “no-pay status.” *Id.* Defense counsel confirmed with the finance section that Appellant had received his final paycheck for the pay period through his ETS on March 28, 2024. *Id.* at 128. Although there was a possibility Appellant could receive one final check, potentially with a “\$0.00 value,” the finance unit “confirmed that basically [Appellant] has been paid out through his ETS.” *Id.*

Notwithstanding these facts, the government maintained that Appellant had not been “officially discharged” and thus was still subject to UCMJ jurisdiction. *Id.* at 103. Defense counsel noted that the issue of personal jurisdiction was non-waivable, but did not raise a specific motion challenging jurisdiction. *Id.* at 120-21. Defense counsel did, however, request time to gather more facts if the military judge wanted to make a formal ruling on jurisdiction. *Id.* at 128-29.

The military judge ultimately issued a written order containing his findings on the jurisdictional issue. *See* Ruling. In his order, the military judge relied on

factors discussed in *United States v. King*, 27 M.J. 327, 329 (C.M.A. 1989), in ruling that the Air Force maintained jurisdiction over Appellant. Ruling at 4-5. Although he stated the *King* factors served only as guidance and noted that the “totality of circumstances” should be considered, *see United States v. Christensen*, 78 M.J. 1 (C.A.A.F. 2018), the military judge repeatedly referred to the *King* factors as “requirements.” Ruling at 3-4. The military judge found that the first factor was established because Appellant had indeed received a complete DD Form 214, but in regard to the other two *King* factors, “the Court does not consider those *requirements* fulfilled.” Ruling at 4 (emphasis added). Despite finding that Appellant received a paycheck through his ETS on March 28, 2024, and that he was currently in a “no pay status,” the military judge found that Appellant never received a final accounting of pay. Ruling at 4. The military judge also found that Appellant had not completed out-processing with his unit, although the Kunsan Air Base medical and dental units showed Appellant in an out-processing or separated status in their systems. Ruling at 4. For these reasons, the military judge found that the totality of the circumstances showed the Air Force had jurisdiction over Appellant on April 10-11, 2024. Ruling at 5.

Reasons to Grant Review

This Court should grant review to address the Air Force Court’s multiple errors in determining that the court-martial below had personal jurisdiction over

Appellant—a holding that violated the sensitive “constitutional and statutory concerns relating to court-martial jurisdiction over civilians.” *United States v. Reid*, 46 M.J. 236, 238 (C.A.A.F. 1997) (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)). The undisputed facts establish that (1) Appellant’s term of service expired prior to his trial, (2) he received a valid DD 214 prior to the start of his trial, and (3) the Air Force failed to place an administrative hold on him pursuant to departmental regulations prior to the issuance of his DD 214. Appendix at 3. Despite these facts, the Air Force Court held the court-martial had jurisdiction over Appellant by applying one line of precedent (developed out of different factual circumstances) over another in a manner that both conflicts with precedent from this Court and departs from the accepted and usual court of judicial proceedings. C.A.A.F. R. 21(b)(5)(B) and (F).

“A lawful discharge from military service normally terminates the constitutional and statutory power of a court-martial to try such a person, even for offenses allegedly committed prior to the discharge.” *Smith v. Vanderbush*, 47 M.J. 56, 59 (C.A.A.F. 1997) (quoting *Reid*, 46 M.J. at 238). Because UCMJ does not define when a discharge occurs, this Court and its predecessor have had to determine when a discharge is sufficient to terminate personal jurisdiction over an accused. The precedent generally falls into two categories: cases in which a discharge is the result of an ETS and cases involving early discharges (i.e. a

discharge before ETS).

In the former category, the analysis turns on whether a valid discharge was issued prior to the adjudication of findings and sentence in a court-martial and whether the service exercised its authority to retain the member. *See Vanderbush*, 47 M.J. at 58-60 (discussing how the Army's failure to extend an ETS discharge resulted in a loss of UCMJ jurisdiction over the accused). If a valid discharge based on an ETS occurs and no administrative hold has been placed, this Court has held that court-martial jurisdiction over an accused, even after it was initiated, is terminated. *Id.*

For the latter category, because the UCMJ does not define the time when a discharge occurs, this Court and its predecessor Court developed guidance through the *King* factors, based on “a civil personnel statute”, to determine when a discharge is sufficiently complete to terminate personal jurisdiction. *See United States v. Nettles*, 74 M.J. 289, 290 (C.A.A.F. 2015) (citing *Hart*, 66 M.J. at 275); *see King*, 27 M.J. at 329 (holding “that three elements [must] be satisfied to accomplish an early discharge”: (1) “there must be a delivery of a valid discharge certificate[;]” (2) “there must be a final accounting of pay made[;]” and (3) the member “must undergo the ‘clearing’ process required under appropriate service regulations to separate him from military service.”). This Court has applied this guidance in the context of an early discharge—such as a discharge after being

passed over for promotion, *see Nettles*, 74 M.J. at 290; for drug use, *see United States v. Harmon*, 63 M.J. 98, 99 (C.A.A.F. 2006); for being deemed physically unfit for military service per service regulations, *see Hart*, 66 M.J. at 274; or where a service member requested early discharge for purposes of early reenlistment, *see King*, 27 M.J. at 328.

Appellant's case falls into the first category. His separation was the result of his ETS and did not involve unsettled facts based on an early discharge. Because Appellant's term of service had expired, without any hold being placed, his case falls under precedent holding that personal jurisdiction was terminated. *See Vanderbush*, 47 M.J. at 58-59.

The Air Force Court erred in failing to recognize this distinction. The lower court erroneously applied the *King* line of precedent to Appellant's case, and determined that the totality of circumstances showed that Appellant was not effectively discharged. While the Air Force Court's totality of circumstances analysis was also flawed, this Court must correct the larger issue of the lower court's failure to recognize the distinction between cases involving an ETS and early discharges. Applying the correct precedent in this case, the undisputed facts show the court-martial was without jurisdiction over Appellant.

Finally, if this Court were to determine that the current state of its precedent requires the result below, this Court should overrule, or at least clarify, the

Christensen/King line of precedent to make clear that it should not be applied in ETS cases. Rather, such cases fall under *Vanderbush*, and can be decided by determining whether bright-line facts—such as those present in Appellant’s case—exist. Appellant’s case presents an appropriate situation for this Court to address the unworkability of the *King* factors, particularly in this context. *See Christensen*, 78 M.J. at 6 (Maggs, J, concurring) (“Although we have cited and applied this three-part test for many years, recent cases reveal significant dissatisfaction with some of its results.”)

