

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

UNITED STATES	)	No. ACM 39761 (rem)
<i>Appellee</i>	)	
	)	
v.	)	
	)	NOTICE OF
Jamal X. WASHINGTON	)	DOCKETING
First Lieutenant (O-2)	)	
U.S. Air Force	)	
<i>Appellant</i>	)	

The record of trial in the above-styled case was returned to this court by the Military Appellate Records Branch (JAJM).

Accordingly, it is by the court on this 25th day of June, 2026,

ORDERED:

That the record of trial in the above-styled matter is referred to Panel 1 review.

Counsel may submit briefs to address whether this court should (1) dismiss Charge I and its Specification and reassess the sentence or (2) order a rehearing in light of our superior court's decision in *United States v. Washington*, __ M.J. __, No. 25-0044, 2026 CAAF LEXIS 353, at *24–25 (C.A.A.F. 13 Apr. 2026) **not later than 26 July 2026**.



FOR THE COURT



JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	) BRIEF ON BEHALF OF
<i>Appellee</i>	) APPELLANT
	)
v.	)
	) Before Panel 1
First Lieutenant (O-2)	)
JAMAL X. WASHINGTON	) No. ACM 39761 (rem)
United States Air Force	)
<i>Appellant</i>	) Filed on 16 July 2026

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

Assignments of Error

I.

**WHETHER THIS COURT MUST SET ASIDE AND DISMISS
CHARGE I AND SET ASIDE THE SENTENCE?**

II.

**WHETHER APPELLANT IS DUE RELIEF FOR
UNREASONABLE POST-TRIAL DELAY?**

Statement of the Case and Relevant Facts

On 12 February and 8-13 April 2019, a panel sitting as a general court-martial at Malmstrom Air Force Base (AFB), Montana, tried First Lieutenant Washington, the Appellant. Contrary to his pleas, the panel convicted appellant of one specification of abusive sexual contact, one specification of conduct unbecoming an officer and a gentleman, and five specifications of fraternization, in violation of Articles 120, 133, and 134 Uniform Code of Military Justice, 10 U.S.C. §§ 920, 933, and 934 (2012) [hereinafter UCMJ]. A panel of officer members sentenced Appellant to be dismissed from the military service. (Original Record (OR)).

at 1174). The Convening Authority approved the sentence as adjudged. (Record of Trial (ROT), Vol. 7, Action, 21 Aug. 2019).

On 30 July 2021, this Honorable Court affirmed the findings as to Charges I and II. This Court set aside and dismissed with prejudice Charge III, Specifications 1-4 and set aside and dismissed without prejudice Charge III, Specification 5. *United States v. Washington*, No. ACM 39761 (reh), 2024 CCA LEXIS 342, at *2-3 (A.F. Ct. Crim. App. Aug. 20, 2024). This Honorable Court further set aside the sentence and directed the return of the record of trial to The Judge Advocate General of the Air Force [TJAG] for return to a Convening Authority for further action consistent with its opinion. *Id.* at *3.

On 18 August 2021, Appellant petitioned the Court of Appeals for the Armed Forces [CAAF] for a grant of review. On 1 October 2021, the CAAF denied the petition without prejudice to his right to raise the matters asserted therein during the normal course of appellate review. *United States v. Washington*, 82 M.J. 30 (C.A.A.F. 2021).

On 19 November 2021, after receiving the record of trial from TJAG, the Convening Authority dismissed the remaining Specification of Charge III as impractical to rehear and ordered a rehearing as to sentence for Charges I and II. *Washington*, 2024 CCA Lexis 342, at *3.

On 12-15 September 2022, a panel of officers sitting as a general court-martial at Malmstrom AFB, Montana, re-sentenced First Lieutenant Washington to a reprimand, total forfeiture of all pay and allowances, and nine months of confinement. *Id.* at *3. Appellant entered confinement immediately thereafter.

On 15 September 2022, the Military Judge conducted a post-trial Article 39(a), UCMJ, session in which Appellant moved that the Military Judge issue an instruction directing the Convening Authority to disapprove the sentence to confinement because the sentence to

confinement violated Article 63, UCMJ. The Military Judge denied the Defense motion. *Id.* at *3-4.

