UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Tavaris BANKS	)	**DOCKETING**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

On 10 October 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A).

As of the date of this notice, the court has not yet received a record of trial in Appellant's case.

Accordingly, it is by the court on this 24th day of October, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 2.

It is further ordered:

The Government will forward a copy of the record of trial to the court forthwith.

FOR THE COURT

[redacted]

OLGA STANFORD
Commissioner

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 10 October 2023, Appellant filed a "Notice of Direct Appeal Pursuant to Article 66(b)(1)(A), UCMJ," with this court. The above-styled case was docketed on 24 October 2023 and the court ordered the Government to "forward a copy of the record of trial to the court forthwith." Over 100 days have elapsed and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 5th day of February, 2024,

ORDERED:

Government appellate counsel will inform the court in writing not later than **29 February 2024** of the status of this case with regard to this court's 24 October 2023 order.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	UNITED STATES' NOTICE OF STATUS OF COMPLIANCE
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS**, USAF *Appellant*	)	No. ACM_____
	)	29 February 2024

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

Pursuant to this Court's 5 February 2024 order, the United States hereby provides notice of status of compliance.

On 24 October 2023, the above-styled case was docketed with this Court. On the same date the Court ordered the Government to "forward a copy of the record of trial to the court forthwith." On 5 February 2024 this Court ordered Government appellate counsel "to inform the court in writing not later than 29 February 2024 of the status of this case with regard to this court's 24 October 2023 order." (Order, dated 5 February 2024.)

The base legal office has indicated that the same court reporter assigned in the above-styled case is completing U.S. v. Dawson. The court reporter will begin transcribing the above-styled case once U.S. v. Dawson is complete. Transcription assistance has been requested in this case.

WHEREFORE, the United States requests this Honorable Court accept this filing as confirmation of the government's compliance with its 5 February 2024 order.

[redacted]

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

[redacted]

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 29 February 2024.

ZACHARY T. EYTALIS, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Counsel Division
Military Justice and Discipline Directorate
United States Air Force
(808) 372-7022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**NOTICE OF DIRECT APPEAL PURSUANT TO ARTICLE 66(b)(1)(A), UCMJ**
v.	)	
Master Sergeant (E-7), **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM SXXXXX
	)	10 October 2023

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

On 30 January – 3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, convicted Master Sergeant (MSgt) Tavaris Banks, contrary to his pleas, of one specification of assault consummated by a battery, in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2019). The military judge sentenced MSgt Banks to a reprimand, reduction to the grade of E-4, and three months of confinement. Record of Trial (ROT) Vol. 1, Statement of Trial Results, dated 3 February 2023. The Convening Authority reduced the sentence to a reprimand, reduction to the grade of E-5, with reduction below the grade of E-6 suspended, and 45 days of confinement. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, dated 16 March 2023.

On 12 July 2023, the Government purportedly sent MSgt Banks the required notice by mail of his right to appeal within 90 days. Pursuant to Article 66(b)(1)(A), UCMJ, MSgt Banks files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]
FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 10 October 2023.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

This court ordered the Government to "inform the court in writing not later than 29 February 2024 of the status of this case with respect to this court's 24 October 2023 order."

In its response on 29 February 2024, the Government stated "the same court reporter assigned in the above-styled case is completing [another case before this court]. The court reporter will begin transcribing the above-styled case once [the other case] is complete." Nearly 120 days have elapsed since the Government's response and, to date, the record has not been provided to the court.

Accordingly, it is by the court on this 26th day of June, 2024,

ORDERED:

Not later than **26 July 2024**, Government will forward a copy of the record of trial to the court.

Should the record of trial not be provided by 26 July 2024, the court reporter, or an appropriate designee, shall provide a memorandum for record stating the status of the processing of the record of trial in this case not later than **27 July 2024** to the Government to submit to this court in a motion to attach. *See* A.F. Ct. Crim. App. R. 23.3(b). Until the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter.

FOR THE COURT

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM _____**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 10 October 2023, this court received a notice of direct appeal from Appellant in the above-styled case, pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A). On 24 October 2023, we docketed the case without the record of trial, but ordered the Government to "forward a copy of the record of trial to the court forthwith."

On 5 February 2024, after 100 days had elapsed since docketing the case, we ordered the Government to inform the court in writing as to the status of Appellant's case. In its timely response to the court, on 29 February 2024, the Government stated "the same court reporter assigned in the above-styled case is completing [another case before this court]. The court reporter will begin transcribing the above-styled case once [the other case] is completed."

On 26 June 2024, we again ordered the Government to forward a copy of the record of trial in Appellant's case not later than 26 July 2024.

On 1 August 2024, counsel for Appellant then submitted a Motion for Leave to File Demand for Speedy Appellate Review and Demand for Speedy Appellate Review.

On this same date, 1 August 2024, the Government moved this court to attach a memorandum for record by the court reporter stating she sent the completed verbatim transcript to the base legal office on 25 June 2024. We granted the motion to attach on 6 August 2024.

On 8 August 2024, the Government again moved this court to attach another memorandum for record, dated 8 August 2024, by the same court reporter who stated the record of trial was "[s]ent to [the Appellate Records Branch (JAJM)]" by the Osan legal office. We granted this motion the same date of this order.

To date, this court has not received the record of trial to Appellant's case.

The Government did not file opposition to Appellant's demand for speedy appellate review.

Accordingly, it is by the court on this 13th day of August, 2024,

ORDERED:

Appellant's Motion for Leave to File Demand for Speedy Appellate Review is **GRANTED**. The court notes Appellant demands speedy appellate review.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR LEAVE TO FILE DEMAND FOR SPEEDY APPELLATE REVIEW AND DEMAND FOR SPEEDY APPELLATE REVIEW**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7), **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM _____
	)	1 August 2024

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

Pursuant to Rule 23(d) and 23.3 of this Honorable Court's Rules of Practice and Procedure, Appellant moves for leave to file a demand for speedy appellate review of his case.

This Court docketed Appellant's case on 24 October 2023 and ordered the Government to "forward a copy of the record of trial to the [C]ourt forthwith." Notice of Docketing, 24 October 2023. From the date of docketing to the present date, 282 days have elapsed. To Appellant's knowledge, the Government has not forwarded a copy of the record of trial to the Court.

Service members have a right to timely post-trial appellate review of court-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006); *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). Accordingly, Appellant demands speedy appellate review of his case.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant Appellant's motion for leave to file this demand for speedy appellate review and review his case in accordance with his asserted right to speedy appellate review.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4770
Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 August 2024.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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Email: frederick.johnson.11@us.af.mil

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	1 August 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (31 Jul 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 1 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	8 August 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (8 Aug 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
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(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 8 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	19 August 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (15 Aug 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 19 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	23 August 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (22 Aug 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 23 August 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	2 September 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (29 Aug 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 2 September 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	**MOTION TO ATTACH DOCUMENT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM ____
	)	6 September 2024

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves this Court to attach the following document to this motion:

Appendix – Banks – ACM ____ – AFCCA Compliance Order JAT MFR (5 Sep 24)

On 26 June 2024, this Court ordered the Government to "forward a copy of the record of trial to the court" no later than 26 July 2024. (*Order*, dated 26 June 2024). If the record was not provided by the designated time, this Court ordered the court reporter to provide "a memorandum for record [MFR] stating the status of the processing of the record of trial in this case not later than 27 July 2024 to the Government to submit to this court in a motion to attach," and further ordered that "[u]ntil the record of trial is returned to the court, such a memorandum of record will be prepared and submitted to the court every seven days thereafter." (Id.) The record of trial did not arrive to the Court before 26 July 2024. Thus, the attached MFR was written by the court reporter in the above captioned case, and it provides the required update on the record of trial processing.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Document.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

FOR

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 6 September 2024.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	31 October 2024

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

Pursuant to Rule 23.3(m)(1), (2), and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **8 January 2025**. The record of trial was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 10 September 2024. From the date of docketing to the present date, 373 days have elapsed. On the date requested, 442 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the

adjudged confinement to 45 days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 28 clients; 14 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF), and two other clients have pending supplements to their petitions for grant of review before the CAAF. Six matters currently have priority over this case:

1) *United States v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF – The record of trial is four volumes consisting of 14 prosecution exhibits, 11 defense exhibits, 12 appellate exhibits, and one court exhibit; the transcript is 482 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.
2) *United States v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF – The record of trial is four volumes consisting of seven prosecution exhibits, nine defense exhibits, and 26 appellate exhibits; the transcript is 656 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.
3) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages.

Undersigned counsel was recently detailed to this case and is reviewing the record in preparation for drafting a grant brief to the CAAF.

4) *United States v. Henderson*, ACM 40419 – The record of trial is five volumes consisting of ten prosecution exhibits, 21 defense exhibits, two court exhibits, and 25 appellate exhibits; the transcript is 937 pages. Undersigned counsel has reviewed approximately seventy percent of the record of trial in this case.

5) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested first enlargement of time.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 31 October 2024.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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1 November 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) TAVARIS BANKS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24057 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

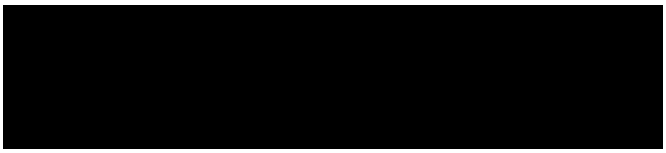
WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 1 November 2024.



JENNY A. LIABENOW, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 31 October 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error.* The Government opposes the motion.

From the date of docketing to when this enlargement would end, 444 days will have elapsed, and from the date of receipt of the record of trial to when this enlargement would end, 120 days will have elapsed.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 4th day of November, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **10 January 2025.**

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits.

Appellant's counsel is advised that any subsequent motions for enlargement of time shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time.

---

* Appellant's counsel asserted the "Government forwarded the record of trial to this Court on 10 September 2024." This court received the record of trial on 12 September 2024.

Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time if counsel previously replied in the affirmative.

Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

[redacted]
OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	2 January 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **9 February 2025**. The record of trial was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 436 days have elapsed. On the date requested, 474 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the

adjudged confinement to 45 days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 29 clients; 17 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief before the United States Court of Appeals for the Armed Forces (CAAF).[1] Six matters currently have priority over this case:

1) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel has drafted a grant brief to the CAAF in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 31-page supplement to the petition for grant of review to the CAAF and a four-page reply to the Government's answer in *U.S. v. Zhong*, ACM 40411, USCA Dkt. No. 25-0011/AF; prepared and filed a 20-page supplement to the petition for grant of review to the CAAF in *U.S. v. Myers*, ACM S32749, USCA Dkt. No. 25-0012/AF; prepared and filed a five-page response to the Government's motion for reconsideration and prepared and submitted a two-page bullet background paper in response to the Government's request for The Judge Advocate General to certify the record to the CAAF in *U.S. v. Patterson*, ACM 40426; reviewed the entirety of the seven-volume record of trial and prepared and filed a 45-page brief on behalf of appellant in *U.S. v. York*, ACM 40604; sat as second chair for outreach oral argument before this Court in *U.S. v. Menard*, ACM 40496; completed his review of the five-volume record of trial and prepared and filed a 17-page AOE in *U.S. v. Henderson*, ACM 40419; prepared and filed a 35-page grant brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; prepared and filed a motion to withdraw from appellate review in *U.S. v. Manriquez*, ACM 40527; drafted a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 15 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; and participated in practice oral arguments for three additional cases. Additionally, counsel was on leave on 24–29 December 2024 and was off for the Veterans Day, Thanksgiving, and New Year's Day holidays.

2) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

3) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

5) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

6) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was

advised of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested second enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 January 2025.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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3 January 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) TAVARIS BANKS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24057 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 January 2025.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	2 February 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **11 March 2025**. The record of trial was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 467 days have elapsed. On the date requested, 504 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 180 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to 45 days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 33 clients; 19 clients are pending initial AOEs before this Court. Additionally, one client has an upcoming oral argument before the United States Court of Appeals for the Armed Forces (CAAF).[1] Seven matters currently have priority over this case:

1) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, 36 appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel is drafting a reply to the Government's answer in this case.
2) *United States v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF – The record of trial is nine volumes consisting of 14 prosecution exhibits, 16 defense exhibits, one court exhibit, and 47 appellate exhibits; the transcript is 896 pages.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a 26-page grant brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed approximately 65 percent of the eight-volume record of trial in *U.S. v. Burkhardt-Bauder*, ACM 24011; prepared and filed a 17-page reply brief to the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; assisted with preparing and filing a 44-page AOE in *U.S. v. Dawson*, ACM 24041; prepared and filed a six-page reply brief in *U.S. v. Henderson*, ACM 40419; began reviewing the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; and participated in practice oral arguments for three additional cases. Additionally, counsel was off for the National Day of Mourning for President Carter's state funeral and the Birthday of Martin Luther King, Jr. holiday.

Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 26 February 2025.

3) *United States v. Burkhardt-Bauder*, ACM 24011 – The record of trial is eight volumes consisting of five prosecution exhibits, 19 defense exhibits, 53 appellate exhibits, and one court exhibit; the transcript is 957 pages. Undersigned counsel has reviewed approximately 80 percent of the record of trial in this case, including all non-sealed materials.

4) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has begun reviewing the record of trial in this case.

5) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

7) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested third enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 February 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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4 February 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) TAVARIS BANKS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 24057 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 February 20[redacted].

JOCELYN Q. WRIGHT, Maj, USAF
Appellate Government Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	4 March 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **10 April 2025**. The record of trial was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 497 days have elapsed. On the date requested, 534 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 210 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to 45 days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, 16 defense exhibits, and 30 appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing 36 clients; 21 clients are pending initial AOEs before this Court. Additionally, one client has a pending brief, one other client has an upcoming oral argument, and one additional client has an upcoming petition for a grant of review, all before the United States Court of Appeals for the Armed Forces (CAAF).[1] Seven matters currently have priority over this case:

1) *United States v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel has drafted an answer brief to the CAAF in this case.
2) *United States v. Cadavona*, ACM 40476 – The record of trial is four volumes consisting of 11 prosecution exhibits, two defense exhibits, and 24 appellate exhibits; the

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a motion to remand in *U.S. v. Burkhardt-Bauder*, ACM 24011; conducted three practice oral arguments and presented oral argument as lead counsel before the CAAF in *U.S. v. Navarro Aguirre*, ACM 40354, USCA Dkt. No. 24-0146/AF; reviewed approximately 15 percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; prepared and filed a seven-page reply brief in *U.S. v. York*, ACM 40604; prepared and filed a 13-page reply brief to the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; reviewed the Government's brief and drafted a 25-page answer to the CAAF in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; and participated in ten practice oral arguments for four additional cases. Additionally, counsel was off for the Washington's Birthday holiday.

transcript is 329 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

3) *United States v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF – The record of trial is six volumes consisting of six prosecution exhibits, one court exhibit, 12 defense exhibits, and 36 appellate exhibits; the transcript is 396 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 19 March 2025.

4) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, 42 appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately 20 percent of the record of trial in this case.

5) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, 14 defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

7) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of 13 prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was advised of his right to a timely appeal, was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fourth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 March 2025.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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5 March 2025

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force, *Appellant.*	)	No. ACM 24057 5 March 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time (Fourth) to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 5 March 2025.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
Joint Base Andrews, MD
DSN: 612-4809

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	3 April 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **10 May 2025**. The record of trial was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 527 days have elapsed. On the date requested, 564 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 240 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to forty-five days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing thirty-six clients; twenty-one clients are pending initial AOEs before this Court. Additionally, one client has an upcoming oral argument before the United States Court of Appeals for the Armed Forces (CAAF).[1] Six matters currently have priority over this case:

1) *United States v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF – The record of trial is eight volumes consisting of twelve prosecution exhibits, eight defense exhibits, two court exhibits, and seventy-five appellate exhibits; the transcript is 987 pages. Undersigned counsel is preparing to present oral argument as lead counsel before the CAAF in this case on 9 April 2025.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately five percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; prepared and filed a thirteen-page supplemental reply brief, conducted three practice oral arguments, and presented oral argument as lead counsel before the CAAF in *U.S. v. Taylor*, ACM 40371, USCA Dkt. No. 24-0234/AF; prepared and filed a twenty-eight-page answer to the CAAF and conducted two practice oral arguments in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; petitioned the CAAF for a grant of review and prepared and filed a twenty-seven-page supplement to the petition in *U.S. v. Cadavona*, ACM 40476, USCA Dkt. No. 25-0114/AF; assisted with preparing and filing an eighteen-page reply and an eight-page motion response in *U.S. v. Dawson*, ACM 24041; and reviewed approximately ninety-five percent of the three-volume record of trial in *U.S. v. Harnar*, ACM 40559. Additionally, counsel attended the CAAF wreath laying ceremony and reception on 25 March 2025.

2) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, forty-two appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately twenty-five percent of the record of trial in this case.

3) *United States v. Harnar*, ACM 40559 – The record of trial is three volumes consisting of five prosecution exhibits, fourteen defense exhibits, six appellate exhibits, and two court exhibits; the transcript is 106 pages. Undersigned counsel has reviewed approximately ninety-five percent of the record of trial in this case.

4) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is fourteen volumes consisting of fourteen prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

5) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

6) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was

provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested fifth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 3 April 2025.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	4 April 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 4 April 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	30 April 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **9 June 2025**. This case was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 554 days have elapsed. On the date requested, 594 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 270 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to forty-five days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing thirty-seven clients; twenty-two clients are pending initial AOEs before this Court.[1] Four matters currently have priority over this case:

1) *United States v. Haymond*, ACM 40588 – The record of trial is seven volumes consisting of five prosecution exhibits, seven defense exhibits, forty-two appellate exhibits, and one court exhibit; the transcript is 689 pages. Undersigned counsel has reviewed approximately forty percent of the record of trial in this case.
2) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is fourteen volumes consisting of fourteen prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel needs to conduct additional review of the record to prepare a brief on remand in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel reviewed approximately fifteen percent of the seven-volume record of trial in *U.S. v. Haymond*, ACM 40588; conducted a practice oral argument and presented oral argument as lead counsel before the United States Court of Appeals for the Armed Forces (CAAF) in *U.S. v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF; assisted with preparing and filing two motions in *U.S. v. Dawson*, ACM 24041; completed his review of the three-volume record of trial and prepared and filed a fifteen-page AOE in *U.S. v. Harnar*, ACM 40559; reviewed the two-volume record of trial and prepared and filed a motion to withdraw from appellate review in *U.S. v. Hatfield*, ACM S32791; and participated in three practice oral arguments for an additional case. Additionally, counsel was on leave on 18 and 26–29 April 2025.

3) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

4) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested sixth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 April 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	2 May 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

[redacted]

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 May 2025.

VANESSA BAIROS, Maj, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 3 June 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Seventh) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

On 6 June 2025, the court held a status conference to discuss the progress of this case. Appellant was represented by Major Frederick J. Johnson; Lieutenant Colonel Allen S. Abrams and Mr. Dwight H. Sullivan from the Appellate Defense Division were also present. Lieutenant Colonel Jenny A. Liabenow represented the Government. In response to questions from the court, Major Johnson provided additional information regarding Appellant's motion. This information included, *inter alia*, that additional appellate defense counsel had been assigned to two of the cases Major Johnson prioritized ahead of Appellant's; confirming that Major Johnson had not completed his review of the record; and that Appellant personally agreed with this motion. Major Johnson anticipated that, if this motion was granted, Appellant would require one additional enlargement of time in order to file his assignments of error. In response to questions from the court, Lieutenant Colonel Liabenow agreed with Appellant's computation of the number of days that have elapsed since Appellant's case was docketed with this court.

The court has considered Appellant's motion, the Government's opposition, prior filings and orders in this case, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 6th day of June, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Seventh) is **GRANTED**. Appellant shall file any assignments of error not later than **9 July 2025**.

FOR THE COURT

[redacted]

ROBERT DRIESSEN, Maj, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	30 May 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **9 July 2025**. This case was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 584 days have elapsed. On the date requested, 624 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 300 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to forty-five days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing thirty-nine clients; twenty-three clients are pending initial AOEs before this Court.[1] Additionally, one client has an upcoming petition for a grant of review and supplement to the petition before the United States Court of Appeals for the Armed Forces (CAAF). Four matters currently have priority over this case:

1) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has completed his review of the record of trial in this case.
2) *United States v. York*, ACM 40604 – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, thirty-six appellate exhibits, and one

[1] Since the filing of Appellant's last request for an enlargement of time, counsel completed his review of the seven-volume record of trial and prepared and filed a twelve-page AOE in *U.S. v. Haymond*, ACM 40588; assisted with preparing and filing two motions and a twenty-two page supplement to the petition for a grant of review before the CAAF in *U.S. v. Dawson*, ACM 24041, USCA Dkt. No. 25-0156/AF; completed his review on remand of the fourteen-volume record and prepared and filed a twenty-nine-page brief in *U.S. v. Driskill*, ACM 39889 (rem); completed his review of the four-volume record of trial in *U.S. v. Keilberg*, ACM 40601; prepared and presented a briefing for the Air Force Senior Defense Counsel Qualification Course; and participated in six practice oral arguments for two additional cases. Additionally, counsel was on leave on 2–4 May 2025, was off for the Memorial Day holiday, and attended the funeral service for CMSgt Swigonski at Arlington National Cemetery on 28 May 2025.

court exhibit; the transcript is 847 pages. Undersigned counsel is preparing to petition the CAAF for a grant of review in this case.

3) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has not yet begun reviewing the record of trial, but additional counsel has been detailed to this case.

4) *United States v. Smith*, ACM 40437 (f rev) – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Undersigned counsel has not yet begun reviewing the record of trial in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested seventh enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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Email: frederick.johnson.11@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 May 2025.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	3 June 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two thirds of the 18 month standard for this Court to issue a decision, which only leaves about 8 months combined for the United Sates and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

JO USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 3 June 2025.

JO USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (EIGHTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	1 July 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of thirty days, which will end on **8 August 2025**. This case was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 616 days have elapsed. On the date requested, 654 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 330 days will have elapsed.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended

part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to forty-five days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel has begun reviewing the record of trial in this case.

Counsel is currently representing forty-two clients; twenty-five clients are pending initial AOEs before this Court.[1] Additionally, one client has an upcoming supplement to the petition for grant of review and another client has an answer brief, both before the United States Court of Appeals for the Armed Forces (CAAF). Six matters currently have priority over this case:

1) *United States v. Driskill*, ACM 39889 (rem) – The record of trial is 14 volumes consisting of 14 prosecution exhibits, four defense exhibits, and 169 appellate exhibits; the transcript is 2,062 pages. Undersigned counsel has drafted the reply brief in this case.
2) *United States v. Keilberg*, ACM 40601 – The record of trial is four volumes consisting of thirteen prosecution exhibits, one defense exhibit, and seven appellate exhibits; the transcript is 118 pages. Undersigned counsel has completed his review of the record of trial and is drafting the AOE in this case.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel began drafting the AOE in *U.S. v. Keilberg*, ACM 40601; petitioned the CAAF for a grant of review and began drafting the supplement to the petition in *U.S. v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF; reviewed the Government's answer and prepared and filed a two-page reply brief in *U.S. v. Haymond*, ACM 40588; and reviewed the Government's answer and drafted a reply brief in *U.S. v. Driskill,* ACM 39889 (rem). Additionally, counsel was off for the Juneteenth holiday.

3) *United States v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF – The record of trial is seven volumes consisting of five prosecution exhibits, two defense exhibits, thirty-six appellate exhibits, and one court exhibit; the transcript is 847 pages. Undersigned counsel has petitioned the CAAF for a grant of review and is drafting the supplement to the petition in this case.

4) *United States v. Kershaw*, ACM 40455, USCA Dkt. No. 25-0177/AF – The record of trial is eight volumes consisting of 11 prosecution exhibits, nine defense exhibits, one court exhibit, and 71 appellate exhibits; the transcript is 703 pages. Undersigned counsel is reviewing the Government's Brief in Support of the Certified Issue and preparing to draft an answer brief in this case.

5) *United States v. Jackson*, ACM S32780 – The record of trial is five volumes consisting of twelve prosecution exhibits, thirteen defense exhibits, five appellate exhibits, and one court exhibit; the transcript is 122 pages. Undersigned counsel has begun reviewing the record of trial, and additional counsel has been detailed to this case.

6) *United States v. Smith*, ACM 40437 (f rev) – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Undersigned counsel has begun reviewing the record of trial, and additional counsel has been detailed to this case.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was provided an update of the status of counsel's progress on Appellant's case, was consulted with

regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested eighth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 July 2025.

Respectfully submitted,

FREDERICK J. JOHNSON, Maj, USAF
Appellate Defense Counsel
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	2 July 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United Sates and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

KATE E. LEE, Maj, USAF
Appellate Government Counsel
Government Trial & Appellate Operations
1500 W. Perimeter Road, Suite 1190
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DSN: 612-4804

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 2 July 2025.

KATE E. LEE, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 July 2025, counsel for Appellant submitted a Motion for Enlargement of Time (Ninth) requesting an additional seven days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, prior filings and orders in this case, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 31st day of July, 2025,

ORDERED:

Appellant's Motion for Enlargement of Time (Ninth) is **GRANTED**. Appellant shall file any assignments of error not later than **15 August 2025**. No further enlargements of time shall be granted without a demonstration of exceptional circumstances.

FOR THE COURT

[redacted]

A

Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (NINTH)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	29 July 2025

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a ninth enlargement of time to file an Assignments of Error (AOE). Appellant requests an enlargement for a period of **seven days**, which will end on **15 August 2025**. This case was docketed with this Court on 24 October 2023. The Government forwarded the record of trial to this Court on 12 September 2024. From the date of docketing to the present date, 644 days have elapsed. On the date requested, 661 days will have elapsed. From the date the Court received the record of trial to when this enlargement of time, if granted, would end, 337 days will have elapsed.

In a previous status conference, undersigned counsel anticipated that Appellant would need a seventh and eighth enlargement of time in order to file an AOE. *United States v. Banks*, No. ACM 24057, Order (A.F. Ct. Crim. App. June 6, 2025). Since both of those enlargements of time have been granted, the deadline is now 8 August 2025, and undersigned counsel was preparing to file Appellant's AOE by that date. *United States v. Banks*, No. ACM 24057, Appellant's Motion for Enlargement of Time (Eighth) (A.F. Ct. Crim. App. granted July 3, 2025). However, on 28 July 2025, the Government filed a twenty-seven-page petition at the United States Court of Appeals for the Armed Forces (CAAF) asking that court to reconsider its unanimous affirmance

of this Court's decision in *United States v. Patterson*, __ M.J. __, 2025 CAAF LEXIS 548 (C.A.A.F. July 14, 2025). *United States v. Patterson*, No. 25-0073/AF, United States' Petition for Reconsideration (July 28, 2025). Undersigned counsel is also detailed to *Patterson* and now has seven days to prepare and file an answer to the Government's petition for reconsideration. C.A.A.F. R. 31(b). Additionally, undersigned counsel has previously scheduled leave on 1–5 August 2025. This motion requests an enlargement of seven days to account for the seven days in which counsel must unexpectedly prepare an answer to the Government's petition.

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base, Republic of Korea, found Appellant guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), 17 March 2023. The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5, with reduction below E-6 suspended for six months, at which time the suspended part of the sentence would be remitted unless the suspension was sooner vacated, and reduced the adjudged confinement to forty-five days. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, 16 March 2023.

The record of trial is seven volumes consisting of ten prosecution exhibits, sixteen defense exhibits, and thirty appellate exhibits; the transcript is 985 pages. Appellant is not currently confined. Undersigned counsel is completing his review of the record of trial and drafting the AOE in this case.

Counsel is currently representing thirty-three clients; nineteen clients are pending initial AOEs before this Court.[1] Additionally, one client has a pending answer to a petition for reconsideration before the CAAF. Two matters currently have priority over this case:

1) *United States v. Patterson*, ACM 40426, USCA Dkt. No. 25-0073/AF – The record of trial is 8 volumes consisting of 12 prosecution exhibits, eight defense exhibits, two court exhibits, and 75 appellate exhibits; the transcript is 987 pages. Undersigned counsel is reviewing the Government's twenty-seven-page petition for reconsideration and drafting an answer, which is due to the CAAF on 4 August 2025.
2) *United States v. Smith*, ACM 40437 (f rev) – The record of trial is four volumes consisting of seven prosecution exhibits, ten defense exhibits, and twenty-nine appellate exhibits; the transcript is 338 pages. Additional counsel has been detailed to this case and is drafting the AOE.

Through no fault of Appellant, undersigned counsel has been unable to complete his review and prepare a brief for Appellant's case. An enlargement of time is necessary to allow counsel to fully review Appellant's case and advise Appellant regarding potential errors. Appellant was provided an update of the status of counsel's progress on Appellant's case, was consulted with regard to enlargements of time, and agrees with necessary requests for enlargements of time, including this request.

[1] Since the filing of Appellant's last request for an enlargement of time, counsel prepared and filed a seven-page AOE in *U.S. v. Keilberg*, ACM 40601; prepared and filed a sixteen-page supplement to the petition for grant of review to the CAAF in *U.S. v. York*, ACM 40604, USCA Dkt. No. 25-0200/AF; prepared and filed an eight-page reply brief in *U.S. v. Driskill,* ACM 39889 (rem); prepared and filed a motion to withdraw from appellate review in *U.S. v. Harnar*, ACM 40559 (f rev); prepared and filed an eleven-page answer brief to the CAAF in *U.S. v. Kershaw*, ACM 40455, USCA Dkt. No. 25-0177/AF; and began drafting the AOE in this case. Additionally, counsel was off for the Independence Day holiday and was on leave on 17–20 July 2025.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested ninth enlargement of time for good cause shown.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 29 July 2025.

Respectfully submitted,

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant.*	)	No. ACM 24057
	)	30 July 2025

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 337 days in length. Appellant's nearly year-long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

WHEREFORE, the United States respectfully requests that this Court deny Appellant's enlargement motion.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 30 July 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant*.	**BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 24057 15 August 2025

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

Assignments of Error[1]

I.

The convening authority impermissibly considered the race of potential court members when he selected only Black replacement members following a request for diverse panel members.

II.

The findings of guilty for the charge and specification of assault consummated by a battery are factually insufficient because the Government failed to prove that Master Sergeant Banks was not acting in self-defense or defense of another when the alleged victim was acting aggressively and throwing water at others.

III.