Argument

I. The Air Force Court erred in finding that Appellant was subject to the personal jurisdiction of the court-martial.

A. Standard of Review

This Court reviews “issues of personal jurisdiction de novo.” *Christensen*, 78 M.J. at 4. A reviewing court accepts “the military judge’s findings of historical facts unless they are clearly erroneous or unsupported in the record.” *Id.* (quoting *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000)). A military judge’s decision to accept an accused’s guilty plea is reviewed for an abuse of discretion. *United States v. Riley*, 72 M.J. 115, 119 (C.A.A.F. 2013) (quoting *United States v. Inabinette*, 66 M.J. 320, 322 (C.A.A.F. 2008)). To determine whether a military judge abused its discretion, “an appellate court will not reverse that finding and reject the plea unless it finds a substantial conflict between the plea and the

accused's statements or other evidence of record." *United States v. Garcia*, 44 M.J. 496, 498 (C.A.A.F. 1996).

B. This Court's precedent demonstrates that the Air Force lost personal jurisdiction to try Appellant by court-martial when his term of service expired prior to trial and no administrative hold was placed on him.

The Air Force lost personal jurisdiction over Appellant when his term of service expired on March 28, 2024, and he became a civilian. It is undisputed that no hold was placed on Appellant, as required by Air Force regulation when retention is sought beyond a member's date of separation for action by a court-martial. The Air Force also issued Appellant a DD Form 214, which he received before his trial. Thus, consistent with this Court's precedent and Air Force regulation, because he was separated from the Air Force, there was no personal jurisdiction to try him before a court-martial on April 10-11, 2024. It was unconstitutional to subject Appellant to trial by court-martial once he became a civilian. *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).

"A lawful discharge from military service normally terminates the constitutional and statutory power of a court-martial to try such a person, even for offenses allegedly committed prior to the discharge." *Reid*, 46 M.J. at 238. "It is black letter law that *in personam* jurisdiction over a military person is lost upon his discharge from the service, absent s[o]me saving circumstance or statutory authorization." *Christensen*, 78 M.J. at 4 (alteration in original) (quoting *Hart*, 66

M.J. at 275). “Members are entitled to separation at their ETS unless there is a specific authority for their retention.” Department of Air Force Instruction (DAFI) 36-3211, Military Separations, ¶ 4.1 (24 June 2022). Generally, members are separated on the date of their ETS by administrative action. DAFI 36-3211, ¶ 4.1.1.

A servicemember, however, does not have an “an unconditional right” to be discharged upon the expiration of their term of service. *Vanderbush*, 47 M.J. at 57. “The authority to retain servicemembers past their period of obligated service for purposes of trial by court-martial is a longstanding feature of military law.” *Id.* at 57-58. For example, court-martial jurisdiction “attaches over a person when action with a view to trial of that person is taken.” R.C.M. 202(c)(1).

But that jurisdiction can be severed and lost. Relevant here, “a valid discharge can operate as a termination of court-martial in personam jurisdiction.” *Harmon*, 63 M.J. at 101 (citing *Vanderbush*, 47 M.J. at 58). That is so because “the authority to retain an individual on active duty is discretionary and not self-executing.” *Vanderbush*, 47 M.J. at 58; see R.C.M. 202(c)(1), Discussion (“If jurisdiction has attached before the effective terminal date of self-executing orders, the person *may be* held for trial by court-martial beyond the effective terminal date.”) (emphasis added). Air Force regulations provide authority for retention of a member beyond the ETS for action by court-martial. DAFI 36-3211, ¶ 4.4. Critically, however, if a member has a specified date of separation, a hold

memorandum is required. DAFI 36-211, ¶ 4.4.2. Thus, although the Air Force has authority to retain a member on active duty for court-martial beyond their ETS, a failure to exercise that authority terminates court-martial jurisdiction if “an otherwise valid administrative discharge [is] issued prior to adjudication of findings and sentence.” *Vanderbush*, 47 M.J. at 59.

Appellant’s case is nearly identical to *Vanderbush*. After charges were preferred in that case, personnel officials initiated administrative procedures to separate the appellant based on his ETS. *Id.* at 57. A discharge certificate was approved and delivered to appellant prior to the date of his trial. *Id.* The Army took no action to retain or hold him. *Id.*

On appeal, this Court noted that Army officials had authority to retain appellant through his trial, but “they did not do so.” *Id.* at 58. Declining to adopt the concept of “continuing jurisdiction,” the Court rejected the government’s argument that the issuance of a valid administrative discharge in that case did not divest the court-martial of jurisdiction. *Id.* at 59. Ultimately, the Court affirmed the lower court’s holding that court-martial jurisdiction over the appellant terminated after the issuance of a valid administrative discharge prior to the adjudication of findings and sentence. *Id.* at 59-61.

Vanderbush controls here and confirms that the Air Force had no personal jurisdiction over Appellant at trial. Like in *Vanderbush*, it is undisputed that

Appellant's term of service expired prior to his trial on March 28, 2024. Ruling at 2. Just as in *Vanderbush*, although charges were preferred prior to his ETS, Appellant was separated by a valid administrative action, and his DD Form 214 was issued and received "prior to adjudication of findings and sentence." *Vanderbush*, 47 M.J. at 59. App. Ex. IV. Thus, he was no longer "awaiting discharge" after his ETS. *See* Art. 2(a)(1), UCMJ. He was, in fact, separated; there was no specific authority for his retention, and thus, he was not subject to court-martial jurisdiction under the UCMJ.

The lack of personal jurisdiction is even more pronounced in Appellant's case. In *Vanderbush*, although the appellant was arraigned prior to his discharge based on his ETS, this Court still concluded that jurisdiction was severed. 47 M.J. at 57-58, 61. But in Appellant's case, arraignment did not occur until after both his term of service expired and receipt of his DD Form 214. *See* App. Ex. IV; R. 12.

Finally, just as in *Vanderbush*, the government failed to take the necessary steps to effectuate its jurisdiction over Appellant. Specifically, the government failed to follow departmental regulations to obtain an administrative hold for a court-martial. It is undisputed that the government never placed an administrative hold on Appellant. Ruling at 2. Just as in *Vanderbush*, while the government had authority to follow a straightforward process to retain the Appellant beyond his ETS for purposes of trial, "they did not do so." 47 M.J. at 58.

On March 28, 2024, Appellant's term of service expired, and no administrative hold was placed on him. Thus, Appellant was separated from the Air Force, by a valid discharge, prior to his April 10-11, 2024, court-martial. Under *Vanderbush*, these undisputed facts compel the conclusion that the Air Force had no personal jurisdiction over Appellant.