On 26 October 2022, Appellant filed before this Court a Petition for Extraordinary Relief in the Nature of a Writ of Habeas Corpus, or in the Alternative, Mandamus. *Id.* at *4. On 28 December 2022, this Honorable Court denied his Petition, reasoning that Appellant could assert the issues which he raised via extraordinary writ in the ordinary course of appellate review. *In Re Washington*, Misc. Dkt. No. 2022-14, 2022 CCA LEXIS 747, at *11 (A.F. Ct. Crim. App. Dec. 28, 2022). On 1 March 2023, the CAAF declined to grant review of this Court's decision concerning Appellant's writ application. *Washington v. United States*, No. 23-0086/AF, 2023 CAAF LEXIS 237 (C.A.A.F. Mar. 1, 2023)

On 20 August 2024, this Court affirmed the findings but re-assessed the sentence to forfeitures of \$2,500.00 pay per month for six months. *United States v. Washington*, No. ACM 39761 (reh), 2024 CCA LEXIS 342, at *85 (A.F. Ct. Crim. App. Aug. 20, 2024).

On 13 April 2026, CAAF reversed this court's holding as to the remaining Specification of Charge I and set aside the finding and sentence. *United States v. Washington*, ___ M.J. ___, 2026 CAAF LEXIS 353, at *24-25 (C.A.A.F. Apr. 13, 2026). That court directed this court to either dismiss Charge I and reassess the sentence or order a rehearing as to Charge I and the sentence. *Id.*

On 21 May 2026, CAAF issued its mandate.

Statement of Facts

Appellant relies on the statements of facts previously briefed before this court for the assignments of error raised on initial briefing and following re-hearing.

Argument

I.

CHARGE I SHOULD BE DISMISSED BECAUSE IT IS NOW FACTUALLY INSUFFICIENT. THIS COURT CANNOT REASSES THE SENTENCE AND MUST ORDER A REHEARING.

This court cannot reassess the sentence because of the major change in the sentencing landscape. This court should dismiss Charge I because, after considering appellant's improperly stricken testimony, this court must find that it is unproven. This court must therefore order a rehearing as to the sentence.

Law

Factual sufficiency

A factual sufficiency review involves a fresh, impartial look at the evidence, giving no deference to the decision of the trial court on factual sufficiency. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The term "reasonable doubt" does not mean that the evidence must be free from conflict. *United States v. Reed*, 51 M.J. 559, 562 (N-M. Ct. Crim. App. 1999), *aff'd*, 54 M.J. 37 (C.A.A.F. 2000). It does, however, mean "an honest, conscientious doubt, suggested by the material evidence, or lack of it," and that the government must prove guilt "to an evidentiary certainty" and must exclude "every fair and reasonable hypothesis of the evidence except that of guilt." *United States v. Billings*, 58 M.J. 861, 869 (Army Ct. Crim. App. 2003) (*citing United States v. Harville*, 14 M.J. 270, 271 (C.M.A. 1982)).

Sentence re-assessment

To determine whether it may re-assess a sentence, this court applies the factors contained in *United States v. Winkelmann*, 73 M.J. 11 (C.A.A.F. 2013). Those factors are whether there are:

(1) [d]ramatic changes in the penalty landscape and exposure ... (2) [w]hether an appellant chose sentencing by members or a military judge alone ... (3) [w]hether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; [and] (4) [w]hether the remaining offenses are of the type that judges of the courts of criminal appeals have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Id. at 15-16.

Standard of Review

This court reviews *de novo* whether it may reassess a sentence. *United States v. Rambharose*, 2020 CCA LEXIS 263 (A.F. Ct. Crim. App. 1998). This court reviews the factual sufficiency of the evidence *de novo*. *United States v. Gilchrist*, 61 M.J. 785, 793 (Army Ct. Crim. App. 2005) (citing *Washington*, 57 M.J. at 399).

Argument

Charge I is now factually insufficient.

This court must dismiss Charge I with prejudice because it cannot be certain of appellant's guilt. This court must conduct a factual sufficiency review to "assess the evidence in the **entire record** without regard to the findings reached by the trial court, and it must make its own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399. The "entire record" includes the verbatim transcript. *United States v. Tate*, 2021 CCA LEXIS 87, *7 (A. Ct. Crim. App. 25 Feb. 2021)(mem. op.). CAAF determined that the military judge abused his discretion when he struck appellant's testimony concerning Charge I.

"We hold that the military judge abused his discretion because Appellant's testimony described surrounding circumstances that were inextricably intertwined with the charged offense and a conversation that did not implicate the victim's sexual

predisposition. Therefore, this evidence was outside the scope of M.R.E. 412. Moreover, the military judge's instruction directing the panel to disregard Appellant's testimony about those surrounding circumstances as well as any testimony from Appellant that made any suggestion or reference to the victim's sexual orientation constituted an extraordinary remedy outside the range of reasonable choices supported by the facts or law.”

Washington, 2026 CAAF LEXIS 353, *1-2.