Trial defense counsel were ineffective when they failed to offer evidence of Master Sergeant Banks's good military character as substantive evidence in his defense.

IV.

The military judge impermissibly impeded public access to Master Sergeant Banks's trial by preventing spectators from seeing certain prosecution exhibits.

[1] Additionally, Appellant personally raises two issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix.

V.

The Government's unreasonable delay in forwarding the record of trial to this Court denied Master Sergeant Banks his right to speedy appellate review.

Statement of the Case

On 30 January–3 February 2023, a special court-martial consisting of officer and enlisted members at Osan Air Base (AB), Republic of Korea, found Appellant, MSgt Tavaris Banks, guilty, contrary to his pleas, of one charge and one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), [2] 10 U.S.C. § 928. R. at 885; Record of Trial (ROT) Vol. 1, Entry of Judgment (EOJ), Mar. 17, 2023. The military judge sentenced MSgt Banks to be reprimanded, to be reduced to the grade of E-4, and to be confined for three months. R. at 985. The convening authority took no action on the findings but reduced the adjudged reduction in grade to E-5. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Tavaris Banks*, Mar. 16, 2023. The convening authority also suspended the reduction below E-6 for six months, at which time the suspended part of the sentence would be remitted unless the suspension was sooner vacated. *Id*. Finally, the convening authority reduced the adjudged confinement to forty-five days. *Id.*

Statement of Facts

Just outside the gate at Osan AB is a collection of shops, restaurants, and bars known as the Songtan Entertainment District, commonly referred to as the "SED." R. at 451. It is a popular area for Airmen at Osan AB, and on 13 August 2022, MSgt Banks went to the SED for a going-away event for one of his colleagues. R. at 726. After going to several establishments, MSgt

[2] Unless otherwise noted, all references to the Uniform Code of Military Justice (UCMJ), the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence are to the *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*).

Banks spotted a group of his friends in a bar called My Place. R. at 728. His friends invited him to come inside, and he obliged. *Id.*

While in My Place, MSgt Banks encountered an individual he did not know. *Id.* This person was RE, and he would later become the alleged victim in this case. R. at 729. RE appeared to be drunk and approached one of MSgt Banks's friends. R. at 730–31. RE put his face close to the friend's face, seemingly trying to fight him, so MSgt Banks stepped in to separate them. *Id.* After separating them, MSgt Banks exited My Place with some of his friends. R. at 733. RE came outside soon after and was saying inappropriate things, such as threatening to "beat [MSgt Banks's] ass." R. at 734, 738. MSgt Banks told him to watch his mouth, and RE then pushed MSgt Banks while walking by him. R. at 734, 736. MSgt Banks called him an idiot, and RE walked towards the center of the SED. R. at 737.

After leaving My Place, RE approached another group of Airmen. R. at 493. He was acting belligerently and began antagonizing these Airmen. *Id.*; Def. Ex. B. At one point, he told some of these other Airmen that they should kill themselves. R. at 494, 499, 500, 512, 528, 538, 664; Def. Ex. B. By his own account, it appeared that RE was trying to pick a fight. R. at 661. Since RE was acting aggressively, they asked him to leave several times. R. at 500–01. ER then threw water at these Airmen, mostly hitting SrA JS. R. at 473, 482, 504, 540, 662.

MSgt Banks could still see RE, and he decided to go and speak with him. R. at 738–40. As he approached RE, MSgt Banks saw that RE was harassing some of the Airmen in the group. R. at 741. RE appeared to be acting more aggressively than MSgt Banks had seen earlier in My Place. R. at 746. MSgt Banks heard the Airmen telling RE that it was time to go and to leave them alone. R. at 742. MSgt Banks then saw RE throw water at the Airmen, after which RE turned towards MSgt Banks. R. at 741–42. As RE turned towards him, MSgt Banks became

concerned that RE might try to harm him, so MSgt Banks punched RE one time. R. at 745; Pros. Exs. 1, 2. After this blow, RE fell to the ground, and MSgt Banks saw that he did not get up. R. at 747. Concluding that RE was no longer a threat, MSgt Banks walked away. *Id.*

Members of the town patrol—security forces Airmen assigned to patrol the SED for UCMJ violations by members subject to the status of forces agreement—found RE a short time later with blood on his head. R. at 439–40. Initially, RE was not cooperative and tried to refuse medical care. R. at 440, 459. The town patrol members put a bandage on RE's head, and he eventually got into an ambulance and was taken for medical treatment. R. at 440–41.

Additional facts are included *infra* as necessary.

Argument

I.

The convening authority impermissibly considered the race of potential court members when he selected only Black replacement members following a request for diverse panel members.

Additional Facts

Before trial, the convening authority excused two panel members who were both minorities. Request for a Diverse Panel, Jan. 27, 2023. Noting that he is African-American, MSgt Banks requested that the convening authority select replacement members who are diverse in terms of race an ethnicity. *Id.* The convening authority noted this request and selected two replacement members, Maj VM and MSgt NB, who are both Black. Replacement of Court Members – *United States v. Master Sergeant Tavaris Banks*, Jan. 30, 2023 [hereinafter Replacement of Court Members]; Court Member Data Sheets.

Standard of Review

Where no objection is made, court-martial composition issues are reviewed for plain error.

United States v. King, 83 M.J. 115, 120–21 (C.A.A.F. 2023). Under plain error review, the appellant bears the burden to demonstrate error that is clear or obvious and results in material prejudice to his substantial rights. *Id.* "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Relatedly, "[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see Edwards v. Vannoy*, 593 U.S. 255, 262 (2021).

"[W]henever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *United States v. Jeter*, 84 M.J. 68, 70 (C.A.A.F. 2023). The Government may then seek to rebut that presumption. *Id.* Should the Government be unable to rebut the presumption, automatic reversal is warranted. *Id.* at 74; s*ee Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017) (granting "automatic relief to defendants who prevailed on claims alleging race . . . discrimination in the selection of the petit jury"); *Batson v. Kentucky*, 476 U.S. 79, 100 (1986) ("If the trial court decides that the facts establish, prima facie, purposeful discrimination and the prosecutor does not come forward with a neutral explanation for his action, our precedents require that petitioner's conviction be reversed."); *Johnson*, 520 U.S. at 466 (citing Supreme Court precedent for the proposition that cases *not* governed by Federal Rule of Criminal Procedure Rule 52(b) are "structural errors" without a prejudice analysis).

Law and Analysis

"The Equal Protection Clause . . . forbids the States to strike black veniremen on the

assumption that they will be biased in a particular case simply because the defendant is black." *Batson*, 476 U.S. at 97. This statement is no less true in the military justice system where the convening authority might arbitrarily select members based on race to create a more diverse panel, or one representative of the accused's race. *Jeter*, 84 M.J. at 73. In extending *Batson* to panel member selection, the United States Court of Appeals for the Armed Forces (CAAF) unequivocally articulated, "It is impermissible to exclude or intentionally include prospective members based on their race." *Id.* "Just as in the civilian context, a convening authority may not draw up a members panel pursuant to the neutral criteria of Article 25, UCMJ, only to have discriminated at other stages of the process." *Id.* at 74.

But at the time of MSgt Banks's court-martial, *United States v. Crawford* permitted convening authorities to use race when selecting panel members provided it was "in favor of, not against, an accused." 35 C.M.R. 3, 13 (C.M.A. 1964). Military appellate courts did "not presume improper motives from inclusion of racial . . . identifiers on lists of nominees for court-martial duty." *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994). The court further approved of using race during panel selection in *United States v. Smith*, saying, "[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels." 27 M.J. 242, 249 (C.M.A. 1988). Not only could race be used to make a panel more representative of the accused's race, but race could also be considered to make a more diverse panel, representative of the military community. As such, at the time of MSgt Banks's trial, race could be considered when creating a panel.

In accordance with the state of the law at the time, MSgt Banks requested panel members who were diverse in race and ethnicity. Request for a Diverse Panel. The convening authority

highlighted this request when selecting two replacement panel members. Replacement of Court Members. The two replacement members he selected, Maj VM and MSgt NB, are both Black, as is MSgt Banks. *Id.*; Court Member Data Sheets. Therefore, their selection fulfilled MSgt Banks's request for diverse panel members, as permitted at the time.

After MSgt Banks's court-martial, *Jeter* explicitly held that *Batson* had abrogated *Crawford*'s encouragement to use race when deciding who should be appointed to a panel: "A person's race is simply unrelated to his fitness as a juror." *Jeter*, 84 M.J. at 73 (quoting *Batson*, 476 U.S. at 87). It is clear, then, that race cannot be considered for court member selection, whether members of certain races are intentionally "included" or "excluded." To "include" one means "excluding" another. "The exclusion of even one juror for impermissible reasons harms that juror and undermines public confidence in the fairness of the system." *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 142 n.13 (1994). *Jeter* unequivocally states that "race shall not be a criterion in the selection of court-martial members." 84 M.J. at 73.

Jeter also laid out a process for determining whether impermissible criteria were used in the selection of court-martial members. First, "whenever an accused makes a prima facie showing that race played a role in the panel selection process at his court-martial, a presumption will arise that the panel was not properly constituted." *Id.* at 70. Here, it is clear that race played a role in the panel member selection process. MSgt Banks requested diverse panel members, and the convening authority acknowledged this request and responded by selecting two Black members for the panel. This is at least a prima facie showing that the convening authority impermissibly considered race when selecting replacement panel members, and it gives rise to the presumption that the panel was not properly constituted.

Once a prima facie showing has given rise to the presumption that the panel was not

properly constituted, "[t]he government may then seek to rebut that presumption." *Jeter*, 84 M.J. at 70. The Government cannot make such a rebuttal here because of the evidence of the convening authority considering race when selecting replacement panel members. Without rebuttal, the presumption that the panel was improperly formed stands, constituting clear and obvious error since it is plain at the time of appellate review that race may not be considered. Although the plain error standard normally calls for an assessment of prejudice, that is not necessary here because the composition of a court-martial is a structural issue, and the unrebutted presumption warrants automatic reversal. *See Jeter*, 84 M.J. at 74; *Johnson*, 520 U.S. at 466.

This error should not be allowed to stand simply because it resulted from MSgt Banks's request. Crucially, at the time of MSgt Banks's court-martial, *Crawford* allowed the consideration of race when selecting panel members as long as it benefited the accused. 35 C.M.R. at 13. The CAAF only later made it clear that this was no longer good law. *Jeter*, 84 M.J. at 73. MSgt Banks's request could not be a waiver because "waiver is the intentional relinquishment or abandonment of a *known* right." *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020) (emphasis added) (quoting *United States v. Glaude*, 67 M.J. 311, 313 (C.A.A.F. 2009)). MSgt Banks could not waive this matter because he could not know at that time what the CAAF would hold in *Jeter*.

Likewise, this cannot be invited error because it was not error at the time. An error is unreviewable if a person both invites the error and intentionally relinquishes or abandons a known right. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). MSgt Banks did not intentionally relinquish or abandon a *known* right by acting in accordance with the law at the time, and he could not invite error by doing something that was permissible at the time.

"An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *Tovarchavez*, 78 M.J. at 462 (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). MSgt Banks and the convening authority both acted in accordance with the law at the time of trial, but the law has changed. The CAAF has now made it clear that "race shall not be a criterion in the selection of court-martial members." *Jeter*, 84 M.J. at 73. Consequently, the convening authority's apparent consideration of race when selecting replacement members is now plain and obvious error warranting automatic reversal. *Id.* at 74. This Court should therefore grant the same remedy the CAAF granted in *Jeter* by setting aside the findings of guilty and the sentence. *Id.* at 75.

II.

The findings of guilty for the charge and specification of assault consummated by a battery are factually insufficient because the Government failed to prove that Master Sergeant Banks was not acting in self-defense or defense of another when the alleged victim was acting aggressively and throwing water at others.

Standard of Review

This Court reviews issues of factual sufficiency de novo. Art. 66(d), UCMJ, 10 U.S.C. § 866(d); *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of [this Court] are themselves convinced of appellant's guilt beyond a reasonable doubt." *United States v. Rosario*, 76 M.J. 114, 117 (C.A.A.F. 2017) (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). For offenses occurring after 1 January 2021, like the one in this case, the UCMJ specifies that this Court "may consider whether the finding is correct in fact upon request

of the accused if the accused makes a specific showing of a deficiency in proof." Article 66(d)(1)(B)(i), UCMJ; 10 U.S.C. § 866(d)(1)(B)(i) (2021). If "the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding." Article 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii). Thus, to set aside a conviction for factual insufficiency, the Court "must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt." *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *25 (A.F. Ct. Crim. App. Apr. 29, 2024), *aff'd*, __ M.J. __, 2025 CAAF LEXIS 349 (C.A.A.F. 2025).

MSgt Banks requests that this Court consider whether the finding of guilt for assault consummated by a battery is correct in fact and find the proof is deficient because the Government failed to meet its burden of proving, beyond a reasonable doubt, that MSgt Banks not did act in self-defense or defense of another. Self-defense requires that the accused (1) reasonably believed that physical harm was about to be inflicted on him and (2) actually believed that the amount of force used was required to protect himself, provided it is "less than force reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(3); *United States v. Scott*, No. ACM 39352, 2019 CCA LEXIS 232, at *1 (A.F. Ct. Crim. App. May 10, 2019). Similarly, the same principles apply to defense of another, provided that the accused did not use force greater than that which the person defended was lawfully entitled to use under the circumstances. R.C.M. 916(e)(5).

Here, MSgt Banks reasonably believed RE was about to harm him. R. at 745. He had already seen that RE was drunk. R. at 731. MSgt Banks also observed RE get in the face of one of MSgt Banks's friends and try to fight him, to the point that MSgt Banks had to intervene and separate them. R. at 730–31. With this background in mind, MSgt Banks then saw RE harassing

another group of Airmen and acting belligerently and more aggressively than before as the other Airmen told RE to leave. R. at 741–42, 746. MSgt Banks then saw RE throw water that hit one of these Airmen. R. at 741–42. RE then turned towards MSgt Banks. R. at 741–42. In that moment, having just witnessed RE inflict bodily harm on another and knowing the background of how belligerent and progressively more aggressive RE had been acting, it was reasonable for MSgt Banks to believe that RE was about to inflict harm on him. Any reasonably prudent person in the same situation would have believed the same thing. R. at 821 (describing the reasonably-prudent-person standard in the court's instruction on self-defense). That belief is what caused MSgt Banks to punch RE. R. at 745.

MSgt Banks also believed that the force he used was required to protect himself. He described the punch as not being hard and "not a knockout punch." R. at 745, 748. A single blow is not "reasonably likely to produce death or grievous bodily harm." R.C.M. 916(e)(3)(B). Since this force was not greater than what is allowed for self-defense under these circumstances, MSgt Banks's actual belief that it was required to protect him makes the single punch a lawful act of self-defense. R. at 746.

Similar reasoning shows that MSgt Banks's action also constitutes defense of another. MSgt Banks reasonably believed that RE was about to inflict harm on one of the other Airmen. He had just seen RE throw water at these individuals, so he had witnessed him inflicting bodily harm on them. R. at 746, 2019 *MCM*, Part IV, ¶ 77(c)(1) (stating that bodily harm is "an offense touching of another, however slight"). Under the circumstances, it was reasonable to believe RE was about to do so again. And, as described above, the force was a single punch. In addition to acting to protect himself, MSgt Banks believed his action was necessary to protect the other Airmen. R. at 756. The punch was still not likely to produce death or grievous bodily harm, and

it was not greater than the force the other Airmen could have lawfully employed in this situation. R.C.M. 916(e)(5). Therefore, in addition to being lawful self-defense, MSgt Banks's action was also lawful defense of others.