C. Alternatively, even if the *King* factors were to be considered in this case, the totality of circumstances establishes that Appellant was not subject to court-martial jurisdiction at the time of his trial.

Because Appellant's case is not an early discharge case, the issue is settled by his ETS occurring prior to his court-martial without any administrative hold. Thus, the Air Force Court's analysis should have ended there and that court erred in finding personal jurisdiction.

But even if the *King* factors were applied to this case, the totality of the circumstances confirms the Air Force did not have personal jurisdiction over Appellant at the time of trial. The *King* factors serve only as guidance. *Christensen*, 78 M.J. at 5. For this reason, even if one or more of the *King* factors have not been fully met, that is not dispositive of personal jurisdiction; the military judge still "must consider the totality of the circumstances in making a jurisdictional determination." *Id.* at 5 n.6. Moreover, the *King* factors, and the statutes upon which the factors were based "are not binding when we find that they go against reason or policy." *Nettles*, 74 M.J. at 291. Here, the totality of the

circumstances establish that the Air Force did not have personal jurisdiction over Appellant at the time of his court-martial.

First, the undisputed facts that Appellant's term of service had expired and he received his DD 214 are the most important factors in this analysis because they provide the clearest guideposts for the "overarching interest" implicated by the law of personal jurisdiction: "to know with certainty and finality what the person's military status is and when that status changes." *Nettles*, 74 M.J. at 291. Such facts are "clear guideposts for prosecutors and commanders when taking actions with a view towards litigation" and provide certainty and finality to the servicemember "so that he can guide his conduct with awareness of the potential (or not) for criminal liability under the UCMJ." *Id.* at 291-92. Moreover, this conclusion is buttressed by the fact that it is consistent with Air Force regulations that provide that generally members are separated at their ETS—unless the Air Force specifically applies procedures to hold the member for court-martial purposes, which the government failed to do here. *See* DAFI 36-3211, ¶¶ 4.1., 4.4.

Second, the totality of circumstances supports the conclusion that personal jurisdiction was lost because the government failed to place an administrative hold on Appellant. Departmental regulations provided a mechanism for the Air Force to issue a hold memorandum on Appellant to prevent his separation, *see* DAFI 36-3211, ¶ 4.4., but it failed to do so. The government's negligence in failing to

properly and timely initiate actions to retain a servicemember have weighed significantly in this Court's analysis that the military did not have personal jurisdiction over a member. *See Christensen*, 78 M.J. at 5 (finding that the government's failure to act in a timely manner to revoke a discharge supported the conclusion that the military lost jurisdiction over the accused); *Nettles*, 74 M.J. at 292 (finding that "Appellant [not being] placed on administrative hold" supported loss of jurisdiction).

Third, the record demonstrates at least two *King* factors are established in this case. On the first factor, a valid DD Form 214 was delivered to Appellant. As noted above, it is undisputed that Appellant's term of service expired on March 28, 2024, and he received an email with the DD Form 214 with the date of separation of March 28, 2024. Ruling at 2; App. Ex. IV. Based on these facts, the military judge found that this factor was established. Ruling at 4.

The record also establishes the second *King* factor because Appellant received, at a minimum, a substantial part of his final pay. The "final accounting of pay" factor is based on Section 1168(a), which in turn states that a member is discharged or released from activity duty when "his final pay *or a substantial part of that pay*, are ready for delivery to him." *King*, 27 M.J. at 329 (emphasis added). The record here demonstrates that a substantial part of Appellant's final pay was delivered to him. It is undisputed that Appellant received a paycheck covering his

pay period up to his ETS on March 28, 2024. Ruling at 2. It is also undisputed that he was coded in a no-pay status. *Id.* Although the finance office still had to review Appellant's account to determine if he was owed a final payment, there was a possibility that Appellant would receive a perfunctory paycheck of \$0.00. *See R.* at 128; Ruling at 2. Thus, the record demonstrates that, at a minimum, Appellant received a substantial part of his final pay. When considering the full scope of these facts, the totality of circumstances demonstrates that there was no personal jurisdiction over Appellant at the time of his trial.

D. The Air Force Court erred in finding personal jurisdiction over Appellant by incorrectly applying one line of precedent over another and by considering Appellant's "belief" that he was still in the Air Force in making a legal determination on whether personal jurisdiction existed.

The Air Force Court determined that Appellant "was not effectively discharged from the Air Force for purposes of court-martial jurisdiction." Appendix at 5. Despite acknowledging that Appellant had received his DD Form 214 (and not finding any error in its issuance), the Air Force Court found that one or more of the *King* factors had not been met. *Id.* The court went on to conclude that the totality of circumstances indicated that Appellant was "not fully discharged" by the Air Force, largely relying on that court's view that Appellant "believed" he was still a member of the Air Force at the time of trial because he renewed his CAC for purposes of attending court and arrived at court in service

dress. *Id.* at 5-6. The Air Force Court's analysis is flawed and inconsistent with this Court's precedent for a number of reasons.

1. The Air Force Court's decision both conflicted with *Vanderbush* and misapplied the *King* precedent by using it in an ETS case.

As an initial matter, the Air Force Court erred in applying the three *King* factors at all in its analysis. The lower court should have followed this Court's approach in *Vanderbush* and focused on the straightforward facts that Appellant received his DD 214 after his ETS, and no administrative hold was issued to resolve the jurisdictional question. The lower court's erroneous approach both failed to recognize that *Vanderbush* controlled Appellant's factual circumstances and misapplied the *Christensen/King* line of precedent in an ETS case.

This Court's predecessor court, in promulgating the three-factor analysis, held that "three elements [must] be satisfied to accomplish an *early discharge*." *King*, 27 M.J. at 329 (emphasis added). This Court has not specifically held that these three factors must be satisfied, or even considered, in a case involving jurisdictional questions surrounding an accused whose ETS has expired prior to trial and who has been delivered a valid DD 214. Nor did the Air Force Court cite a controlling case requiring the consideration of the *King* factors in an ETS case. Indeed, in *Vanderbush*, the majority did not even mention *King*, much less apply, the *King* factors in holding that the appellant's court-martial jurisdiction

terminated. Rather, this Court’s analysis focused on the bright-line facts that a valid discharge issued upon the ETS and the absence of an administrative action to retain the appellant. 47 M.J. at 58-60.

Notably, in *Christensen*, this Court recognized the *King* factors could be utilized as “*guidance*—not as *prerequisites*” to help determine whether a servicemember’s discharge had been finalized for jurisdictional purposes. *Christensen*, 78 M.J. at 5 (emphasis in original). But *Christensen* was a case involving an early discharge, where the member was administratively separated for his failure to complete an alcohol rehabilitation program—not a case like Appellant’s involving an ETS. *Id.* at 2.