Appellant’s testimony denying the allegation contained in Charge I is therefore now before this court. This court must consider it as it again conducts factual sufficiency review. *Id.*

This court must set aside and dismiss Charge I because the Charge is unproven in light of appellant’s no longer stricken testimony. In he said-he said cases such as this, the credibility of alleged victim is the paramount issue. *United States v. Flesher*, 73 M.J. 303, 318 (C.A.A.F. 2014). Appellant’s version of events concerning Charge I was contradicted only by Captain C.P. Captain C.P.’s testimony, in addition to being contradicted by appellant, was contradicted by the testimony of other witnesses.

Captain C.P.’s testimony was inconsistent and was riddled with selective memories beneficial to him. Captain C.P. could remember specifics concerning the alleged physical contact with appellant and his exact words to appellant, “I'm not into that or anything like that.” (R. at 600-02). Captain C.P. claims not to remember surrounding circumstances, including who bought drinks for whom, what Captain C.P. did while he was at the Beacon, or what others did. (R. at 608-09). His inability to remember buying alcohol for appellant, his initial inability to remember spending significant time with appellant, and publicly urinating indicated selective memory and a shading of testimony. (R. at 547, 610, 612). Captain C.P. contradicted this lack of memory as to appellant’s location by testifying that he sat with appellant and Sergeant L [REDACTED] for most of the evening. (R. at 610-11).

Captain C.P. had a motive to transform consensual experimentation with homosexual conduct into a sexual assault. The protection of an established relationship provides a strong motive for an alleged victim transform an ill-advised consensual encounter into a non-consensual one. *United States v. Smith*, 68 M.J. 445, 448-49 (C.A.A.F. 2010). In this case, Captain C.P. had a live-in girlfriend, Miss H.H. at the time of the alleged incident. (R. at 576). His account to her of the evening in question did not include any reference to genital touching. (R. at 578). Instead, his account to her was consistent with another account he gave to another officer, close to the time of occurrence, in which he also did not mention any genital touching. (R. at 697).

This court cannot be convinced beyond a reasonable doubt that Captain C.P.'s subsequent addition of the alleged genital touching to his version of the night's events was not because he needed to establish his heterosexual bona fides in order to protect his relationship with Miss H.H. This court must set aside and dismiss Charge I because it cannot be convinced that appellant's version of events, which is again part of the record, is less credible than Captain C.P.'s.

This court must order a re-hearing as to the sentence.

After dismissing Charge I, this court cannot re-assess the sentence and must order a sentence re-hearing as to Charge II) because the *Winkelmann* factors favor a re-hearing. Those factors are whether there are:

(1) [d]ramatic changes in the penalty landscape and exposure ... (2) [w]hether an appellant chose sentencing by members or a military judge alone ... (3) [w]hether the nature of the remaining offenses capture the gravamen of criminal conduct included within the original offenses and, in related manner, whether significant or aggravating circumstances addressed at the court-martial remain admissible and relevant to the remaining offenses; [and] (4) [w]hether the remaining offenses are of the type that judges of the courts of criminal appeals have the experience and familiarity with to reliably determine what sentence would have been imposed at trial.

Winkelmann, 73 M.J. at 15-16.

Here, there has been a dramatic change in the penalty landscape and exposure. This court considers whether it may “determine what sentence **the members** would have imposed” and “the maximum sentence **the court members** considered.” *United States v. Riley*, 58 M.J. 305, 312 (C.A.A.F. 2013) (emphasis added). Members are not informed of the sentences or re-assessments of previous proceedings. *United States v. Rhodes*, 64 M.J. 630, 632-33 (A.F. Ct. Crim. App. 2007). Panel members are not told of limits on the approved sentence because this information “directly assaults their ability to arrive at an independent and unbiased sentence based solely on evidence presented to them under... R.C.M. 810(a)(2), 810(c), and 1001.” *Id.* Therefore, this court may consider only whether there has been a dramatic change in the sentence that may be *adjudged*, not the sentence that may be approved, because this court considers matters from the perspective of the panel, and the panel does not learn of matters limiting the sentence that may be approved.

Here, there has been a dramatic change in the penalty landscape. A dramatic change in the penalty landscape occurs where the maximum sentence the panel can adjudge at re-hearing is a small fraction of the original maximum sentence. *United States v. Buber*, 62 M.J. 476, 480 (C.A.A.F. 2006). In this case, assuming *arguendo* that the military judge at rehearing correctly determined the maximum sentence for Charge II,¹ the maximum sentence a panel could adjudge dropped from seven years and six months to six months following CAAF’s decision in this case. The new maximum sentence is 6.7% of the old. Therefore, there has been a dramatic change in the penalty landscape and the first *Winkelmann* factor favors a rehearing as to sentence.

¹ Appellant maintains that this determination was incorrect and relies upon Assignment of Error XI in his brief following the first rehearing as to sentence for this proposition.