It is crucial to keep the burden of proof at the forefront of this analysis. MSgt Banks never has the burden to prove that his actions were lawful as self-defense or defense of another. Rather, the Government must prove that his action was not self-defense or defense of another. R. at 821–22 (instructing the members on the burden of proof for self-defense). The Government did not prove this beyond a reasonable doubt and therefore did not meet its burden. The evidence of RE's escalating aggression, his harassment of the group of Airmen, and his infliction of bodily harm on them, albeit slight, shows why MSgt Banks reasonably believed RE was about to inflict harm on him or others. R. at 741–42, 746. That evidence is at least enough to create reasonable doubt as to whether the Government disproved this factor. Likewise, the Government offered scant evidence to prove that the single blow was greater than the force MSgt Banks was lawfully able to employ under these circumstances. Since the Government failed to meet its burden regarding self-defense and defense of another, this Court should be clearly convinced that the findings of guilty are against the weight of the evidence and are therefore factually insufficient. Article 66(d)(1)(B)(iii), UCMJ; 10 U.S.C. § 866(d)(1)(B)(iii)

MSgt Banks respectfully requests that this Court set aside the findings of guilty and the sentence and dismiss the charge and specification with prejudice.

III.

Trial defense counsel were ineffective when they failed to offer Master Sergeant Banks's good military character as substantive evidence in his defense.

Additional Facts

During presentencing proceedings, MSgt Banks introduced extensive evidence of his good military character. R. at 898–948. Four other service members—Maj JB, Capt JM, SMSgt JH, and MSgt AL—testified about his outstanding service, leadership, and character. R. at 907–48. He also introduced six character letters, five of which came from current or former service members. Def. Exs. H–M. In contrast, the Government presented almost no sentencing case, offering only the personal data sheet and MSgt Banks's enlisted performance reports (EPRs) before resting. R. at 895–97. MSgt Banks's EPRs showed a career of exemplary performance. Pros. Ex. 10.

Standard of Review

This court reviews allegations of ineffective assistance of counsel de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

Law and Analysis

MSgt Banks's trial defense team had the opportunity to significantly bolster his defense by offering evidence of his good military character during findings. Because they failed to do so, MSgt Banks received ineffective assistance of counsel. To prevail on an ineffective assistance of counsel claim, an appellant must demonstrate "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* at 288 (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). This test comes from the seminal case *Strickland v. Washington*,

which also notes an appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689. The CAAF uses a three-part test to determine whether this presumption of competence has been overcome:

> 1. Are appellant's allegations true; if so, "is there a reasonable explanation for counsel's actions"?
>
> 2. If the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)).

For the first part of the test, it is clear from the record that MSgt Banks's trial defense counsel did not offer any evidence of good military character during findings. *See* R. at 717–93 (showing no attempt to offer evidence of good military character during the defense case-in-chief). As a result, the military judge did not give an instruction on good military character. R. at 817–28; App. Ex. XXVI. This was despite having ample evidence of MSgt Banks's good military character available, as demonstrated by the evidence presented at the presentencing phase of the court-martial. R. at 907–48; Pros. Ex. 10. Trial defense counsel could have called the military witnesses who testified during presentencing and offered MSgt Banks's EPRs. *See United States v. Bagstad*, No. NMCCA 200602454, 2007 CCA LEXIS 444, at *1 (N-M. Ct. Crim. App. Oct. 31, 2007) (describing a "classic good military character defense" that included fitness reports establishing an exemplary service record). Since they clearly did not, they failed to utilize available evidence of MSgt Banks's good military character for his defense.

There is no apparent reasonable explanation for this action. The record reveals no hint of any adverse information about MSgt Banks's military character, as evidenced by the Government's remarkably brief sentencing case. R. at 895–97; *see* Pros. Ex. 9 (indicating MSgt

Banks had no previous courts-martial or Article 15 actions). The lack of potentially harmful evidence distinguishes this case from past cases in which appellants alleged ineffective assistance of counsel for failing to offer evidence of good military character. *See United States v. McConnell*, 55 M.J. 479, 484 (C.A.A.F. 2001) (noting that trial defense counsel was concerned that witnesses who could testify about the appellant's good military character could also be cross-examined about explicit comments the appellant made to his daughter); *United States v. Morciego*, No. NMCCA 200101789, 2005 CCA LEXIS 186, at *6 (N-M. Ct. Crim. App. June 22, 2005) (noting that the appellant had three nonjudicial punishments that could have been used for impeachment if the defense had offered evidence of good military character). Failing to offer good military character evidence was not likely a strategic decision to avoid harmful rebuttal evidence. And evidence of good military character would have been compelling, making the decision not to utilize it even less reasonable. *See Palik*, 84 M.J. at 291 (describing an action with "tremendous upside and virtually no downside").

Turning to the second part of the test, the failure of trial defense counsel to utilize available evidence of MSgt Banks's good military character fell measurably below the performance ordinarily expected of fallible lawyers. Using good military character to lessen the probability of an accused's guilt is a long-recognized tactic in military justice. *E.g., United States v. Smith*, 34 M.J. 341, 342 (C.M.A. 1992) (citing *United States v. Cooper*, 15 U.S.C.M.A. 322 (C.M.A. 1965) ("Upon request, an accused is entitled to an instruction calling attention to evidence of good military character.")); *United States v. Vandelinder*, 20 M.J. 41, 44 (C.M.A. 1985) (describing good military character as a "trait" that is "pertinent" to various prosecutions). Since this defense is well-established, trial defense counsel should have quickly recognized the opportunity to employ it when representing a client with the extensive and commendable military record of MSgt Banks.

Pros. Ex. 10. And they had already gathered the necessary resources to employ this defense in preparation for their presentencing case. All they had to do was offer the evidence during the findings phase instead of in the presentencing proceedings. Not doing so, whether due to a failure to identify the opportunity, a lack of recognition of the evidence's likely impact, or an inexplicable choice to forgo employing this useful evidence, fell measurably below the performance expected of fallible lawyers.

Absent this error, there is a reasonable probability that there would have been a different result, so the third part of the test is also satisfied. If trial defense counsel had properly offered evidence of MSgt Banks's good military character during findings, it would have been admitted. The Military Rules of Evidence have curtailed the use of good military character evidence, but it is permitted for offenses under Article 128, UCMJ, 10 U.S.C. § 928. Mil. R. Evid. 404(a)(2)(A). Moreover, it is especially pertinent to the element that was most at issue in this case: whether the bodily harm was done unlawfully. R. at 820 (instructing members on the elements of the specification of Charge II), 850 (focusing in argument on whether the Government met its burden to prove MSgt Banks's actions were not lawful). The Defense's strategy revolved around self-defense and defense of another; those were perhaps the only things left since MSgt Banks was on video striking the blow in question and testified himself that he did so. Pros. Exs. 1, 2; R. at 745. In this context, evidence of good military character would have been particularly useful. A service member with good military character employs force lawfully, especially in interactions with other service members. *See* R. at 652 (identifying the named victim as a service member). This evidence would have also resulted in a beneficial instruction telling the members that evidence of MSgt Banks's good military character "may be sufficient to cause a reasonable doubt as to his guilt." Dep't of the Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, ch. 7, ¶ 7-8-1 (Feb.

29, 2020). The mixed findings delivered by the members show that this case was already a close call for them. R. at 885. Had the Defense presented the evidence of MSgt Banks's good military character to the members, there is a reasonable probability that it would have persuaded them to acquit MSgt Banks due to self-defense or defense of another, a markedly different result. Consequently, the failure to present readily available evidence of good military character during findings constitutes ineffective assistance of counsel and warrants relief.

MSgt Banks respectfully requests that this Court set aside the findings of guilty and the sentence.

IV.

The military judge impermissibly impeded public access to Master Sergeant Banks's trial by preventing spectators from seeing certain prosecution exhibits.

Additional Facts

Several times throughout the trial, the military judge stated that he did not want some prosecution exhibits to be shown to the gallery. R. at 36, 418, 445, 475. He seemed particularly concerned that the gallery should not see the videos of the incident in Prosecution Exhibits 1 and 2. R. at 35–36, 418, 445, 450, 475. To effectuate this desire, the military judge instructed counsel to take steps to prevent the gallery from seeing these exhibits, including positioning the screen showing them so that the gallery could not see it or displaying the exhibits on a laptop. R. at 36, 418, 445, 475. In one instance, the military judge also instructed those in the gallery to either position themselves where they could not see the exhibits or look away whenever they were displayed. R. at 445. He did not articulate a reason for these restrictions, saying only, "[T]he gallery doesn't necessarily need to see this, in my opinion," "I don't really want it shown to the gallery," "I would prefer that the gallery not really watch it, to be honest," and "I don't believe

that the gallery needs to see this video, to be honest." R. at 36, 418, 445. There was no objection to the miliary judge's instructions. R. at 36, 418, 445, 475.

Standard of Review

This Court reviews forfeited issues for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citing *United States v. Harcrow*, 66 M.J. 154, 156 (C.A.A.F. 2008)).

Law and Analysis

The military judge committed plain error by improperly preventing the gallery from viewing certain exhibits. MSgt Banks did not object to this at trial, but failure to raise an objection merely forfeits that objection absent an affirmative waiver. R.C.M. 905(e). Thus, this issue was forfeited and should be reviewed for plain error. *Gladue*, 67 M.J. at 313. Establishing plain error requires an appellant to prove three prongs: "(1) there was error; (2) the error was clear or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)).

Preventing the gallery from viewing Prosecution Exhibits 1 and 2—videos of the incident in question—was an error. "[C]ourts-martial shall be open to the public," including "members of both the military and civilian communities." R.C.M. 806(a). This requirement builds upon the right to a public trial found in the Sixth Amendment. U.S. Const. amend. VI. Although the military judge did not fully close the trial or outright prohibit any spectators, stopping them from viewing particular exhibits meant that the trial was not fully public. Those in the gallery could not see the evidence being displayed in court, meaning they were deprived of the information needed to follow and evaluate the proceedings, including motions arguments, opening statements, and examination of witnesses. R. at 36, 418, 445, 475. As a result of the military judge's actions, the public was effectively deprived of full access to proceedings that are open to the public.

There was no justification for these restrictions. R.C.M. 806 does provide some limitations, allowing the military judge to reasonably limit the number of spectators in or access to the courtroom "to maintain the dignity and decorum of the proceedings." R.C.M. 806(b)(1). To that end, some courts-martial employ measures to restrict the gallery from viewing contraband evidence, like child pornography, that is also typically ordered sealed in the record. *United States v. Toschiaddi*, No. NMCCA 200800044, 2009 CCA LEXIS 246, at *24–25 (N-M. Ct. Crim. App. July 16, 2009). But other, non-contraband evidence should still be "openly displayed and visible to the gallery." *Id.* at *25. Here, the evidence the military judge did not want the gallery to see was not contraband. Prosecution Exhibits 1 and 2 are videos from surveillance cameras showing the incident in question. Pros. Exs. 1, 2. Although they depict some violence by showing a person striking another, who then falls to the ground, they are not graphic and depict this event from a distance. *Id.* Allowing the gallery to view them would not have imperiled the dignity or decorum of the proceedings. Tellingly, the military judge did not articulate a reason for these restrictions other than his own preferences. R. at 36, 418, 445. This deficiency is similar to that of the military judge in *United States v. Ortiz*, who failed to identify relevant factors to consider and failed to articulate her reason for closing the courtroom. 66 M.J. 334, 339 (C.A.A.F. 2008) ("For that reason alone her decision was not in conformity with the law."), *overruled on other grounds*, *United States v. Hasan*, 84 M.J. 181, 206 n.16 (C.A.A.F. 2024). In *Ortiz*, the CAAF set aside the findings after holding that the military judge abused her discretion. *Id.* at 342. Without some justification, preventing spectators in the gallery from viewing evidence displayed in court was error.

The second and third factors of the plain error analysis are also satisfied. This error was clear and obvious. The requirement for a court-martial to be open to the public is clear from both the Constitution and the Rules for Courts-Martial. U.S. Const. amend. VI; R.C.M. 806.

Restricting the gallery from viewing evidence presented in court obviously impedes the public's access to the proceedings, and doing so without justification is a clear violation of the requirement for public trials. Finally, the error materially prejudiced MSgt Banks's constitutional right to a public trial. U.S. Const. amend. VI. As the trial defense counsel noted, many others from MSgt Banks's career field attended the trial, showing a level of public interest in the proceedings. R. at 972. Yet the military judge prevented the public from seeing evidence that the Government displayed in court as part of its effort to convict MSgt Banks, including evidence of self-defense. Pros. Exs. 1, 2. This denied a constitutional right and merits relief for plain error.

MSgt Banks respectfully requests that this Court set aside the findings of guilty and the sentence.

V.

The Government's unreasonable delay in forwarding the record of trial to this Court denied Master Sergeant Banks his right to speedy appellate review.

Additional Facts

MSgt Banks filed his notice of appeal on 10 October 2023, and this Court docketed his case on 24 October 2023. Notice of Docketing, Oct. 24, 2023. At the same time, the Court ordered the Government to forward a copy of the record of trial "forthwith." *Id.* The Government ultimately forwarded the record to the Court on 10 September 2024. While the Court awaited the record, MSgt Banks demanded speedy appellate review, which the Court acknowledged on 13 August 2024. Order, Aug. 13, 2024. After this Court received the record, MSgt Banks requested and received nine enlargements of time. Order, July 31, 2025.

Standard of Review

This Court reviews de novo whether an appellant's due process rights are violated due to post-trial delay. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020). In the

absence of a due process violation, this Court considers whether relief for excessive post-trial delay is warranted consistent with this Court's authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). *United States v. Valentin-Andino*, 85 M.J. 361, 366 n.4 (C.A.A.F. 2025).

Law and Analysis

The excessive post-trial delay caused by the 322 days it took the Government to forward the record to this Court merits relief. Convicted servicemembers have a due process right to the timely review and appeal of court-martial convictions. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). The "unique" review powers of a service Court of Criminal Appeals "calls for . . . even greater diligence and timeliness than is found in the civilian system." *Diaz v. JAG of the Navy*, 59 M.J. 34, 39 (C.A.A.F. 2003). Prior to the 1 January 2019 effective date of the Military Justice Act of 2016, under the timeline set forth by the CAAF in *Moreno*, military appellate courts presumed unreasonable delay when a service court of criminal appeals (CCA) failed to render a decision within eighteen months of docketing. *Livak*, 80 M.J. at 633 (citing *Moreno*, 63 M.J. at 142). Here, more than twenty-one months have already elapsed since docketing this case, meaning the Court will not render a decision within eighteen months of docketing, creating a presumption of unreasonable delay.

The addition of a specific statutory provision governing appropriate relief for post-trial delay superseded much of the previous case law. *Valentin-Andino*, 85 M.J. at 366 n.4. However, it cannot supersede the due process right because that is a constitutional right. *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004). A presumption of unreasonable post-trial delay triggers the four-factor due process analysis promulgated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely review and appeal; and (4) prejudice. *Moreno*, 63 M.J. at 135 (citing *Barker*, 407 U.S.

at 530). All four factors must be considered and balanced against each other, and no single factor is required to find a due process violation for post-trial delay. *Id.* at 136.