As a result of the Air Force Court’s overreliance on the *King* factors, that court’s analysis focused on the “effectiveness” of the discharge, Appendix at 5-6, which would be a proper consideration in early discharge cases, rather than the bright-line facts that showed as a matter of law that the Air Force no longer possessed legal personal jurisdiction over Appellant. Whether Appellant was “effectively discharged” was the wrong question for the Air Force Court to ask. Appendix at 5. On these facts, Appellant already was discharged. His term of service expired prior to trial, he received his DD 214, and the Air Force failed to place a hold on him. Thus, the Air Force Court erred in holding otherwise.

2. An accused's subjective belief as to whether he is still a servicemember is not relevant to the legal determination of whether personal jurisdiction exists.

The Air Force Court also erred in relying on its view that Appellant believed that “he was still an active-member of the Air Force” in determining whether the Air Force had personal jurisdiction over Appellant. Appendix at 6. “Jurisdiction is the power of a court to try and determine a case and to render a valid judgment.” *Harmon*, 63 M.J. at 101. Determining whether jurisdiction is present is a “legal question.” *Id.*

“[J]urisdiction is never waived and may be raised at any stage of the proceedings.” *Reid*, 46 M.J. at 240 (quoting *United States v. Reid*, 43 M.J. 906, 910 (Army Crim. App. 1996)); *see also* R.C.M. 907(b). Because jurisdiction cannot be waived, absent some express acceptance of court-martial jurisdiction, evidence of an accused's purported beliefs as to whether he was still in the Air Force are irrelevant to the legal determination of whether a court-martial still had power to try an accused.

Thus, the Air Force Court erred in holding that the Appellant was subject to the personal jurisdiction of the court-martial based on the Appellant's belief that he was still in the Air Force at the time of trial. The Air Force Court's analysis largely relied on inferring Appellant's subjective intent based on the fact that he signed a stipulation of fact, he renewed his CAC to attend the court-martial, and he arrived

to court in service dress to plead guilty. Appendix at 5-6.⁴ Apart from the fact that the lower court's analysis appears to incentivize an accused who contests jurisdiction to skip out on their hearings, these observations are inapposite⁵.

Whether Appellant believed he was in the Air Force is not relevant to whether the court-martial had the power to “try and determine a case and to render a valid judgment.” *Harmon*, 63 M.J. at 101. That is precisely why jurisdictional challenges can be raised at any time. Even if Appellant believed he was in the Air Force at one point in the proceeding, he was not precluded from raising a meritorious jurisdictional challenge at a later point in the proceeding. *See* R.C.M. 907(b). Indeed, the Air Force Court's reliance on Appellant's “belief” that he was still in the Air Force because he showed up to his court-martial in service dress sound more like arguments suggesting waiver (on an issue that cannot be waived) rather than objective evidence as to whether personal jurisdiction existed.

This Court's reasoning in *Reid* highlights the lower court's error in relying on Appellant's purported beliefs of his military status to determine jurisdiction. In

⁴ The Air Force Court incorrectly reasoned that this evidence suggested that Appellant “objectively believed” he was still in the Air Force. Appendix at 5. While it might have been an objective fact that, for example, Appellant attended the court-martial in service dress, what Appellant believed or what could be inferred about his beliefs nevertheless would have been subjective.

⁵ Indeed, it is just as likely Appellant completed these administrative tasks because he feared the government would charge him with a failure to go if he did not appear at his court-martial.

considering whether a court-martial lacked jurisdiction to try an accused in another context, this Court rejected the government's argument that the accused had accepted jurisdiction by pleading guilty to certain charges. *Reid*, 46 M.J. at 240. This Court noted that it found "in the plain meaning of the statute a limitation on the court-martial's power to proceed, *notwithstanding the desires of the parties*. A court cannot do that which exceeds the scope of its jurisdiction." *Id.* (emphasis added).

Similar here, whether Appellant believed he was in the Air Force, or even subjectively desired to be in the Air Force, at the time of his court-martial has no bearing on either the question of whether he was actually in the Air Force or whether the court-martial had personal jurisdiction to try him. By relying on this irrelevant, subjective evidence, rather than the undisputed evidence that his term of service expired and that he received his DD 214 without an administrative hold, the Air Force Court erred.

II. To the extent this Court's precedent concerning the application of the *King* factors and those factors' role in the totality of the circumstances analysis allows the result below, this Court should overrule it or clarify its limits in cases involving an expiration of term of service.

As the foregoing demonstrates, a proper application of this Court's precedent to the facts of this case leaves little doubt that the decision below was wrong. But if the decision below is somehow consistent with this Court's precedents, this Court should overrule, or least clarify, the *Christensen/King*

precedent to the extent they require the application of the three *King* factors to ETS cases.

As noted above, the Air Force Court's decision creates conflict between *Vanderbush* and the *Christensen/King* precedent in jurisdictional questions arising from ETS cases. In regard to ETS cases, consistent with *Vanderbush*, this Court should clarify that jurisdictional questions should be resolved by looking at bright-line, objective facts such as whether a valid DD 214 has been issued and received and whether a service nevertheless placed an administrative hold on a member prior to the receipt of the DD 214.

There are already many problems with the application and usefulness of the *King* factors generally. *See Christensen*, 78 M.J. at 6 (Maggs, J, concurring). The unworkable nature of these factors reaches an extreme point in ETS cases, which so acutely affect the line between a servicemember and civilian that they impact "the sensitivity of constitutional and statutory concerns relating to court-martial jurisdiction over civilians." *Reid*, 46 M.J. at 238. This case presents an appropriate vehicle to provide clarity in these sensitive cases.

A. The line of precedent addressing the application of the *King* factors developed from early discharge cases, not ETS cases.

As noted above, it does not appear that this Court has specifically held that the *King* factors should be considered in an ETS case where a DD 214 has been validly issued. Rather, the precedent developing the three *King* factors, as well as

precedent modifying the applicability of these factors as guidance under a totality of the circumstances analysis, spawned from cases involving an early discharge.