At both the original hearing and the rehearing as to sentence, the panel sentenced appellant. (R. at 1174); (R. at 513)(rehearing). The second *Winkelmann* factor therefore favors a rehearing as to sentence.

Charge II does not capture the gravamen of Charge I. Charge I alleges a non-consensual sexual offense. The facts surrounding Charge II indicate that the offense was consensual. TSgt J.A. affirmatively testified that the touching involved was not offensive and was with his consent. (RR. at 549, 554, 563). The conduct involved in Charge II was not charged as sexual misconduct. Therefore, the two offenses are distinct. One does not capture the gravamen of the other. The third *Winkelmann* factor favors rehearing.

Finally, undersigned counsel are unable to find any case in which any service court considered the case of an officer “nut-tapping” an enlisted Airman as part of a joke. (R. at 549-50). This court therefore cannot be familiar with how a panel would judge these facts, because they are unique. This court should find that it cannot re-assess the sentence and should order a re-hearing as to sentence.

II.

IN THE ALTERNATIVE, THIS COURT SHOULD GRANT RELIEF FOR UNREASONABLE POST-TRIAL DELAY.

If this court determines that it will re-assess appellant’s sentence, it should also grant his credit for post-trial delay.

Law

A convicted service member’s right to due process includes a timely review and appeal of court-martial convictions. *United States v. Toohey*, 60 M.J. 100, 101 (C.A.A.F. 2004). “Dilatory post-trial processing, without an acceptable explanation, is a denial of fundamental military justice, not a question of clemency.” *United States v. Bauerbach*, 55 M.J. 501, 507 (A. Ct. Crim.

App. 2001). Accordingly, this court may grant relief for excessive post-trial delay even without a showing of “actual prejudice” within the meaning of Article 59(a) pursuant to its authority under Article 66(c). *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002). Post-trial processing is presumed to be unreasonably delayed when this court has not reached a final decision in an appellant’s case within eighteen months of the docketing of appellant’s case with this court. *Moreno*, 63 M.J. at 142.

This court considers the *Barker* factors in determining whether a delay amounts to a due process deprivation. Those factors are: (1) length of delay; (2) reasons for delay; (3) an assertion of the right to timely review and appeal; and (4) prejudice flowing from the delay. *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

Standard of Review

This court conducts a de novo review of whether post-trial delay violates an Appellant’s substantive rights. *United States v. Moreno*, 63 M.J. 129, 135 (2006).

Argument

Appellant is due relief because the delay here amounts to a due process violation. The *Barker* factors indicate that such a violation has occurred. Here, the first factor is in appellant’s favor because the appellate delay exceeds five years. The second factor also is in appellant’s favor because the five years delay is unexplained in or by the record of trial. *Moreno*, 63 M.J. at 142.

The third factor is in appellant’s favor because, on 26 March 2021, appellant noticed the court of his demand for speedy post-trial processing. (R. at 350-52)(re-hearing). Finally, appellant was prejudiced by the delay because has been forced to remain a registered sex offender. He has been forced to register as a sex offender through result of proceedings that

“violated Appellant's Sixth Amendment right to testify in his own defense.” *Washington*, 2026 CAAF LEXIS 353, *11. He has been understandably prejudiced in his personal and professional life as a result of this registration. Therefore, the *Moreno* factors favor relief.

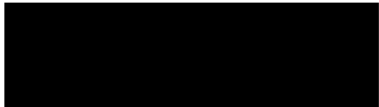
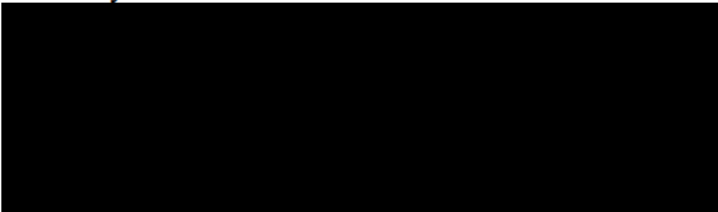
In the alternative, even if the court finds no prejudice, it should still re-assess the appellant’s sentence. “A timely, complete, and accurate record of trial is a critical part of the court-martial process.” *United States v. Collazo*, 53 M.J. 721, 725 (Army Ct. Crim. App. 2000). “Every [Servicemember] deserves a fair, impartial, and timely trial, to include the post-trial processing of his case.” *Id.* This court should grant appellant credit against any sentence because of the delay present here, even if it finds no due process violation. In granting relief for delay, this court should approve a sentence of no punishment and set aside and dismiss Charge II.

Conclusion

WHEREFORE, appellant respectfully requests this court set aside and dismiss Charge I and order a re-hearing as to the sentence, or, in the alternative, grant credit against any re-assessed sentence due to unreasonable post-trial delay by approving a sentence of no sentence and dismiss Charge II.