The first factor here strongly favors MSgt Banks. The length of the delay is already over twenty-one months, and it will likely surpass two years before the Court renders a decision. This is well beyond the eighteen-month standard previously set by the CAAF. *Moreno*, 63 M.J. at 142.

The second factor, the reasons for the delay, also favors MSgt Banks. Much of the delay is the result of the Government taking 322 days to forward the record to this court. Taking almost a year to forward a record to the Court—after the Court ordered it done "forthwith"—is an inexcusable delay. Notice of Docketing, Oct. 24, 2023. MSgt Banks acknowledges that his own requests for enlargements of time also caused delays in the process, but as the appellant, he should be allowed to take the time he feels is necessary to prepare his appeal. His appeal could go nowhere while the Court was awaiting the record. Moreover, his motions for enlargements of time consistently noted that the delays were largely attributable to the demands of his counsel's docket and came about "[t]hrough no fault of Appellant." *E.g.,* Appellant's Motion for Enlargement of Time (Ninth), July 29, 2025. Indeed, delays caused by a detailed military counsel's workload ultimately fall on the Government because it is required to adequately staff the appellate defense division. *United States v. Moreno*, 63 M.J. 129, 137 (C.A.A.F. 2006) ("The Government must provide adequate staffing within the Appellate Defense Division to fulfill its responsibility under the UCMJ to provide competent and timely representation."); *see* Article 70, UCMJ, 10 U.S.C. § 870. When viewed in conjunction with the Government's inexplicable delay in forwarding the record, these enlargement of time requests do not swing this factor against MSgt Banks.

The third factor weighs heavily in favor of MSgt Banks. While this Court waited for the Government to forward the record, MSgt Banks demanded speedy appellate review. Order, Aug.

13, 2024. This Court acknowledged that order, noting that it had still not received the record of trial at that time. *Id.* This constitutes an assertion of MSgt Banks's right to a timely appeal in the midst of the Government's protracted delay and strongly favors relief.

Finally, prejudice also favors MSgt Banks. Since he did not receive a punitive discharge, he is not eligible for excess leave while awaiting appellate review. R. at 985; Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, Jan. 24, 2024, at ¶ 20.53. Rather, he has been stuck in limbo, unable to fully resume his career or move to the next chapter of his life. *See* DAFI 36-3211, *Military Separations*, June 24, 2022, at ¶ 3.7.1.4 (prohibiting administrative discharge before appellate review is final). Moreover, any relief he might receive through the appellate process has been similarly delayed. Along with the other factors, this prejudice favors a finding of a due process violation that merits relief.

Even in the absence of a due process violation, this Court can provide appropriate relief for excessive post-trial delays. Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2); *Valentin-Andino*, 85 M.J. at 366 n.4. This Court has previously granted appropriate relief for unreasonable delays that affected appellate review by not affirming one grade of an adjudged reduction. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *19 (A.F. Ct. Crim. App. Jun. 7, 2024), *aff'd on other grounds*, 85 M.J. 361 (C.A.A.F. 2025). When doing so, the Court identified a "systemic problem indicating institutional neglect" in post-trial processing. *Id.* at *17. The 322-day delay caused by the Government not forwarding the record of trial to the Court is yet another instance of this institutional neglect. Accordingly, similar relief is appropriate. This Court should address the denial of MSgt Banks's right to speedy appellate review by not approving the remaining one-grade reduction in his sentence.

MSgt Banks respectfully requests that this Court not affirm the adjudged reduction in

grade, as modified by the convening authority.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 August 2025.

Respectfully submitted,

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Appendix

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

VI.

The conviction for assault consummated by a battery should be overturned because the investigator was derelict in his duties.

The investigator was derelict in his duties numerous times throughout the investigation. Dereliction of duty as outlined in the Manual for Court Martial includes the following elements: "(a) That the accused had certain duties; (b) That the accused knew or reasonably should have known of the duties; and (c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties." *Manual for Courts-Martial, United States* (2019 ed.), Part IV, ¶ 18(b)(3). Investigator (Inv.) Garwood failed to comply with numerous Air Force Manuals (AFMANs), Air Force Instructions (AFIs), and squadron operating procedures.

Inv. Garwood committed a tier 1 violation of AFMAN 31-115 during the rights advisement. 51st Security Forces Squadron written guidance states they must obtain jurisdiction from the Korean Nation Police. This was never done. The lead investigator failed to conduct the rights advisement outlined in the AFMAN. This was raised in court when Inv. Garwood stated that "there is no written guidance." R. at 143. The Military Judge explained we could not use the AFMAN to disprove his statement due to it being a controlled item. R. at 149. But the AFMAN was changed, and the version in effect during the time of the investigation was no longer controlled at the time of trial because it was obsolete.

Moreover, Inv. Garwood showcased his inept detective skills by failing again to follow procedures by not obtaining photos of the parties involved. This led to one photo being presented which was not an accurate visual of what occurred. Furthermore, Inv. Garwood failed to retrieve

a video of RE that later became Def. Ex. B; the video was obtained by defense counsel from a witness after they were interviewed by Inv. Garwood. R. at 643. The video obtained showed RE drunk and telling the group to go kill themselves. Several 1168s state RE used "fighting words" to include racial slurs, and a video of him telling the group to go kill themselves was produced to aid in the belief he used "fighting words." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). This was not applied to my case. RE was not held accountable for any of his actions. Inv. Garwood obtained statements from the group in which it was stated RE communicated threats and committed an assault. No action was taken against him yet there were three offenses listed on my 1168. Pros. Ex. 4. With this pattern of negligence, Inv. Garwood meets all the elements listed above and this conviction should be overturned with prejudice.

VII.

The reference in the reprimand to being a Security Forces member highlights the wrongfulness of the conviction, so the findings and the sentence, especially the reprimand, should be set aside.

The reprimand states that, as a Security Forces member, I should understand Use of Force (UoF). Looking at this, RE met the standard of assaultive bodily harm. Department of the Air Force Instruction 31-117, *Arming and Use of Force*, Jan. 28, 2025. Reviewing the UoF continuum, he could be met with force such as tasers. This was not a UoF issue; it was a matter of self-defense. Because of this, I ask the reprimand be removed and I be granted a new trial.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 27 August 2025

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issue. This case was docketed with the Court on 24 October 2023. This Court received the completed record of trial and verbatim transcript on 10 September 2024. Since receiving the verbatim transcript, Appellant has been granted nine enlargements of time. This is the United States' first request for an enlargement of time. As of the date of this request, 673 days have elapsed since docketing, and 351 days have elapsed since this Court received the verbatim transcript.

There is good cause for the enlargement of time in this case. Appellant has raised one assignment of error in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without a statement from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the

Court, and to give the United States sufficient time to incorporate trial defense counsels' statements into its answer. The additional time will permit counsel to incorporate the changes and accommodate for the drafting and supervisory review before the United States files its answer.

To avoid any confusion as to due dates, the United States respectfully asks this Court to provide a specific date on which the United States' brief will be due to the Court.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 August 2025.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 August 2025, Appellant, through counsel, submitted an assignments of error brief. In the brief, Appellant alleges, *inter alia*, that trial defense counsel were ineffective when they failed to offer evidence of Appellant's good military character as substantive evidence in his defense.

On 27 August 2025, the Government filed a Motion to Compel Declarations and contemporaneously filed a Motion for Enlargement of Time (First). The Government requests this court compel Appellant's trial defense counsel, Major Joseph Bishop and Captain Michael Bruzik, to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide a declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant did not oppose these motions.

The court has examined the claimed deficiencies and finds good cause to compel a response. The court cannot fully resolve Appellant's claims without piercing the privileged communications between Appellant and trial defense counsel. Moreover, in light of the court's order, it finds the Government's requested enlargement of time is appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 5th day of September, 2025,

ORDERED:

The Government's Motion to Compel Declarations is **GRANTED**. Major Joseph Bishop and Captain Michael Bruzik are each ordered to provide an affidavit or declaration to the court that is a specific and factual response to Appellant's claims that they were ineffective when they failed to offer evidence of Appellant's good military character as substantive evidence in his defense.

A responsive declaration by each counsel will be provided to the court **not later than 6 October 2025.** The Government shall deliver a copy of the responsive affidavits or declarations to Appellant's counsel.

It is further ordered:

The Government's Motion for Enlargement of Time (First) is **GRANTED**. The Government's answer to Appellant's assignments of error brief will be filed **not later than 20 October 2025**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 27 August 2025

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court compel each of Appellant's trial defense counsel, Maj Joseph Bishop and Captain Michael Bruzik, to provide an affidavit or declaration in response to Appellant's allegations of ineffective assistance of counsel (IAC). In his third assignment of error, Appellant claims trial defense counsel "were ineffective when they failed to offer evidence of [Appellant]'s good military character as substantive evidence in his defense." (App. Br. at 13).

On 25 and 26 August 2025, Appellant's trial defense counsel responded to undersigned counsel stating that they would only provide an affidavit or declaration pursuant to an order from this Court. To prepare an answer under the test set out in United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide an affidavit or declaration. Appellant is alleging his trial defense counsel failed to introduce evidence of his good military character during findings. (App. Br. at 13). During presentencing, trial defense counsel introduced character letters from six individuals attesting to Appellant's good character and military service. (Def. Ex. H-M). According to Appellant, trial defense

counsel should have introduced evidence of Appellant's good military character during findings to assist in his defense to the specification under Article 128. (App. Br. at 14). Appellant contends that evidence of his good military character should have come in through either witness testimony or his enlisted performance reports because there was "no hint of adverse information about [Appellant]'s military character" that could have been offered by the Government in rebuttal. (Id.)

A statement from Appellant's counsel is necessary because the record is insufficient to determine the strategy trial defense counsel used when deciding what evidence to present during their case in chief. Thus, the United States requires statements from both trial defense counsel to adequately respond to Appellant's brief. *See* United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from both trial defense counsel. *See* Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

Accordingly, the United States respectfully requests this Court order each trial defense counsel to provide a declaration, containing specific and factual responses to Appellant's allegations of ineffective assistance of counsel, within 30 days of this Court's order.

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 27 August 2025.

REGINA HENENLOTTER, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tavaris BANKS	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 15 August 2025, Appellant submitted a motion to attach the following document(s) to the record: a six-page Appendix consisting of a data sheet and Single Unit Retrieval Format (SURF) summary of personnel data for two potential panel members from Appellant's court-martial.

On 22 August 2025, the Government opposed the motion.

The court has considered Appellant's motion, the Government's opposition, and the applicable law. The court grants Appellant's motion; however, it specifically defers consideration of the applicability of *United States v. Jessie*, 79 M.J. 437 (C.A.A.F. 2020), and related case law to the attachment until it completes its Article 66, UCMJ, review of Appellant's entire case.

Accordingly, it is by the court on this 28th day of August, 2025,

ORDERED:

Appellant's Motion to Attach is **GRANTED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant*.	**APPELLANT'S MOTION TO ATTACH A DOCUMENT** Before Panel No. 2 No. ACM 24057 15 August 2025

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Master Sergeant (MSgt) Tavaris Banks, by and through counsel, hereby moves to attach the Appendix to this motion to MSgt Banks's Record of Trial. The Appendix may be attached consistent with *United States v. Jessie*, because its consideration is necessary to "resolv[e] issues raised by materials in the record." 79 M.J. 437, 444 (C.A.A.F. 2020); *accord United States v. Willman*, 81 M.J. 355, 358 (C.A.A.F. 2021) ("In addition to permitting consideration of any materials contained in the 'entire record,' our precedents also authorize the CCAs to supplement the record to decide any issues that are raised, but not fully resolved, by evidence in the record."). The Appendix totals six pages in length and consists of the following:

Court Member Data Sheets: Data sheets presenting biographical data for prospective court members and accompanying Single Unit Retrieval Format (SURF) summaries of personnel data.[1] These data sheets are relevant and necessary to resolve MSgt Banks's first assignment of error and

[1] Although Rule 17.2(d) of this Court's Rules of Practice and Procedure indicates that attachments to filings are not subject to specific redaction requirements, it requires the exclusion of sensitive personal data to the extent practicable. Thus, the court member data sheets attached in the Appendix have been redacted to remove personally identifiable information, including social security numbers, dates of birth, phone numbers, and e-mail addresses.

determine whether the court-martial panel was properly constituted. *See United States v. Jeter*, 84 M.J. 68 (C.A.A.F. 2023). The record shows that MSgt Banks requested replacement panel members who are diverse in race and ethnicity, and the convening authority acknowledged this request when selecting replacement members. Replacement of Court Members – *United States v. Master Sergeant Tavaris Banks*, Jan. 30, 2023. The data sheets show the race of the replacement members—both are Black—and are therefore necessary to determine whether the convening authority acted in accordance with MSgt Banks's request by considering race when selecting these members. Thus, the data sheets are necessary to resolve an issue raised by the record and may be considered by this Court. *Jessie*, 79 M.J. at 444.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant this motion to attach a document.

Respectfully submitted,

[redacted]

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Appendix

1. Court member Data Sheets, various dates, 6 pages.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 15 August 2025.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO MOTION TO ATTACH
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 22 August 2025

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

Pursuant to Rules 23(c) and 23.3(b) of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion to Attach, dated 15 August 2025.

Opposition to Motion to Attach

The United States opposes the attachment of court member data sheets because they are matters outside the record and are not "necessary to resolve an issue raised by the record" pursuant to United States v. Jessie, 79 M.J. 437 (C.A.A.F. 2020).

This Court is reviewing this case pursuant to Article 66(d)[1], UCMJ. When reviewing whether findings of guilt are correct in law and fact in accordance with Article 66, a "CCA cannot consider matters outside the 'entire record.'" Id. at 444. The "entire record" includes those matters listed in R.C.M. 1103(b)(2)-(3) and the briefs and arguments counsel present

[1] References in Jessie to Article 66(c), UCMJ, are to the version of the statue in effect before implementation of the Military Justice Act of 2016, as incorporated into the 2019 Manual for Courts-Martial, United States. The substantive language of the previous Article 66(c) is now found in Article 66(d) and has not materially changed. Therefore, Jessie's references to Article 66(c) should be presumed to apply to the post-2019 Article 66(d).

"regarding matters in the record of trial and 'allied papers.'" Id. at 440-41. "[T]he practice of considering material outside the record should not be expanded beyond the context of Article 55, UCMJ, and the Eighth Amendment." Id. at 445.

The Court may consider matters outside the record where: (1) such documents are "necessary for resolving issues raised by materials in the record"; and (2) the issues are not "fully resolvable by those materials" already in the record. Id. at 444-45. The default is a rule of exclusion "because the text of Article 66(c), UCMJ, does not permit the [courts of criminal appeals] to consider matters that are outside the entire record." Id. at 445. This rule of exclusion reflects the notion that, for military justice proceedings to be "truly judicial in nature," appellate courts cannot consider information when it "formed no part of the record." *See* United States v. Fagnan, 30 C.M.R. 192, 195 (U.S.C.M.A. 1961).