For instance, *King* itself centered on the issues created by an early discharge, specifically, the determination of whether an early discharge was valid and complete to sufficiently deprive the Air Force of personal jurisdiction over a member for UCMJ purposes. 27 M.J. at 327-28. In deciding the jurisdictional question, the Court of Military Appeals looked to civil personnel statutes for guidance on when an early discharge is completed for UCMJ jurisdictional purposes. *Id.* at 329, citing 10 USC § 1168(a), 1169. These statutes themselves were “designed to protect servicemembers from premature separation.” *United States v. Keels*, 48 M.J. 431, 432 (C.A.A.F. 1998). Thus, the Court of Military Appeals determined that three factors had to be “satisfied to accomplish an *early discharge*.” *King*, 27 M.J. at 329 (emphasis added).

This Court’s jurisprudence applying these factors following *King* likewise involved early discharge cases. *See Nettles*, 74 M.J. at 290 (applying the *King* factors where member was discharged from the reserves after he had twice been passed over for promotion); *Hart*, 66 M.J. at 274 (applying the *King* factors where member was administratively separated on disability discharge for being physically unfit for military service). *Christensen*, in which this Court reaffirmed that “the guidance and criteria derived from § 1168 are not binding when we find that they

go against reason or policy,” also involved an early discharge case. 78 M.J. at 2, 5 (citing *Nettles*, 74 M.J. at 291) (considering the *King* factors where command initiated a member’s administrative separation from the Army for his failure to complete an alcohol abuse rehabilitation program). This precedent illustrates the fact that the *King* factors were developed to determine when a discharge is effective in the context of early discharge cases.

B. Complications exist in applying the *King* factors, particularly in ETS cases.

Over time, problems with the application of the *King* factors have come to light. *See Christensen*, 78 M.J. at 6 (Maggs, J, concurring) (“Although we have cited and applied this three-part test for many years, recent cases reveal significant dissatisfaction with some of its results.”). These problems are magnified in the context of cases involving a discharge based on an ETS. In a case like Appellant’s where undisputed facts show that the Appellant’s term of service expired, he received his DD 214, and the Air Force failed to place an administrative hold on him, a consideration of the *King* factors—even as part of a totality of circumstances analysis—is unworkable and runs contrary to “reason [and] policy. *See Nettles*, 74 M.J. at 291.

For example, the Air Force Court’s consideration of the “final accounting of pay” *King* factor, even if part of the totality of circumstances, in finding that personal jurisdiction existed in this case frustrates the goals of certainty and

finality, and thus, cuts against reason and policy. Appendix at 5. Completion of a final accounting of pay depends on arbitrary actions outside of Appellant's control. For instance, like the issues with the delays in delivery of a discharge certificate in *Nettles*, the final pay process relies on "the service's administrative apparatus to process" these actions. *Nettles*, 74 M.J. at 292. But Appellant's status "ought not hinge on their occurrence or nonoccurrence." *Id.* Otherwise, an arbitrary situation would be created where the finality of an expiration of term of service, "must be disregarded if personnel in the finance office have overlooked or failed to make sufficient progress in calculating a departing servicemember's pay at the time of separation." *Hart*, 66 M.J. at 279 (Effron, C.J., dissenting).

Given the high volume of actions involving pay that systems such as the Defense Finance and Accounting Service must accomplish, "there is a significant potential for delays and mistakes." *Id.* (Effron, C.J., dissenting). Because of these arbitrary risks, an overreliance on this *King* factor "would eliminate the ability of servicemembers and the government to rely on the certainty provided" by the effective date of the ETS. *Id.* (Effron, C.J., dissenting). If the government failed to provide final pay to a member upon their ETS, "the error may be remedied by completing the required paperwork and making the requisite payment to the servicemember." *Id.* (Effron, C.J., dissenting). It does not require the absurd result that the member is still subject to court-martial jurisdiction. Additionally, we all

know from personal experience that “the path to good intentions in government programs is often obscured by sludge.” *Foxwood, Ltd. v. United States*, 173 Fed. Cl. 109, 112 (2024) (citing Cass R. Sunstein, *Sludge: What Stops Us from Getting Things Done and What to Do About It* (2021) (broadly defining bureaucratic “sludge” as the unnecessary friction and hurdles that prevent people from getting things done)) (cleaned up).

Finally, the consideration of the *King* factors in ETS cases like Appellant’s frustrates reason and policy because such an approach runs counter to the purposes of Section 1168. Section 1168(a), upon which the *King* factors were based, “is a personnel management statute designed to protect servicemembers and their families from the adverse financial consequences of premature separation.” *Hart*, 66 M.J. at 278 (Effron, C.J., dissenting). “The pertinent legislation originated in World War II as part of the Servicemen’s Readjustment Act of 1944” and “ensured the efficient administration of disability claims and the timely discharge of servicemembers.” *Id.* (Effron, C.J., dissenting). Using a statute designed to protect servicemembers as a hook to keep a veteran like Appellant, whose term of service expired, subject to UCMJ jurisdiction would turn the statute on its head. Such a result would particularly run counter to reason and policy where, as in this case, the government did not take steps that were available to it to retain the member with an administrative hold.

C. The application of bright-line facts and regulations in ETS cases are sufficient to determine whether court-martial jurisdiction exists.

“The overarching interest implicated by the law of the personal jurisdiction” is “certainty and finality.” *Nettles*, 74 M.J. at 291. In ETS cases, this policy is best fulfilled by relying on bright line, clear-cut facts as this Court did in *Vanderbush*, rather than an open-ended totality analysis. Such clear facts are present in Appellant’s case and establish that he was separated and that personal jurisdiction was severed: the receipt of his DD 214 and the lack of an administrative hold. These facts are “clear guideposts for prosecutors and commanders when taking actions with a view towards litigation” and provide certainty and finality to the servicemember “so that he can guide his conduct with awareness of the potential (or not) for criminal liability under the UCMJ.” *Id.* at 291-92.

In contrast, to the extent this Court has applied the *King* factors, derived from § 1168, in early discharge cases, “we have done so where the unsettled state of the record requires consideration of multiple factors in determining whether an individual remained in military status.” *Hart*, 66 M.J. at 280 (Effron, C.J., dissenting). But, similar to *Vanderbush*, the state of the record is not unsettled in Appellant’s case. Rather, it is undisputed that he received his DD 214 and that no administrative hold was placed on him.

This Court should overrule and clarify the *King* line of precedent to make

clear that courts need not consider the *King* factors at all, even as part of a totality of circumstances analysis, in a case involving an expiration of term of service.

Instead, in such cases, courts should look to whether bright-line facts exist, such as whether a DD 214 has been received and whether an administrative hold has been placed, based on departmental regulations.

In addition to providing clarity, such a holding would be consistent with departmental policy which creates a general presumption that a member is separated at ETS. DAFI 36-3211, ¶ 4.1. This approach would also be consistent with departmental regulations, which provide authority for the retention of a member beyond the ETS for action by court-martial using a hold memorandum. DAFI 36-3211, ¶ 4.4.2.