Robert Feldmeier
Attorney-at-law



Joshua L. Lopes, Capt, USAF
Appellate Defense Counsel



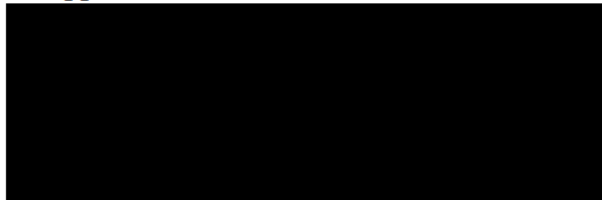
CERTIFICATE OF FILING AND SERVICE

I certify that foregoing was sent via email to the Court and served on the Air Force
Government Trial and Appellate Operations Division on 16 July 2026.

Respectfully submitted,

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Joshua L. Lopes
Capt, U.S. Air Force
Appellate Defense Counsel

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
	)	
v.	)	Crim. App. No. 39761 (rem)
	)	
First Lieutenant (O-2),	)	
JAMAL X. WASHINGTON,	)	24 July 2026
United States Air Force,	)	
<i>Appellant.</i>	)	

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

ISSUE PRESENTED

**WHETHER THIS COURT SHOULD DISMISS CHARGE I
AND ITS SPECIFICATION AND REASSESS THE
SENTENCE OR ORDER A REHEARING.**

STATEMENT OF THE CASE

In 2019, a panel of members, sitting as a general court-martial at Malmstrom Air Force Base, contrary to Appellant's pleas, convicted him of one specification of abusive sexual contact upon CP (Charge I and its specification) in violation of Article 120, UCMJ; one specification of conduct unbecoming an officer and a gentleman (Charge II and its specification) in violation of Article 133, UCMJ; and five specifications of fraternization (Charge III) in violation of Article 134, UCMJ. (*Report of Result of Trial*, 25 June 2019, ROT, Vol. 1.) The panel sentenced Appellant to a dismissal. (JA at 132.)

Relevant to this appeal, Appellant was convicted of the following offense in Charge I:

On or about 23 September 2017, commit sexual contact upon [CP], to wit: touching his genitals through the clothing, with an intent to gratify the sexual desires of the said First Lieutenant Jamal X. Washington, by causing bodily harm to [CP], to wit: touching his genitals through the clothing, without his consent.

(Id.)

On appeal, this Court affirmed the findings in Charge I (abusive sexual contact of CP) and Charge II, Specification 1 (conduct unbecoming). United States v. Washington, No. ACM 39761, 2021 CCA LEXIS 379, *110 (A.F. Ct. Crim. App. 30 July 2021) (unpub. op.). This Court set aside and dismissed with prejudice Charge III, Specifications 1-4 (fraternization), and set aside and dismissed without prejudice Charge III, Specification 5 (fraternization). Id. at *111. This Court set aside the sentence and remanded the case to the convening authority who could order a rehearing as to Charge III, Specification 5 and the sentence. Id.

The convening authority determined that a rehearing on Charge III, Specification 5 was impractical and dismissed the specification. United States v Washington, No. ACM 39761 (reh), 2024 CCA LEXIS 342, *3 (A.F. Ct. Crim. App. 20 August 2024) (unpub. op.) The convening authority ordered a rehearing on the sentence for Charge I and II. Id. At a sentencing rehearing, the panel members sentenced Appellant to nine months confinement, forfeiture of all pay and allowances, and a reprimand. Id. On appeal the second time, this Court disapproved Appellant's term of confinement and reprimand. Id. at *84. This Court reassessed the sentence to forfeitures of pay to \$2,500.00 pay per month for six months. Id. at *85.

Our superior Court granted review of the following issue: Whether the original military judge abused his discretion when he struck a portion of Appellant's testimony. United States v. Washington, 85 M.J. 408 (C.A.AF. 2025). CAAF answered the granted issue in the affirmative and set aside the finding of guilt as to Charge I and its specification and the sentence. United States v. Washington, 2026 CAAF LEXIS 353, *24 (C.A.A.F. 13 April 2026). CAAF found that Appellant's stricken testimony about a consensual hug, thigh touch, and lying on the bed was inextricably intertwined with the charged conduct and therefore not covered – and not

excluded – under Mil. R. Evid. 412. Id. at *15. Similarly, CAAF found that CP’s statement that men and woman have flirted with him in the past, also stricken by the military judge, did not shed light on CP’s sexual orientation because the statement did not imply anything about CP’s sexual predisposition – mode of dress, speech, or lifestyle. Id. at *15. Thus, the military judge erred in striking Appellant’s testimony.