Here, Appellant asks this Court to attach court member data sheets and the accompanying Single Unit Retrieval Format (SURF) printouts to the record on the grounds that they are "necessary to resolve [Appellant's] first assignment of error and determine whether the court-martial panel was properly constituted." (App. Mot. at 1.) In the assignment of error, Appellant asserts that the presence of racial identifiers therein—along with the fact that his court-martial preceded the decision in United States v. Jeter, 84 M.J. 68 (C.A.A.F. 2023)[2]—"gives rise to the presumption that the panel was not properly constituted." (App. Br. at 7).

However, Appellant can make those arguments without resorting to matters outside of the record. As Appellant noted in his Assignment of Errors, the current record contains his "Request for a Diverse Panel" and the convening authority's "Replacement of Court Members" granting

[2] In Jeter, our superior court held that "[i]t is impermissible to exclude or intentionally include prospective members based on their race." 84 M.J. at 73.

that request. (App. Br. at 4).[3] To the extent that Appellant is arguing that there is a change in the law that he should benefit from, the issue can be resolved by the materials already in the record and the proposed attachments are unnecessary to resolve the issue.[4]

CONCLUSION

Because the existing record can fully resolve Appellant's issue, it is not necessary to attach further materials to the record. Jessie, 79 M.J. at 442. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion to attach court member data sheets.

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[3] Though the member data sheets were attached to the pretrial advice and subsequent requests for replacement members given to the convening authority, they were omitted from the Record of Trial in accordance with Department of the Air Force Manual 51-203, *Records of Trial* (21 April 2021).

[4] The United States is not conceding the merits of Appellant's issue nor is it conceding that that it can properly be raised on appeal.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 22 August 2025.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 8 October 2025

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 4-day enlargement of time to respond in the above-mentioned case. This case was docketed with the Court on 24 October 2023. This Court received the completed record of trial and verbatim transcript on 10 September 2024. Since receiving the verbatim transcript, Appellant has been granted nine enlargements of time. This is the United States' second request for an enlargement of time. The United States' first request was granted on 5 September 2025 to allow for trial defense counsel to submit declarations related to allegations of ineffective assistance of counsel (IAC) and for undersigned appellate government counsel to incorporate such declarations into their answer. The United States' first enlargement of time was granted until 20 October 2025. If this second enlargement of time is granted, the United States' response will be due on 24 October 2025. As of the date of this request, 715 days have elapsed since docketing, and 393 days have elapsed since this Court received the verbatim transcript.

There is good cause for the enlargement of time in this case. Appellant has raised seven assignments of error and a novel issue regarding structural error. Undersigned counsel has

completed review of Appellant's brief, the record of trial, and trial defense counsel's declarations addressing Appellant's allegation of IAC. Undersigned counsel has begun drafting the answer to Appellant's assignments of error.

The Air Force Appellate Operations Division (JAJG), as a whole, currently has 16 briefs with due dates pending at the Air Force Court of Criminal Appeals and three briefs with pending due dates before the Court of Appeals for the Armed Forces (CAAF). Undersigned appellate counsel has one brief due to CAAF on 22 October 2025. JAJG currently only has six active duty appellate attorneys, one active duty division chief, and one civilian associate chief. JAJG's director of operations, Lt Col Liabenow, was reassigned out of the office in August 2025 without a replacement, which means that JAJG has one less supervisory attorney to conduct supervisory review of briefs. In addition, JAJG's associate chief and primary attorney for supervisory review, Ms. Payne, will be out of the office on pre-approved leave from 8-14 October 2025, and there is a federal holiday (3-day weekend) from 11 October to 13 October.

An enlargement of time is necessary to ensure adequate supervisory review of this brief prior to filing. Both JAJG's Chief and Associate Chief are presenting oral arguments at CAAF on 21 and 22 October respectively and need to participate in four moot courts the week of 13 October for JAJG's four CAAF oral arguments on 21-22 October 2024. In addition, JAJG has 8 total briefs currently due the week of 20 October, although it is submitting motions for enlargement of time for several cases. Due to oral argument preparation, it will be very difficult for JAJG leadership to accomplish supervisory review of this lengthy brief until oral argument is over. Four additional days will allow for proper supervisory review.

WHEREFORE, the United States respectfully requests this Honorable Court grant this motion for an enlargement of time.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 October 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES MOTION TO ATTACH DOCUMENTS**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 6 October 2025

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A – Capt Michael Bruzik Declaration, dated 1 October 2025 (2 pages)
- Appendix B – Major Joseph Bishop Declaration, dated 2 October 2025 (2 pages)

The attached declarations are responsive to this Court's order directing Maj Bishop and Capt Bruzik to provide declarations responsive to Appellant's Assignment of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 5 September 2025.) Appellant claims his trial defense counsel were ineffective. (App. Br. at 13-17.) These declarations are necessary to resolve this assignment of error.

Our Superior Court held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached

documents are relevant and necessary to address this Court's order and Appellant's Assignment of Error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 6 October 2025.

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IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES,	)	
Appellee,	)	**UNITED STATES ANSWER TO**
	)	**ASSIGNMENTS OF ERROR**
v.	)	
	)	
	)	Before Panel No. 2
Master Sergeant (E-7)	)	
TAVARIS BANKS	)	No. ACM 24057
United States Air Force	)	
Appellant	)	24 October 2025

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

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TRIAL DEFENSE COUNSEL STRATEGICALLY WITHHELD EVIDENCE OF GOOD MILITARY CHARACTER TO PREVENT HARMFUL REBUTTAL EVIDENCE OF APPELLANT'S PREVIOUS VIOLENT CONDUCT.

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TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT

COURT OF APPEALS FOR THE ARMED FORCES

COURTS OF CRIMINAL APPEALS

FEDERAL CIRCUIT COURTS

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UNIFORM CODE OF MILITARY JUSTICE

OTHER AUTHORITIES

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 24 October 2025

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

ISSUES PRESENTED

I.

THE CONVENING AUTHORITY IMPERMISSIBLY CONSIDERED THE RACE OF POTENTIAL COURT MEMBERS WHEN HE SELECTED ONLY BLACK REPLACEMENT MEMBERS FOLLOWING A REQUEST FOR DIVERSE PANEL MEMBERS.

II.

THE FINDINGS OF GUILTY FOR THE CHARGE AND SPECIFICATION OF ASSAULT CONSUMMATED BY A BATTERY ARE FACTUALLY INSUFFICIENT BECAUSE THE GOVERNMENT FAILED TO PROVE THAT MASTER SERGEANT BANKS WAS NOT ACTING IN SELF-DEFENSE OR DEFENSE OF ANOTHER WHEN THE ALLEGED VICTIM WAS ACTING AGGRESSIVELY AND THROWING WATER AT OTHERS.

III.

TRIAL DEFENSE COUNSEL WERE INEFFECTIVE WHEN THEY FAILED TO OFFER EVIDENCE OF MASTER SERGEANT BANKS'S GOOD MILITARY CHARACTER AS SUBSTANTIVE EVIDENCE IN HIS DEFENSE.

IV.

THE MILITARY JUDGE IMPERMISSIBLY IMPEDED PUBLIC ACCESS TO MASTER SERGEANT BANKS'S TRIAL BY PREVENTING SPECTATORS FROM SEEING CERTAIN PROSECUTION EXHIBITS.

V.

THE GOVERNMENT'S UNREASONABLE DELAY IN FORWARDING THE RECORD OF TRIAL TO THIS COURT DENIED MASTER SERGEANT BANKS HIS RIGHT TO SPEEDY APPELLATE REVIEW.

VI.[1]

THE CONVICTION FOR ASSAULT CONSUMMATED BY A BATTERY SHOULD BE OVERTURNED BECAUSE THE INVESTIGATOR WAS DERELICT IN HIS DUTIES.

VII.[1]

THE REFERENCE IN THE REPRIMAND TO BEING A SECURITY FORCES MEMBER HIGHLIGHTS THE WRONGFULNESS OF THE CONVICTION, SO THE FINDINGS AND THE SENTENCE, ESPECIALLY THE REPRIMAND, SHOULD BE SET ASIDE.

STATEMENT OF CASE

At his special court-martial composed of officer and enlisted members at Osan Air Bae (AB), Republic of Korea, Appellant was convicted contrary to his plea of one charge and one specification of assault consummated by battery in violation of Article 128, UCMJ, on 3 February 2023. (ROT, Vol 1, *Statement of Trial Results,* dated 3 February 2023). Appellant elected to be sentenced by the military judge, who sentenced Appellant to three months of confinement, reduction to the rank of E-4, and a reprimand. (Id.)

[1] Issues VI and VII are raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

The convening authority took no action on the findings, but took two actions on Appellant's sentence: (1) Confinement was reduced from three months to 45 days; and (2) the reduction in rank to E-4 was reduced to reduction to E-5, with reduction below E-6 suspended until 15 September 2023, at which time unless soon vacated, it would be remitted. (ROT, Vol 1, *Entry of Judgement,* dated 17 March 2023).

STATEMENT OF FACTS

Introduction

Appellant was charged with assault consummated by battery for striking RE on the face with his hand. (ROT, Vol 1, *Entry of Judgement,* dated 17 March 2023). While Appellant, RE, and the other witnesses did not know each other at the time of the offense, RE and Appellant were identified as the offender and victim by RE, JB (a member of security forces), and Appellant. For ease of understanding, the victim and Appellant will be consistently referred to as RE and Appellant even when capturing testimony by witnesses who did not know them at the time of the offense.

The Footage

Prosecution Exhibit 1 is approximately 3 minutes long and displays a street with several people in civilian clothes standing in the top right corner. This group included a man in a red hat and black shirt (JS), a man in black shorts and a purple tie-dye shirt (EM), and a man in a green shirt (JR). (Id.; R. at 476, 495-496, 529).

At about 12 seconds in, a recyclable plastic water bottle landed in the street about half a dozen feet away from the group (approximately in the middle of the screen) and skidded forward. (Id.) A man identified as RE came on screen walking toward the water bottle. (Id.) JS interacted with RE, who then brought his arms up with his palms up and then shook his body

while standing in front of the group. (Id.) RE then picked up the water bottle that had previously been thrown. (Id.) The group appeared to say something to him, and RE interacted with them before moving away. (Id.) RE then approached the group again. He continued to speak with the group and at one point raised his arms with his palms up again. (Id.) At 01:30, Appellant appeared on camera and approached RE. (Id.) Appellant was carrying a bag in his left hand. (Id.) While Appellant was watching, RE sprayed water from his water bottle on one of the members in the group. (Id.) Approximately two seconds later, Appellant struck RE in the head and knocked him to the ground. (Id.) JS, EM, and JR's group and Appellant left the scene while RE was still on the ground. RE appeared to struggle to rise off the ground for the next minute before standing and walking in circles in the area. (Id.)

Prosecution Exhibit 2 is approximately 24 seconds long and showed the same incident between Appellant and RE from a different and closer angle. While two people partially obstructed the camera's view of Appellant and RE, Appellant can be seen striking RE at 12 seconds. (Id.) Appellant then stood bent over RE with his arms out for six seconds while RE was splayed unmoving on the ground. (Id.)

Defense Exhibit B is a 5-second-long video of RE from the interaction with the group from that night. RE can be seen and heard saying "Are you kidding me bro? Dude, kill yourself, dude." (Id.)

The Victim

RE was stationed at Osan AB in August of 2022 (R. at 653). He recalled going out to the SED and drinking. (Id.) RE believed he went to about seven different bars with his coworkers. (Id.) At some point the people he originally went out with headed home. (R. at 673). He had moments of blackout during the night and could not remember anything after 0300

on 13 August 2022. (R. at 654). RE did not recall being punched in the head, and he woke up in a Korean ambulance. (Id.) While in the ambulance, he took a short video of himself at about 0430 on 13 August 2022. (Pros. Ex. 7). RE's head was bandaged, and blood stains were visible on his face, neck, and shirt. (Id.) RE received six stitches on the top of his head at the hospital. (R. at 656). His jaw also hurt and it "hurt to eat and stuff." (R. at 657). RE testified that his personality is to "laugh things off" even when something serious happens. (Id.) RE was laughing during his interview with security forces about the incident on 13 August 2022. (R. at 660). RE identified himself walking up to the group of men outside the vape shop in Prosecution Exhibit 1. (R. at 673). Up until the 42 second mark, RE did not think he looked aggressive; just "really drunk." (R. at 674). RE said he then did a little dance on video, started walking away from the group near the vape shop, and did not appear aggressive. (R. at 675). After a man in a red hat (JS) got RE's attention and RE went back over, RE did not think the interaction looked aggressive. (R. at 677). RE saw himself turn away from the group and return a couple of times and then saw himself splash water on the group. (Id.)

RE said that upon seeing the CCTV footage prior to trial, he thought it looked like he was trying to pick a fight. (R. at 661). RE agreed with trial defense counsel that from what he saw on the footage, he was probably taking an aggressive tone and "knew it was kind of towards like a, I guess, altercation of some sort." (Id.) RE agreed that on the video he got into the group's personal space and splashed water on one of them. (R. at 662). RE identified himself in Defense Exhibit B but denied that his behavior on the video was threatening the group. (R. at 664). After watching the CCTV footage again in court, RE did not feel his actions were aggressive or that he was a threat. (R. at 678). RE thought that he was "one drunk guy against three guys. Like obviously I'm no threat and I'm not really doing anything. I'm not swinging any punches. The

most I did was sprinkle water." (R. at 679). RE only stated he appeared aggressive in Defense Exhibit B.

The Witnesses

On 13 August 2022, JR, EM, and JS were stationed at Osan AB and out drinking in the SED. (R. at 492-493, 472, 526). They were going to bars and playing pool, and at one point encountered an unknown drunk man, RE, on the street outside a vape shop. (R. at 493, 473, 526). JS testified that RE threw a water bottle in their direction that landed about six or seven feet from them. (R. at 526). JS let RE know he did not appreciate that, and RE started talking to the group. (R. at 518, 526).

EM testified that RE "started talking a whole bunch of mess to us," and was "pretty much just like . . . antagonizing us, and threatening to throw water on us," but he could not remember the details of the conversation. (R. at 493). JR could not recall the conversation either, but JS and EM said RE called JS "Scooby Doo" without explanation. (R. at 473-474, 499, 538). JS said the group was "kind of just entertaining" RE's drunken actions, but JS and EM both felt RE started getting more aggressive and encroaching on the group's personal space. (R. at 499, 526). EM testified that RE was "shimmying around a lot . . . sort of dancing in a way," which JS confirmed happened "through our whole interaction," and JS, JR, and EM recalled RE moving unpredictably (R. at 490, 499, 508, 530). EM did not find this threatening. (R. at 508).

The group told RE to go away several times when he would not leave. (R. at 501, 526). In Defense Exhibit B, JR identified his voice saying "do what you want, bro" in response to RE's comment, but he could not recall the conversation itself. (R. at 483). After watching Defense Exhibit B, JS testified that the drunk man acted more aggressively than what was captured on the

video, and he started to become aggressive towards his group. (R. at 539). EM stated that RE started threatening to throw water on them after telling them to kill themselves. (R. at 500).

JS and EM heard RE threaten to throw water at the group, at which point JS felt threatened. (R. at 493, 544). JS did feel that RE could "have caused the situation to escalate" because they told him to leave and "he came back." (R. at 532). JS said he was not in fear of getting harmed, but "in fear of what could end up happening." (Id.) JS encountered drunk individuals every night in the SED, and they would sometimes behave in erratic ways. (R. at 533).