Finally, such holding would provide clear, dispositive guidance to lower courts when dealing with jurisdictional questions involving ETS cases. In Appellant's case, there was a clear mechanism available to retain Appellant for a court-martial once he was issued a DD 214 after his ETS: an administrative hold. *See* DAFI 36-3211, ¶ 4.4.2. But, similar to *Vanderbush*, the Air Force "did not do so." 47 M.J. at 58 ("The issue here is not whether the Army had authority under the Constitution, the Uniform Code of Military Justice, or the Manual for Courts-Martial to retain SGT Vanderbush on active duty through the period of trial, sentence, and review. Army officials did have that authority, but, as in *Howard*,

they did not do so.”). In these circumstances, the facts are clear and resolving the lack of jurisdiction does not require an analysis of the *King* factors or an open-ended totality of the circumstances analysis. This Court should grant review to clarify this point.

D. In overruling/clarifying the *King* precedent, this Court should also make clear that assessing whether an accused believed he was still a servicemember plays no role in making the legal determination of whether court-martial jurisdiction existed.

Should this Court take the opportunity to clarify its precedent in this area, it should also clarify that an accused’s belief as to whether he was in the Air Force at the time of trial is not a proper fact to consider in making a legal determination of whether personal jurisdiction over the accused exists.

“[J]urisdiction is never waived and may be raised at any stage of the proceedings.” *Reid*, 46 M.J. at 240. For this reason, as noted above, what an accused subjectively believed about his status at one point in time during a legal proceeding should have no bearing on whether jurisdiction existed because such decisions are legal, judicial determinations and they can be made at any time of the proceedings. An accused’s beliefs are irrelevant in such an analysis because a court cannot exceed the scope of its jurisdiction, “*notwithstanding the desires of the parties.*” *Id.* (emphasis added). This Court should make clear that an accused’s beliefs are not relevant to a consideration of jurisdiction in either ETS or early discharge cases.

To be sure, this Court has considered facts showing that an accused had an “objectively reasonable belief” that he was no longer in a service, as a factor weighing *against* jurisdiction in early discharge cases. *See Christensen*, 78 M.J. at 5 (noting a variety of underlying facts such as the appellant had turned in his military identification card, been told by his unit that he was “out of the Army now,” received no visits from his command, and had communication from his unit). This Court should further clarify that a consideration of such underlying facts, as opposed to an accused’s belief, could be relevant in a totality of the circumstances analysis in an early discharge case. But in an ETS case, courts should look to bright-line facts, such as those present in Appellant’s case, namely, whether an accused received a DD 214 and whether an administrative hold was placed before receipt of the DD 214.

Appellant respectfully requests that this Honorable Court grant review of this issue.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Thomas R. Govan, Jr.", is written over the typed name.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 21 because it contains 8,008 words. I further certify that this brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.

A handwritten signature in blue ink, appearing to read "Thomas R. Govan, Jr.", is positioned above the printed name and title.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on October 14, 2026.

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Appendix

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

No. ACM S32804

UNITED STATES

Appellee

v.

Jacob A. GRANT

Airman Basic (E-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 17 July 2026

Military Judge: Christopher D. James.

Sentence: Sentence adjudged on 11 April 2024 by SpCM convened at Kunsan Air Base, Republic of Korea. Sentence entered by military judge on 6 May 2024: Bad-conduct discharge, confinement for 90 days, and a reprimand.

For Appellant: Major Thomas R. Govan, Jr., USAF; Major Trevor N. Ward, USAF.

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

Before MORGAN, GRUEN, and KEARLEY, *Appellate Military Judges*.

Senior Judge GRUEN delivered the opinion of the court,¹ in which Chief Judge MORGAN and Judge KEARLEY joined.

¹ Captain Caston Casey, an intern assigned to the court under the Air Force Internship Program and supervised by an attorney admitted to practice before this court, participated in the preparation of this opinion with Senior Judge Gruen.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 30.4.

GRUEN, Senior Judge:

A military judge sitting alone as a special court-martial convicted Appellant, in accordance with his pleas, of three specifications of wrongful broadcast of an intimate visual image, in violation of Article 117a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 917a.² The military judge sentenced Appellant to a bad-conduct discharge, confinement for 90 days, and a reprimand. The convening authority took no action on the findings and sentence but provided the language for the reprimand.

Appellant raises two issues on appeal: (1) whether Appellant was subject to the personal jurisdiction of the court-martial; and (2) whether appropriate sentencing relief is warranted because of the 249-day delay between sentencing and docketing with this court.

We affirm the findings and sentence and find no error that materially prejudiced Appellant's substantial rights.

I. BACKGROUND

Appellant and BD had a non-exclusive, intimate relationship from around mid-2020 to March 2022. During this time, both Appellant and BD were active-duty Air Force members. While in this relationship, BD sent Appellant nude images and videos that Appellant saved to his phone. Appellant and BD also consensually recorded intimate sexual acts on Appellant's phone.

On or about 23 November 2021, BD expressed to Appellant through a written text via the social media application "Snapchat" that she did not want Appellant "posting" any images depicting BD. In January 2023, BD discovered visual images, to include videos, of her face visible while engaging in sexual acts with Appellant on various public social media platforms. The videos were posted on divers occasions between on or about 2 December 2022 and 7 December 2022; on or about 15 December 2022; and on divers occasions between on or about 23 January 2023 and 1 April 2023. These posts form the basis for the three specifications of wrongful broadcast charged against Appellant.

² Unless otherwise noted, references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

The charge and specifications were preferred on 28 June 2023, and referred to a general court-martial on 11 October 2023. They were later withdrawn but not dismissed. Pursuant to a plea agreement, they were re-referred to a special court martial on 2 April 2024. Appellant elected to be tried by military judge alone and pleaded guilty to wrongfully broadcasting BD's intimate images without BD's consent. Appellant's special court-martial commenced on 10 April 2024, and he was sentenced by the military judge on 11 April 2024 to a bad-conduct discharge, confinement for 90 days, and a reprimand.

II. DISCUSSION

A. Jurisdiction

Appellant argues that he was not subject to the jurisdiction of the court-martial because he had received a DD Form 214, and "[t]he Air Force never placed a hold on Appellant" to extend his expiration of term of service (ETS), and had received a final paycheck prior to the commencement of the court-martial.

1. Additional Background

Appellant entered active-duty service on 29 January 2019. Appellant's expiration of term of service (ETS) was 28 March 2024.