CAAF set aside Charge I and its specification (abusive sexual contact upon CP) and affirmed Charge II, Specification 1 (dishonorably touching JJA’s genitals through the clothing) in violation of Article 133, UCMJ. Id. at *24. The Court remanded the record of trial to this Court to either dismiss Charge I and its specification and reassess the sentence or order a rehearing. Id. at *25.

This Court then ordered counsel to submit briefs to address whether it should dismiss Charge I and its specification and reassess the sentence or order a rehearing. (*Notice of Docketing*, 25 June 2026.)

STATEMENT OF THE FACTS

On the merits, CP testified that while on TDY Appellant approached CP at the hotel and said, “I need to tell you something.” (R. at 598.) CP went to Appellant’s room and sat down at the edge of the bed. (Id.) Appellant eventually leaned in and kissed CP on the lips. (Id.) After the kiss, Appellant reached down CP’s pants and touched his groin over his underwear. (R. at 600.) CP told Appellant “I’m not into you. I’m not into that or anything like that.” (R. at 601.) Despite this comment, Appellant touched CP’s groin over his underwear again. (R. at 601.) CP never told Appellant that he could touch him for a second time. (Id.)

Appellant testified and denied that the he touched Appellant’s groin area but instead alleged that they had a lasting consensual hug and that he had his hand on CP’s thigh while lying

on the bed.. (R. at 802.) Appellant testified that CP “talked about, he had [sic] men and women come on to him before.” (R. at 803.) The military judge struck Appellant’s testimony about the consensual hug, thigh touch, lying on the bed, and CP’s statement that men and women had come on to him. (R. at 867-68.) The military did not strike Appellant’s denial of the allegation. (Id.)

ARGUMENT

**THIS COURT SHOULD AUTHORIZE A REHEARING AND
REMAND THIS CASE TO THE CONVENING AUTHORITY
WHO MAY ORDER A REHEARING ON THE FINDINGS
AND SENTENCE.**

Standard of Review

This Court has broad discretion to either reassess a sentence or order a rehearing. R.C.M. 810; United States v. Winkelmann, 73 M.J. 11, 12 (C.A.A.F. 2013).

Law and Analysis

This Court should use its discretionary authority to authorize a rehearing on the remaining offense that CAAF set aside, as well as the sentence. The United States disagrees with Appellant that this Court should dismiss Charge I and its specification and order a rehearing for the sentence only. Given that the excluded evidence was not considered by a factfinder at trial, this Court should authorize a rehearing on both the findings (Charge I) and sentence (Charge I and Charge II). Further, a rehearing allows Appellant to assert a defense that he was deprived of at his original trial. A rehearing is necessary to ensure a fair trial for both the government and Appellant.

A. A rehearing is warranted because a factfinder should be able to evaluate Appellant's guilt in light of the evidence excluded at his original trial.

Appellant argues that the conviction is factually insufficient because this Court cannot be convinced that Appellant's version of events is less credible than CP's allegations. (App. Br. at 7.) This is not the standard to apply to determine whether a rehearing is appropriate because Charge I has already been set aside. There is no conviction at issue before this Court, and logically speaking it cannot make a factual sufficiency determination under Article 66. A factual sufficiency determination for a conviction that does not exist cannot dictate whether this Court exercises its broad authority to order a rehearing. Appellant's arguments urging this Court to dismiss Charge I are without merit.

This Court should authorize a rehearing because nothing indicates that the government would not be able to prove the offense beyond a reasonable doubt if it tried Appellant again. Even if a factfinder considers Appellant's claims that only a consensual encounter occurred, it can still find Appellant's guilt beyond a reasonable doubt by finding CP's testimony credible. CP's testimony alone may prove Appellant's guilt beyond a reasonable doubt. *See United States v. Rodriguez-Rivera*, 63 M.J. 372, 383 (C.A.A.F. 2006) (holding that the testimony of a sole witness may satisfy the government's burden of proof to prove the offense beyond a reasonable doubt). In any event, a factfinder would be in the best position to weigh the evidence, make credibility determinations, and determine Appellant's guilt or innocence. *See United States v. Robbins*, 52 M.J. 455, 458 (C.A.A.F. 2000) (noting that it is the responsibility of the court-martial panel to weigh evidence and determine credibility).

It should be up to the factfinder to determine the credibility of CP and Appellant's claims. At a rehearing, the parties at trial will have full opportunity to present their cases in accordance with CAAF's evidentiary ruling. In sum, this Court should allow the convening authority to

make the decision whether to proceed with a rehearing, rather than foreclosing that option altogether.