EM saw another originally unknown man, Appellant, walk up and stand near their group while looking in their direction. (R. at 503, 507). EM, JS, and JR testified that RE did spray JS with water from his water bottle, which caused JS to put his hand up to block it. (R. at 473, 493, 526, 540-41). In that moment, JS was concerned there could be another attack by RE and felt vulnerable at the time. (R. at 541-542). EM put himself between JS and RE at that point because he was concerned RE might attack again. (R. at 505). EM felt the reasonable response to RE's actions was to step between him and JS. (R. at 510). EM did not feel like *he* was in danger but thought the man might harm JS in a "physical way," because the man was also telling them to kill themselves. (R. at 494) (emphasis added).

While JS and EM felt there was a possibility of a fight breaking out between the group and RE, JR was not scared of RE during this interaction. (R. at 478, 501, 542). JR felt RE was drunk and unpredictable, and he "felt like I could get away if I really wanted to." (R. at 488, 490). EM testified that RE never raised his fists. (R. at 508). JS confirmed that RE did not make any threats beyond telling them to kill themselves. (R. at 528).

JR, EM, and JS all recalled that Appellant then "stepped in" and punched RE in the face. (R. at 473-474, 494, 526). EM estimated the force of the hit to be a five or six on a scale of one to ten, and the punch knocked RE to the ground. (R. at 494-495). After RE was on the ground, JS did not think he appeared conscious. (R. at 551, 554).

Both JR and JS were shocked that Appellant punched RE, although JS quickly thought it was funny. (R. at 474, 531). JR stated that throwing water was "not that big of a deal . . . [RE] didn't lunge at us or anything like that. Words are words." (R. at 489).

JS was relieved the drunk man was on the ground and the interaction had stopped. (R. at 543). JS did not believe striking RE in the face was necessary to prevent harm to JS. (R. at 554). But JS did believe that if no one intervened, the drunk man would continue to act aggressively toward his group. (R. at 555). EM was only sort of surprised that the drunken man was hit because he was being "belligerent" and "antagonizing," so "that happening to him wasn't really much of a surprise to" EM. (R. at 495). EM did think it was somewhat surprising that Appellant, someone EM did not know, hit RE. (Id.) EM was glad someone intervened because he did not want to get into a fight. (R. at 507).

JS, JR, and EM then "scattered" and left the scene while Appellant was still on the ground. (R. at 477, 496).

Appellant

Appellant testified in his own defense at the court-martial.

Appellant was stationed at Osan AB, Korea, in August of 2022. (R. at 718). At the time of trial, he had been in security forces for 18 years. (Id.) He has training in MMA fighting and de-escalation. (R. at 760-761).

From the night of 12 August to the early morning of 13 August 2022, Appellant attended a going away party for a coworker. (R. at 726). Appellant started bar hopping and saying hello when he saw people he knew. (R. at 728). Appellant saw some friends, to including AH and AW, at the bar called "My Place." (Id.) A man Appellant did not know but later identified as RE got in AW's "face" and was being "very aggressive." (R. at 729). Appellant thought RE was drunk and wanted to fight AW and so Appellant grabbed him and moved him away. (R. at 731). They moved RE away from AW and, after RE said some "crazy things" to Appellant, another friend moved Appellant away as well. (R. at 730). RE was telling Appellant he would "fuck [him] up" and "beat [his] ass." (R. at 738).

Appellant testified that once Appellant was outside, RE came outside as well and kept "saying inappropriate things.." (R. at 734). When Appellant told RE to "watch his mouth," RE "shoulder check[ed]" Appellant with his left hand as he walked by. (R. at 734, 736). RE then walked off. (R. at 737).

Appellant was talking with other people, but he noticed RE head down the street toward an intersection. (R. at 738-739). Appellant saw RE talking to some people and decided to go over and say something to him. (R. at 739-740). Appellant went over and saw RE "harassing" the group by yelling at them before throwing water on them. (R. at 741). Appellant described RE as "posturing up" and "moving around like crazy." (Id.) Appellant thought RE was behaving aggressively but could not hear what he was saying. (R. at 742). Appellant heard the group tell RE to leave "many" times," but RE did not leave and instead threw water at the group. (Id.) Appellant compared RE throwing water to training in tactics and fighting he had received in security forces, which was that a person could be attacked after first having water thrown on them. (R. at 748).

Appellant said RE then turned toward him a "split second" later. (R. at 741, 750). Appellant started thinking "about a strike. I'm thinking about with like, target focus training." (R. at 745). Appellant took in the position of RE's shoulder movement and feet being set, which Appellant thought looked like preparation to punch. (R. at 749). Appellant said RE was a threat to him in that moment and he believed RE could have harmed someone else. (R. at 755). Appellant then punched RE because he thought RE was going to harm Appellant, but Appellant did not think the punch was hard. (R. at 745). Appellant just "wanted it to stop." (R. at 755). Appellant did not expect RE to fall over from the punch because it was not a "knock out punch." (R. at 748).

Appellant testified he believed he was defending himself, and defending the others present at the time by defending himself. (R. at 756). Appellant believed RE could have done more than just throw water. (R. at 757). With respect to the other group, Appellant wanted RE to stop bothering everybody. (R. at 746). Appellant saw RE throw the water, try to fight AW, threaten and push Appellant, and felt his behavior was getting more aggressive; as a result, Appellant thought RE was going to harm the other group of people. (Id.) Appellant later said that in the moment of the punch, he was concerned about himself. (R. at 749).

After the punch, Appellant described RE's eyes as blinking and rolling back after the punch. (R. at 747). Appellant determined RE would not be a threat to him and walked away. (Id.)

The Aftermath

SC was a security forces member stationed at Osan AB on 13 August 2022 and was on duty in the SED. (R. at 687). She found RE in the SED with a lot of blood on him. (R. at 688). SC saw RE had a "big gash" on his head that the blood was coming from. SC's coworker took a

picture of SC and RE after a bandage was applied to his head that shows blood running down his face, on his shirt, and on the ground around them. (R. at 691; Pros. Ex. 8). It was possible that the blood on his face would have prevented SC for seeing other injuries on RE. (R. at 695). RE appeared to be intoxicated and was "laughing hysterically." (R. at 691, 693).

JB was stationed at Osan AB, Korea, with the Security Forces Squadron. (R. at 438). He had been in security forces for 14 years. (Id.) At the time of the incident, he was working "town patrol," which is a 3-kilometer radius surrounding Osan AB where security forces "enforce[s] UCMJ violations with SOFA members." (R. at 439). JB knew Appellant for nine years at the time of trial because they were tech school instructors together for three years. (Id.)

JB was on duty the morning of 13 August 2022 and received a call to respond to a medical emergency. (R. at 439-440). The call was for an individual bleeding from the head, and when JB arrived RE was sitting on the sidewalk with bandages on his head and his body covered in blood. (R. at 440). RE did not originally cooperate and attempted to refuse medical care. (Id.) JB thought it would be "fair" to assume RE was highly intoxicated. (R. at 460). Once RE was transported for medical care, there was not an immediate investigation into what had happened. (R. at 441). The investigation started the following evening when a shop owner informed JB through the Korean translator (KATUSA) that he had CCTV footage from the incident on 13 August 2022. (R. at 444). KATUSA recorded two angles CCTV footage onto his phone (Pros. Ex. 1 and 2) and then showed JB the footage, from which JB identified Appellant. (Id.)

In Court, JB identified Appellant appearing on the video from Prosecution Exhibit 1 wearing denim shorts and a white shirt with the number 24 on it. (Pros. Ex. 1; R. at 446). JB

also identified the individual struck and lying down in the video as the same individual he had responded to for the medical emergency, meaning RE. (Id.)

Trial counsel then played Prosecution Exhibit 2 for JB. Fifteen seconds into the video, JB identified Appellant and discussed his body position. (R. at 448). Specifically, JB explained that when Appellant "[brought] his arms out" as he did on the video while standing over a prone RE, it was the "typical mannerism of [Appellant]" as a tech school instructor "when he would yell or stress inoculation." (Id.)

Inv SG was an investigator at Osan AB and received a call in August 2022 about an assault that took place in the SED. (R. at 562-563). He participated in the investigation into assault consummated by battery against Appellant. (R. at 563). He was unable to find additional CCTV footage beyond what JB had already collected. (R. at 564-565).

Inv. SG interviewed RE. (R. at 636). Inv SG did not open an investigation in RE for his behavior that night, because splashing someone with water is not typically enough to open an investigation. (R. at 640, 647). Inv. SG was shown Defense Exhibit B during trial and testified that he had not known the video existed, and it had not come out in the investigation. (R. at 643, 650).

On 16 August 2022, Inv SG interviewed Appellant. (R. at 566; Pros. Ex. 3) The interview lasted approximately two hours. (Pros. Ex. 3). Appellant told Inv. SG that he weighed about 220 pounds, and RE was "medium size. (R. at 569, 589).

Appellant said he had a few drinks that night, which included gin and tonic. (R. at 579). He recalled getting "a shoulder check" while in the bar from RE. (Id.) Appellant estimated that on a scale of sober (1) to blackout drunk (10), RE was maybe a six or an eight. (R. at 583). Appellant recalled RE saying "fuck you" and Appellant "let it get to [him]." (R. at 579).

Appellant felt saying "fuck you" was "combative language." (R. at 581). Appellant said that in hindsight, he knew he "wasn't in danger." (R. at 582). But in the moments after RE pushed Appellant, Appellant wanted to "shut this shit down right now." (R. at 584). Later in the interview, Appellant says he did feel threatened by RE when RE pushed him. (R. at 587). When Inv SG asked if the push was what drove Appellant's next actions, Appellant replied "in the situation, it was that." (R. at 584). Appellant could not recall how much time had passed between the push and the punch. (Id.) Appellant said RE walked away after the push and he walked after him within a few seconds. (R. at 588). (Id.) Appellant shared that after the push by RE, AH tried to calm Appellant down. (R. at 593).

Appellant admitted to striking RE but said "I don't think I hit him that hard." (R. at 580). Upon reviewing the CCTV footage, Inv SG asked Appellant what he "hope[d] to get out of hitting" RE. (R. at 594). Appellant said "just shut it down. . . . Like [RE] was off the wall and pushing me. . . . He kept going, like I just wanted to stop it." (Id.)

At first, Appellant told Inv SG that he went to get food after hitting RE. (R. at 588). After reviewing the CCTV footage, Appellant saw that he had food in his hand at the time he approached RE before punching him. (R. at 591). Appellant drew attention to the bag in his hand on the CCTV footage and said "I still ain't let go of my food, like, because this dude wasn't threatening me. . . .if I was threatened as a threat, . . . I'd drop that stuff." (R. at 595).

Appellant did not say he was acting to protect anyone else during the interview. (R. at 631-632). Appellant told Inv. SG that Appellant was not "in the right mindset from being tired . . . and then me having drink . . . but that's no excuse. . . . [A]t the end of the day, I made a bad decision." (R. at 580).

Appellant made a written statement to law enforcement on 22 August 2022. He summarized the incident and stated he hit RE. (Pros. Ex. 6). Appellant said this was in part because, after throwing the water and turning to Appellant, Appellant saw "his eyes (sic) he looked as if he was going to him me. . . .I saw his should move (right) like telegraphing a punch."

Appellant testified about his first interview with Inv SG. He said he was "scatterbrained" from work at the time. (R. at 750). He had also been pulled from leading his flight as of Monday morning and "that broke me." (R. at 751). Appellant said he "wanted to just eat it" and so said "I did it. I punched him in the face." (Id.) Appellant said when he told Inv SG he did not "respect [RE] as a threat," he meant he would have been preparing for a fight and would not have approached him if Appellant respected RE as a threat. (R. at 752). Appellant said that he did not approach RE from an "offensive" perspective or he would have been preparing for a fight. (R. at 754).

Appellant also testified that by saying "shut it down," to Inv SG, he meant he wanted RE to "stop being that belligerent person he was being." (Id.) Appellant "felt that I could talk to him and do that, but I didn't." (Id.)

ARGUMENT

I.

THERE SHOULD BE NO RELIEF FOR ERROR WHERE APPELLANT AFFIRMATIVELY REQUESTED A DIVERSE PANEL.

Additional Facts

On 23 January 2023, the Staff Judge Advocate excused two panel members from Appellant's court-martial pursuant to the authority delegated to him by the convening authority.

(ROT, Vol 3, *Excusal of Court Member*). Replacements were not detailed for these two excused members. (Id.) On 27 January 2023, Appellant requested that the convening authority give him a diverse panel. (ROT, Vol 3, *Request for a Diverse Panel*). Specifically, Appellant noted that the two excused members had been African-American and Asian-American, and that Appellant was African-American. (Id.) Appellant requested members who would be "diverse in terms of race, ethnicity, and rank," as the "law permits." (Id.) On 30 January 2023, the convening authority detailed two replacement members. (ROT, Vol 3, *Replacement Court Members*). The convening authority acknowledged that Appellant had requested a diverse panel. (Id.) The convening authority stated that he was appointing to replacement members "[b]y reason of their age, education, training, experience, length of service, and judicial temperament, under Article 25, UCMJ." (Id.) The two replacement members were African-American. (Appellant's Appendix to Motion to Attach).

Standard of Review

When no objection is made at the trial level, this Court reviews court-martial composition issues for plain error. United States v. King, 83 M.J. 115, 121 (C.A.A.F. 2023). Under plain error review, Appellant bears the burden of establishing that (1) there is error; (2) the error is clear or obvious; and (3) the error materially prejudiced a substantial right. Id. at 123 (citation omitted). "[F]ailure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006).

Law and Analysis

Pursuant to Article 25, "[w]hen convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length

of service, and judicial temperament." 10 U.S.C.S. § 825(e)(2). Absent contrary indication, military appellate courts presume that the convening authority acted in accordance with Article 25, UCMJ, in "carr[ying] out the duties imposed upon him by the Code and the Manual." United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020) (*citing* United States v. Wise, 20 C.M.R. 188, 194 (1955)).

"[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration." United States v. Harcrow, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting Johnson v. United States, 520 U.S. 461, 468 (1997)). "An appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." United States v. Tovarchavez, 78 M.J. 458, 462 (C.A.A.F. 2019).

Under United States v. Jeter, convening authorities cannot include or exclude "prospective members based on their race." 84 M.J. 68, 73 (C.A.A.F. 2023). This decision stemmed from the Supreme Court's holding in Batson v. Kentucky, 476 U.S. 79 (1986). Because Batson found that "[a] person's race simply is unrelated to his fitness as a juror," it abrogated the holding from United States v. Crawford, 15 C.M.A. 31, 41 (1964), which previously stood for the premise that race could be an appropriate consideration for a panel member if it was "in favor of, not against, an accused." Although CAAF treated the specific error in Jeter as structural, the Court said, "*under these facts*, we reverse." 84 M.J. at 74. The United States contends that structural error should not apply here. While Jeter reflects that it is structural error to engage in racial discrimination in panel selection that would presumably prejudice a minority accused, it is unclear under Jeter and Batson, whether the same analysis would apply when racial discrimination was used to select a panel of diverse panel members that

was intended to benefit or level the playing field for a minority accused. Since the intention was to benefit the accused, harmless error analysis seems appropriate.