Despite Appellant's ETS occurring on 28 March 2024, and despite the fact that no hold was placed on Appellant's account to extend his ETS, Appellant signed a stipulation of fact on 29 March 2024, indicating that he was an active-duty member of the United States Air Force. The stipulation of fact also detailed that the court-martial had both personal and subject-matter jurisdiction over Appellant. The stipulation of fact was signed by Appellant's trial defense counsel on 29 March 2024 and 31 March 2024. As part of the plea agreement, the charge and its specifications were re-referred to a special court-martial on 2 April 2024.

Appellant received notice via email, at approximately 0206 hours on 10 April 2024, that his Department of Defense Form 214 (DD Form 214) would be available within 24 hours of such notification—a few hours before the court-martial was to begin. At the time of the court-martial, Appellant had not begun out-processing from his unit and did not have an out-processing checklist loaded into virtual military personal flight (vMPF). Appellant had been out-processed from medical and dental prior to the court-martial but the medical out-processing system is separate from the military personal flight (MPF) process. Appellant had not out-processed with finance and a final financial accounting had not yet been completed for Appellant.

Appellant had recently renewed his CAC prior to his court-martial and appeared for the proceedings in his service dress uniform. Appellant's *Care*

inquiry³ revealed that Appellant had received his DD Form 214. The military judge *sua sponte* heard additional facts from both trial counsel and trial defense counsel. Both parties agreed to the following facts submitted to the military judge: (1) Appellant's ETS occurred on 28 March 2024, with Appellant's DD Form 214 available for download at approximately 0206 on 10 April 2024; (2) Appellant had received a paycheck covering pay periods prior to Appellant's ETS, however, the 8th Comptroller Squadron identified that Appellant's account still required review and Appellant had not received a final accounting of pay; and (3) Appellant had not out-processed with his unit or the finance office. Appellant did not have a unit out-processing checklist loaded on vMPF.⁴

The military judge ultimately held that the Air Force had jurisdiction over Appellant for the court-martial proceedings due to the totality of the circumstances. The military judge issued a written ruling on 6 May 2024 and attached that ruling to the entry of judgment.

2. Law

We review issues of court-martial jurisdiction *de novo*. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019) (citing *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016)). Challenges to jurisdiction not raised at trial are not waived and may be raised for the first time on appeal. *See* Rule for Courts-Martial (R.C.M.) 907(b)(1); *United States v. Reid*, 46 M.J. 236, 240 (C.A.A.F. 1997).

When action with a view to trial is taken against a person, court-martial jurisdiction attaches over that person and "shall continue for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service[.]" R.C.M. 202(c)(1). "Actions by which court-martial jurisdiction attaches include: apprehension; imposition of restraint, such as restriction, arrest, or confinement; and preferral of charges." R.C.M. 202(c)(2). "If jurisdiction has attached before the effective terminal date of self-executing orders, the person may be held for trial by court-martial beyond the effective terminal date." *See* R.C.M. 202(c)(1), Discussion.

Jurisdiction over an accused is lost upon a member's discharge from the service, but "the UCMJ does not state when a servicemember's discharge from the armed forces becomes effective for jurisdictional purposes[.]" *United States*

³ *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

⁴ Appellant had out-processed from the medical and dental clinics at Kunsan Air Base, however, that a separate and distinct process from out-processing from his unit or finance.

v. Christensen, 78 M.J. 1, 4 (C.A.A.F. 2018). There are three criteria for determining whether a servicemember is effectively discharged for jurisdictional purposes: “(1) the delivery of a discharge certificate (a DD Form 214); (2) a ‘final accounting of pay’; and (3) the completion of the ‘clearing’ process that is required under service regulations.” *Id.* (quoting *United States v. Hart*, 66 M.J. 273, 276–79 (C.A.A.F. 2008)). However, these criteria are guidance that is not binding when contrary to “reason or policy.” *Id.* (quoting *United States v. Nettles*, 74 M.J. 289, 291 (C.A.A.F. 2015)).

“[I]f one or more of these criteria have not been fully met, then the military trial judge must consider the totality of the circumstances in making a jurisdictional determination.” *Id.* at 5 n.6 (citing *Nettles*, 74 M.J. at 291). In analyzing the totality of the circumstances, the United States Court of Appeals for the Armed Forces (CAAF) has looked at an appellant’s “objectively reasonable belief” that he is no longer a servicemember. *Id.* at 5.

3. Analysis

We conclude that Appellant was not effectively discharged from the Air Force for purposes of court-martial jurisdiction.

Starting with the three criteria, the CAAF has identified for analyzing whether a servicemember is effectively discharged for jurisdictional purposes, Appellant’s receipt of a DD Form 214 weighs in his favor. However, the remaining factors are not met as Appellant did not receive a final accounting of pay, nor did he complete out-processing from his unit, with no evidence of any unreasonable delay by the military. Because “one or more of these criteria have not been fully met,” we “consider the totality of the circumstances in making a jurisdictional determination.” *Christensen*, 78 M.J. at 5. The totality of the circumstances indicates that Appellant was not fully discharged from the Air Force.

The facts display circumstances showing that Appellant objectively believed he was still in the Air Force at the time of the court-martial. In particular, Appellant and his trial defense counsel signed and dated a stipulation of fact for the court-martial after Appellant’s ETS had passed. While a “hold” for Appellant’s service was never accomplished in the military personnel system to extend the ETS, charges were preferred against Appellant on 28 June 2023 with a view towards court-martial. In accordance with Appellant’s plea agreement, the charges and specifications were withdrawn, but not dismissed, and re-referred to a special court-martial on 2 April 2024, with his consent. Although the re-referral occurred after Appellant’s ETS, circumstances show that all parties believed Appellant was still an active member of the Air Force by fulfilling actions aligning with Appellant’s plea agreement. Additionally, Appellant’s command did not dismiss the charges, which indicates there was no commander’s intent to discharge Appellant prior to the court-martial.