B. Appellant's claim of unreasonable post-trial delay is outside the scope of CAAF's remand order.

CAAF remanded the record of trial to this Court to either dismiss Charge I and its specification and reassess the sentence or order a rehearing. Washington, 2026 CAAF LEXIS 353, at *25. Consequently, Appellant's claim of post-trial delay based on Article 66 is beyond the scope of CAAF's mandate. In turn, Appellant's claim is also outside the scope of this Court's briefing order, which only ordered briefing on whether it should order a rehearing or dismiss Charge I and its specification and reassess the sentence. (*Notice of Docketing*, 25 June 2026.) Thus, this Court should not consider Appellant's argument regarding post-trial delay.

Further, despite Appellant's arguments regarding prejudice because of post-trial delay, he may still be subjected to sex offender registry if he is found guilty of Charge I and its specification at a rehearing. And Appellant is not pointing to any specific delay or dilatory processing by the government, he just complains that the entire appellate process has taken too long. The appellate process has taken so long, in large part because Appellant has been successful in some of his appeals, necessitating remands and a rehearing. Appellant's success does not equate to prejudice. That said, this issue regarding post-trial delay is not ripe for this Court's consideration. Appellant may raise this issue during the normal course of appellate review after his rehearing.

CONCLUSION

The United States respectfully requests that this Court authorize a rehearing and return this case to The Judge Advocate General for remand to an appropriate convening authority who may order a rehearing as to Charge I and its specification and the sentence.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel

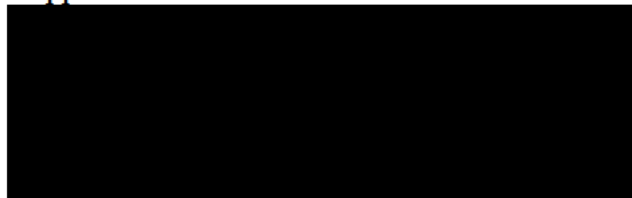
MARY ELLEN PAYNE
Associate Chief

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, the Air Force Appellate Defense Division, and civilian appellate defense counsel on 24 July 2026.



VANESSA BAIROS, Maj, USAF
Appellate Government Counsel



IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	REPLY BRIEF ON BEHALF
<i>Appellee</i>	)	APPELLANT
	)	
v.	)	
	)	Before Special Panel
First Lieutenant (O-2)	)	
JAMAL X. WASHINGTON	)	No. ACM 39761 (upon remand)
United States Air Force	)	
<i>Appellant</i>	)	Filed on 2 August 2026

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

Comes now Appellant in reply to the government's brief and states as follows:

1. This court has continuing Article 66, UCMJ, authority and responsibility.

The government incorrectly asserts that court cannot conduct Article 66 review because “[c]harge I has already been set aside.” Gov. Br (rem) at 5. The government is incorrect. Charge I is again before this court. Only the finding for Charge I has been set aside. *United States v. Washington*, __ M.J. __, 2026 CAAF LEXIS 353, *24-25 (C.A.A.F. Apr. 13, 2026). Since CAAF did not dismiss the Charge itself, this court therefore must determine whether, on the basis of the entire record, the individual judges of this court are convinced of appellant's guilt.

“after weighing the evidence of record and making allowances for not having personally observed the witnesses, we [must be personally] convinced of appellant's guilt **beyond a reasonable doubt.**” *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). [A CCA] must base its decision as to legal and factual sufficiency on the ‘**entire record.**’ *United States v. Bright*, 60 M.J. 936, 938 (A. Ct. Crim. App., 2005) citing *United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004) quoting Article 66(c), UCMJ.”

United States v. Romero, 2008 CCA LEXIS 588, *6-7 (A. Ct. Crim. App. 27 Jun. 08)(mem. op.)(emphasis added).

The entire record now includes appellant's testimony because CAAF determined that it was improperly stricken. *Washington*, 2026 CAAF LEXIS 353, at *1-2. If this court is not convinced of appellant's guilt beyond a reasonable doubt after considering appellant's previously stricken testimony, this court must dismiss Charge I with prejudice.

The government incorrectly asserts that Article 66 does not apply on remand from CAAF. Gov. Br (rem) at 5-6. This court must conduct an Article 66 review because "[o]nce jurisdiction is acquired pursuant to Article 66, the Court of [Criminal Appeals] has a statutory duty to review the case to completion..." under the Article 66(c) standard of review. *Boudreaux v. United States Navy-Marine Corps Court of Military Review*, 28 M.J. 181, 182 (CMA 1989). Upon remand, "a CCA cannot refuse to review an issue that was not waived" and must apply the same plenary, *de novo* standard that it applied on initial review. *United States v. Steele*, 83 M.J. 188, 192 (C.A.A.F. 2023). Therefore, this court must review the record of trial again and consider appellant's improperly stricken testimony.

In *Steele*, a CCA returned a matter for a re-hearing on the sentence. *United States v. Steele*, 82 M.J. 695 (A. Ct. Crim. App. 2019). After resentencing, the *Steele* appellant raised a constitutional challenge to one of the charges. The CCA refused to consider the new challenge *de novo* because "[w]hile [an] appellant is entitled to plenary review under Article 66 . . . he is only entitled to one such review." *Id.* at 698 citing *Smith*, 41 M.J. at 386. Instead, the Army CCA applied a "cause and prejudice" standard and refused, on that basis, to consider the *Steele* appellant's constitutional claims. *Steele*, 82 M.J. at 698-99. CAAF reversed the Army CCA and held that "if an issue is not waived, then [a CCA] must review the issue" under Article 66(c) and may not dodge its duty of *de novo* review. *Steele*, 83 M.J. at 191.

Similar to *Steele*, in which the *Steele* appellant raised an issue during further review after a re-hearing, *id.*, here, appellant raises after re-hearing whether his remaining convictions are factually insufficient when considered in light of his improperly stricken and now-admitted testimony. Further similar to *Steele*, in which the Army CCA attempted to avoid conducting a review by relying on a standard other than *de novo* review, *Steele*, 83 M.J. at 191, here, the government would have this court rely on some standard other than Article 66 in deciding whether to return the matter for rehearing or to dismiss the Charge. Gov. Br (rem) at 5. As in *Smith*, reliance on any other standard besides the plenary, *de novo* review that Article 66 demands is *er*. Therefore, this court should decline the government's suggestion to determine the disposition of appellant's case under some lesser standard. Instead, it should dismiss Charge I because it is unproven.

2. This court should dismiss both Charges for post-trial delay.

The government incorrectly claims that “[a]ppellant’s claim of unreasonable post-trial delay is outside the scope of CAAF’s remand order.” Gov. Br. (rem) at 6. Here, the CAAF remand order gave this court the option of dismissing Charge I. Dismissal of a Charge, with or without prejudice, is a remedy for post-trial delay. *United States v. Moreno*, 63 M.J. 129, 143 (C.A.A.F. 2006). This court therefore has the option to dismiss Charge I for any lawful reason, including for post-trial delay.

The government ignores the effect and severity of the post-trial delay on this case. Appellant’s re-hearing as to sentence was completed on 15 September 22. (R. at 529)(rehearing). This court did not render its decision in *United States v. Washington*, 2024 CCA LEXIS 342 (A.F. Ct. Crim. App. 20 Aug. 2024) until nearly two years later. Appellant repeatedly demanded speedy post-trial processing. In the interim, Appellant was forced to serve

the entirety of a sentence to confinement that this court subsequently held to be improper. *Id.* at *85. That sentence was served for a conviction that CAAF found to be fundamentally flawed and in violation of appellant's constitutional rights. *Washington*, 2026 CAAF LEXIS 353 at *1-2. This court should dismiss with prejudice both Charges because of this period of delay alone.

Moreover, the entirety of the delay in appellant's case is manifestly unreasonable. Appellant's initial court-martial concluded in April of 2019. It is now July of 2026, or more than seven years after the initial court-martial adjourned. The government now proposes to conduct yet another rehearing, further delaying the completion of this matter, potentially by years. Gov. Br. (rem.) at 5. This court should find that the length of the delay already incurred violates appellant's right to due process and requires dismissal of both charges.

The government's suggestion that "a rehearing allows Appellant to assert a defense that he was deprived of at his original trial" is dystopian. Gov. Br. (rem.) at 4. Appellant was deprived this defense because of the actions of government counsel. Trial counsel created the appellate mess into which this court again wades by advancing a plainly erroneous interpretation of Mil. R. Evid. 412. See e.g. R. at 858(sealed). The suggestion that a re-hearing is advantageous to appellant is therefore disingenuous at best.

According to the government, the "appellate process has taken so long, in large part because Appellant has been successful in some of his appeals, necessitating remands and a rehearing." Gov. Br. (rem.) at 6. In other words, government attorneys are responsible for the delay because they committed layers of error that required years of litigation to correct. This court should therefore discount the nonsensical assertion that "Appellant's success does not equate to prejudice." *Id.*

Enough is enough. This court should terminate the seven-year duration of this case by dismissing both Charges, or in the alternative, dismissing Charge I with prejudice and ordering a re-hearing as to the sentence.

Conclusion

WHEREFORE, appellant respectfully requests this court to dismiss both Charges for post-trial delay, or, in the alternative, dismiss Charge I and order a re-hearing as to the sentence, and order credit against any re-assessed sentence due to unreasonable post-trial delay.

[REDACTED]
Attorney-at-law
[REDACTED]