Appellant urges this court to follow the CAAF's 1997 ruling in *Smith v. Vanderbush* where jurisdiction was not recognized when an ETS and discharge had occurred, without a Government-initiated hold, between preferral of charges and commencement of court-martial. 47 M.J. 56, 61 (C.A.A.F. 1997). However, *Vanderbush* differs from the case at bar in that the appellant had completed a computation of final pay, out-processed his unit, received a discharge certificate, and believed he was discharged from the Army to the extent that he left the Republic of Korea, where the court-martial was to be held, and returned to the United States via a government-procured airline ticket. *Id.* at 57. With *Vanderbush* not present for the court-martial, a jurisdictional issue was immediately raised by defense counsel resulting in a determination that in fact, that court-martial had no jurisdiction. *Id.*

Appellant's case is distinguishable from *Vanderbush*, because even after Appellant's ETS had passed, Appellant believed he was still an active-member of the Air Force by failing to complete out-processing, renewing his CAC for the purposes of attending the court-martial, and arriving to the court-martial in service dress to plead guilty to the charges originally preferred against him on 28 June 2023. While not waived, the jurisdictional issue was not raised by the parties and only discussed when prompted by the military judge during Appellant's *Care* inquiry. It appears that all parties believed that there was jurisdiction over Appellant for the purposes of court-martial proceedings and that Appellant was an active member of the Air Force throughout. The totality of the circumstances leads to the conclusion that Appellant was subject to the personal jurisdiction of the court-martial.

B. Post-Trial Delay

Appellant argues the Government violated his right to speedy post-trial review in taking 249 days from the announcement of sentence to the docketing of Appellant's record of trial (ROT) with this court—99 days longer than the 150-day standard established by law.

1. Additional Background

The post-trial chronologies provided by the court reporter in the ROT, and the details provided in the Government's answer, establish the following timeline for post-trial processing:

11 April 2024 (Day 0): The sentence is adjudged.

11 April 2024 (Day 0): Appellant completed AF Form 304 requesting Appellate Defense Counsel

19 April 2024 (Day 8): Appellant submits clemency request.

25 April 2024 (Day 14): Convening authority signs the convening authority decision on action memorandum (CADAM).

6 May 2024 (Day 25): Military judge signs the entry of judgment.

13 May 2024 (Day 32): Court reporter began transcribing Appellant's trial transcript.

30 May 2024 (Day 49): Court reporter signed ROT Certification memo.

29 July 2024 (Day 109): Court reporter began sending parts of Appellant's transcript to both trial counsel and defense counsel for review.

7 August 2024 (Day 118): Court reporter sends the final part of Appellant's trial transcript to both trial counsel and defense counsel for review.

8 August 2024 (Day 119): Both trial counsel and defense counsel provide transcript edits to the court reporter.

8 August 2024 (Day 119): Trial counsel certifies Appellant's trial transcript.

9 August 2024 (Day 120): Defense counsel certifies review of Appellant's trial transcript.

9 August 2024 (Day 120): Court reporter certifies Appellant's trial transcript.

9 September 2024 (Day 151): Legal office distributed copies of the record.

16 September 2024 (Day 158): Legal office sent record to 7 AF/JA.

11 December 2024 (Day 244): 7 AF/JA sent record to Military Justice Policy Division (JAJM).

12 December 2024 (Day 245): JAJM delivered record to this court.

16 December 2024 (Day 249): The ROT is docketed with this court.

11 May 2026 (Day 760): Appellant files his assignment of errors, after requesting and receiving fourteen (14) enlargements of time (EOT) (over Government opposition).

2. Law

We review whether an appellant's due process rights are violated because of post-trial delay de novo. *United States v. Livak*, 80 M.J. 631, 633 (C.A.A.F. 2020).

Servicemembers have a due process right to timely review and appeal of courts-martial convictions. *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006) (citing *Toohey v. United States*, 60 M.J. 100, 101 (C.A.A.F. 2004)). In *Moreno*, the CAAF identified thresholds for facially unreasonable delay during the post-trial and appellate process when: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, and (3) the CCA did not render a decision within 18 months of docketing. *Id.* at 142–43. This court has established a timely review standard through a 150-day threshold from aggregated sentence-to-docketing for facially unreasonable delay in cases referred to trial on or after 1 January 2019. *Livak*, 80 M.J. at 633.

If there is a presumptive or facially unreasonable delay, the matter is examined under four non-exclusive factors: “(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.” *Moreno*, 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

The three types of prejudice arising from post-trial delays identified in *Moreno* are: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person’s grounds for appeal and ability to present a defense at a rehearing. *Moreno*, 63 M.J. at 138–139.

Each factor is analyzed to determine whether the respective factor favors the Government or Appellant. *Id.* at 136. The court then “balance[s] our analysis of the factors” to make the determination on whether a due process violation has occurred. *Id.* (citing *Barker*, 407 U.S. at 533).

“No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding.” *Id.* (citing *Barker*, 407 U.S. at 533). However, there is no due process violation if the appellant has not shown prejudice from the delay unless “the delay is so egregious that tolerating it would 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).

In any case before this court with proper jurisdiction, “the [c]ourt may provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial after the judgment was entered into the record[.]” 10 U.S.C. § 866(d)(2). Such relief means that which is “suitable considering the facts and circumstances of th[e] case.” *United States v. Valentin-Andino*, 85 M.J. 361, 367 (C.A.A.F. 2025). The relief provided does not have to be objectively meaningful and this court is not required to “explain its reasoning regarding the relief” it provides. *Id.* at 367.

3. Analysis

Analyzing the delay under the *Barker* factors, both the length of delay and reasons for the delay weigh in favor of Appellant.

First, as the time from sentencing to docketing with this court exceeds the *Livak* threshold by 99 days, and we have exceeded the 18-month threshold by less than a month, the delay is facially unreasonable.

Second, the Government has not provided a compelling reason for the delay from sentencing to docketing with this court. In their answer, the Government points to the court reporter completing duties for eleven other cases as a reason for the 120 days post-trial to the certifying of the trial transcript. However, the additional 125 days from certifying the transcript to delivery of the record to this court largely goes unanswered—the only explanation given was an administrative delay that was not “intentionally or negligently dilatory.”

However, the remaining factors of Appellant’s assertion of the right to timely review and appeal and prejudice weigh in favor of the Government. The record does not reflect that Appellant has asserted a right to timely review, with the record showing that Appellant was aware of a right to a timely appeal but consented to fourteen EOTs after his case was docketed with this court. Appellant does not raise prejudice nor that the delay has violated his due process right to timely appeal. Further, oppressive incarceration, anxiety, concern, impairment of Appellant’s grounds for appeal and ability to present a defense at a rehearing are not raised by Appellant. Balancing all four factors, despite the 99-day delay being unreasonable and chalked up as due to administrative reasons, Appellant has not been prejudiced and a due process violation has not occurred. Therefore, appropriate relief is not warranted.

III. CONCLUSION

The findings are correct in law. *See* Article 66(d), UCMJ, 10 U.S.C. § 866(d) (*Manual for Courts-Martial, United States* (2024 ed.)). In addition, the sentence as entered is correct in law and fact, and no error materially prejudicial to Appellant’s substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court