This Court could consider the invited error doctrine in Appellant's case. "The invited error doctrine prevents a party from 'creat[ing] error and then tak[ing] advantage of a situation of his own making [on appeal].'" United States v. Martin, 75 M.J. 321, 325 (C.A.A.F. 2016) (quoting United States v. Eggen, 51 M.J. 159, 162 (C.A.A.F. 1999) (internal quotation marks omitted) (quoting United States v. Raya, 45 M.J. 251, 254 (C.A.A.F. 1996))). The invited error doctrine "reflects the policy that invited errors 'are less worthy of consideration than those where the defendant merely fails to object.'" United States v. Perez, 116 F.3d 840, 844 (9th Cir. 1997) (quoting Guam v. Alvarez, 763 F.2d 1036, 1037 (9th Cir. 1985)). This Court should correct invited errors "only in extraordinary circumstances, such as 'when the integrity of the judicial process itself would otherwise suffer.'" Id. (quoting Alvarez, 763 F.2d at 1037) (internal citations omitted).

Even if this error in this case was structural in nature, the invited error doctrine applies to structural errors. United States v. Gaya, 647 F.3d 634, 640 (7th Cir. 2011) (applying invited error to Sixth Amendment right to consult with defendant); Durden v. State, 99 N.E.3d 645, 655 n.11 (Ind. 2018) (several states have applied invited-error doctrine to structural errors) (internal citations omitted); United States v. Teerlink, 141 F.4th 1126, 1131 (10th Cir. 2025) (applying invited error to proposed jury instructions).

Tension between holdings by the Supreme Court and their application to the military is not a new concept to military justice. For example, Ramos v. Louisiana, the Supreme Court held that the Sixth Amendment right to a jury includes the right to a unanimous jury. 590 U.S. 83 (2020) This holding sparked numerous motions and appeals for unanimous verdicts to be

applied to courts-martial. *See e.g.* United States v. Pritchard, 82 M.J. 686, 689 (A. Ct. Crim. App. 2022); United States v. Westcott, 2022 CCA LEXIS 156 (A.F. Ct. Crim. App. Mar. 17, 2022); United States v. Martinez, 2022 CCA LEXIS 212 (A.F. Ct. Crim. App. Apr. 6, 2022); and United States v. Brown, 2021 CCA LEXIS 414 (A.F. Ct. Crim. App. Aug. 16, 2021).

These cases were filed despite Article 52, UCMJ, 10 U.S.C.S. § 852, providing that unanimous verdicts were not required at courts-martial, CAAF stating that they were not required, and long-standing Supreme Court case law that said the right to a unanimous jury trial did not apply to the military. *See* United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012); Ex parte Milligan, 71 U.S. 2 (1866). CAAF addressed the applicability of Ramos to courts-martial in United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023). Our superior Court reaffirmed that servicemembers do not have a Sixth Amendment right to a unanimous verdict. Id. at 298. Since Anderson, appellants have continued to file assignments of error alleging that they are entitled to unanimous verdicts presumably to preserve this issue for later appeal. *See e.g.* United States v. Gonzalez, 2025 CCA LEXIS 412 (A.F. Ct. Crim. App. Aug. 29, 2025); United States v. Haymond, 2025 CCA LEXIS 450 (A.F. Ct. Crim. App. Sep. 23, 2025); and United States v. Kim, 2025 CCA LEXIS 386 (A.F. Ct. Crim. App. Aug. 15, 2025).

While Jeter was published after Appellant's trial in 2023, Batson has been the law since 1986. While CAAF only officially abrogated Crawford in Jeter, that should not mean that an accused could not invite an error in panel selection by specifically *requesting* a diverse panel when Batson already held that "[a] person's race simply is unrelated to his fitness as a juror." 476 U.S. at 87. This situation is vastly different from Jeter, where the appellant challenged the "systemic exclusion of members based on race" prior to and during voir dire and then prevailed by making a prima facia showing on appeal that race was a consideration in his panel selection.

84 M.J. at 71, 74; United States v. Jeter, 81 M.J. 791, 794 (N-M Ct. Crim. App. 2021). Even in Batson, part of the reason the case was reversed was because the appellant objected to the exclusion of minority members from his panel and preserved the issue for appeal. 476 U.S. at 100. An accused "generally is entitled to automatic reversal regardless of the error's actual effect on the outcome" only "where there is an objection at trial and the issue is raised on direct appeal. Weaver, 582 U.S. at 299. Here, *Appellant* requested that the convening authority give him a diverse panel on the basis of race when two minority members were excused and not immediately replaced. (*Request for Diverse Panel*).

The judicial process itself would not suffer from finding that Appellant invited this error and declining to provide relief. The judicial process *would* suffer if Appellant's conviction was set aside after Appellant asked for and received what he believed to be a benefit to his court-martial at the time. Providing Appellant with relief for this error would also incorrectly expand Jeter's holding, which did not contemplate a situation where an accused had specifically *asked* for a diverse panel as opposed to either suffering or benefiting from a convening authority's intentional and systemic exclusion or inclusion of panel members based on race. *See* Jeter, 84 M.J. at 71.

This Court should also consider applying the doctrine of judicial estoppel. "Judicial estoppel precludes a party from successfully asserting a position in a proceeding and then asserting an inconsistent position later." United States v. Augspurger, 61 M.J. 189, 193 (C.A.A.F. 2005) (Crawford, J., dissenting in part and concurring in part) (*citing* Lowery v. Stovall, 92 F.3d 219, 223 (4th Cir. 1996). The doctrine serves to "protect the integrity of the judicial process . . . by prohibiting parties from deliberately changing positions according to the

exigencies of the moment." New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (internal citations omitted).

While the Supreme Court has not "establish[ed] inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel," it has listed several factors that will "typically inform . . . whether to apply the doctrine:" (1) "a party's later position must be clearly inconsistent with its earlier position;" (2) "whether the party has succeeded in persuading a court to accept that party's earlier position," and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." Id. at 750-751. Courts may also consider other factors that may "inform the doctrine's application in specific factual contexts." Id.

Here, Appellant first took the position that he wanted the convening authority to provide him with a diverse panel. (ROT, Vol 3, *Request for a Diverse Panel*). He specifically noted that the previously excused members had been part of minority groups and their exclusion "concerns me and my attorney greatly." (Id.) Appellant asked the convening authority to include members who would be "diverse in terms of race, ethnicity, and rank." While the convening authority only acknowledged this request without granting it (see below), he did detail two African-American members to Appellant's panel. (ROT, Vol 3, *Replacement Court Members*). Appellant now takes the position that, in light of Jeter, his case suffered from an improperly constituted panel for the inclusion of those two members based on their race. (App. Br. at 5). Appellant meets the first factor because his current position is "clearly inconsistent" with his earlier position. Judicial estoppel is appropriate here because Appellant did not make a "mistake" when making his request for a diverse panel, even if Jeter later changed the landscape. New Hampshire, 532 U.S. at 753 ("it may be appropriate to resist application of judicial estoppel

when a party's prior position was based on inadvertence or mistake") (internal citations omitted). Appellant knew he was requesting a diverse panel because he wanted "the impartiality of my panel [to be] above all reproach." (ROT, Vol 3, *Request for a Diverse Panel*).

Second, while the Government does not concede that the convening authority considered race in selecting Appellant's replacement members, Appellant *did* achieve the result he wanted: two African-American members were added to his panel. (ROT, Vol 3, *Replacement Court Members*). Appellant received his desired result from his request. To claim reversible error now creates the "risk of inconsistent court determinations" to the extent that the convening authority gave Appellant what Appellant, at the time, believed to be "in [his] best interest," one of the members added to the panel ended up serving on Appellant's court-martial (R. at 409), and Appellant now wishes to use the convening authority's court member replacement as a basis to overturn his conviction. New Hampshire, 532 U.S. at 752.

Third, Appellant would derive an enormous unfair advantage if he is not estopped, because his new position calls for this Court to overturn his conviction for assault consummated by battery under Jeter at the Government's expense.

Judicial estoppel should be applied in Appellant's case because to do otherwise would allow Appellant to use his inconsistent positions regarding panel members to receive a windfall in the form of a possible overturned conviction, and this would "undermin[e] the integrity of the judicial process." New Hampshire, 532 U.S. at 755.

If this Court finds the invited error doctrine and judicial estoppel do not apply, it still should not grant Appellant relief. Appellant has not demonstrated error in the panel composed by the convening authority just because the convening authority appointed two African-American members to the panel. Turning to the test from Jeter, Appellant has not made a prima

facie showing that that the convening authority unlawfully considered race in appointing the two replacement members. (App. Br. at 7). "Prima facie" means "at first sight" or "on first appearance." Black's Law Dictionary (4th pocket ed. 2011). Here, there is nothing that suggests "at first sight" that either race "played a role in the panel selection process." Jeter, 84 M.J. at 69. While the convening authority *acknowledged* that Appellant had requested a diverse panel and appointed two African-American panel members, he did not say that they were appointed based on race. (*Replacement Court Members*). The convening authority explicitly stated that he appointed the two new panel members after considering the factors listed under Article 25 with no mention of their race. (Id.). This is precisely what CAAF called on convening authorities to do: to stay within the bounds of permitted criteria under Article 25. *See* Jeter, 84 M.J. at 72.

Race was never mentioned elsewhere in Appellant's transcript with respect to the panel. This Court should not be persuaded that the convening authority considered race under Crawford when the convening authority explicitly stated they appointed the two members based on the requirements of Article 25. This Court presumes the opposite—that convening authorities act in accordance with Article 25, UCMJ—absent evidence to the contrary. United States v. Bess, 80 M.J. 1, 10 (C.A.A.F. 2020). Even if Appellant could establish prima facia discrimination, Appellant suffered no prejudice. Appellant requested a diverse panel and ended up receiving what he wanted. He has shown no evidence that he was harmed by receiving exactly what he requested.

This Court should find that Appellant invited error by requesting a diverse panel subsequent to the Supreme Court's ruling in Batson and decline to provide him with relief. In the alternative, this Court should find that Appellant has not made a prima facie showing that race was impermissibly considered in his panel selection and decline to provide relief.

II.

THE EVIDENCE WAS FACTUALLY SUFFICIENT.

Standard of Review

Factual sufficiency is reviewed using the following standard if every finding of guilty is for an offense occurring on or after 1 January 2021[2]:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon request of the accused if the accused makes a specific showing of a deficiency in proof.
>
> (ii) After an accused has made such a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> > (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
> >
> > (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), the Court is clearly convinced that the finding of guilty was against the weight of the evidence, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B).

"[T]he degree of deference will depend on the nature of the evidence at issue." United States v. Harvey, 85 M.J. 127, 130 (C.A.A.F. 2024). This Court has discretion to determine "what level of deference is appropriate." Id. "For example, a CCA might determine that the appropriate deference required for a court-martial's assessment of the testimony of a fact witness, whose credibility was at issue, is high because the CCA judges could not see the witness testify.

[2] National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Section 542(b), 134 Stat. 3611-12.

In contrast, when the CCA can assess documents, videos, and other objective evidence just as well as the court-martial, the CCA might determine that the appropriate deference required is low." Id.

This Court has said that, to show a deficiency of proof, "the statute requires Appellant to 'identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding.'" United States v. Csiti, 2024 CCA LEXIS 160 at *18 (A.F. Ct. Crim. App. 29 April 2024) (*citing* Harvey, 83 M.J. at 691).

Law and Analysis

To obtain a conviction for assault consummated by a battery, the Government must prove: (1) That the accused did bodily harm to a certain person; (2) that the bodily harm was done unlawfully; and (3) that the bodily harm was done with force or violence. Manual for Courts-Martial (MCM), pt. IV, ¶ 77.b.(2) (2019 ed.)

"Bodily harm" means an offensive touching of another, however slight. Id. at 77.c.(1)(a).

The defense of self-defense exists if Appellant "(A) Apprehended, upon reasonable grounds, that bodily harm was about to be inflicted wrongfully on the accused; and (B) believed that the force that the accused used was necessary for protection against bodily harm." Rule for Courts Martial (R.C.M.) 916(e)(3). The same analysis is applied to the defense of others, provided that the accused may not use more force than the person defended was lawfully entitled to use under the circumstances. R.C.M. 916(e)(5). When a theory of self-defense is raised, the burden is on the government to prove beyond a reasonable doubt that the defense does not exist. R.C.M. 916(b)(1).

"Findings may be based on direct or circumstantial evidence." R.C.M. 918(c).

A. Appellant has not shown a deficiency of proof in the Government's case to trigger a factual sufficiency review

Appellant raised two deficiencies in proof to trigger a factual sufficiency review. He argues in general that the Government failed to prove wholesale that neither the defense of self-defense nor defense of others applied in Appellant's case. (App. Br. at 11). This argument came from (1) Appellant's contention that RE was acting increasingly aggressive, and (2) that the single punch used by Appellant was within the bounds of self-defense and or defense of others. (App. Br. at 12). Appellant did not deny that he struck Appellant. (R. at 745).

As an initial matter, our sister services have found that a "general disagreement with a verdict" or with a conclusion of a fact finder is insufficient to establish a deficiency of proof. *See* United States v. Valencia, 85 M.J. 529, 535 (N-M Ct. Crim. App. Dec. 5, 2024). Appellant is generally arguing that RE's "aggressive behavior" of throwing water at someone made his punch to RE's head a permitted use of force to defend himself or another under R.C.M. 916(e)(3) and R.C.M. 916(e)(5). This Court should follow our sister services and find that Appellant has failed to establish a specific showing of a deficiency in proof by merely disagreeing with the fact-finder's conclusion regarding the defense of self-defense or defense of others.

B. The Government provided evidence for each element of the offense, demonstrating that Appellant committed assault consummated by battery and proved self-defense did not exist.

Even if this Court concludes that Appellant satisfied his burden to allege a specific deficiency in proof, relief should still be denied. The government presented compelling evidence establishing beyond a reasonable doubt that Appellant committed assault consummated by battery and that the defense of self-defense or defense of others did not apply.

While the government has a heavy burden of persuasion, it need not prove a case to its "mathematical certainty." Kloh, 27 C.M.R. 403, 406 (C.M.A. 1959). The Government may

meet its burden of proof with direct or circumstantial evidence. *See generally* United States v. Maxwell, 38 M.J. 148, 150-51 (C.M.A. 1993). Military jurisprudence has long held that "direct evidence of a crime or its elements is not required for a finding of guilty; circumstantial evidence may suffice." United States v. Hart, 25 M.J. 143, 147 (C.M.A. 1987) (affirming a conviction based on circumstantial evidence); *see also* United States v. Davis, 49 M.J. 79, 83 (C.A.A.F. 1998) (finding sufficient evidence of premeditation based on circumstantial evidence of intent). And the Supreme Court has "never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required." Desert Palace, Inc. v. Costa, 539 U.S. 90, 100 (2003); *see* Holland v. United States, 348 U.S. 121, 140 (1954) ("Circumstantial evidence … is intrinsically no different from testimonial evidence."). The Government proved beyond a reasonable doubt that neither the defense of self-defense nor defense of others applied in Appellant's case.

1. *Appellant did not reasonably apprehend that bodily harm was about to be inflicted wrongfully upon him.*

From reviewing Prosecution Exhibits 1 and 2, RE did not physically threaten or raise his fists at anyone. (Id.) RE did spray water on JS (Pros. Ex. 1), but that alone did not mean that RE was going to continue to wrongfully inflict bodily harm on anyone else. Spraying water is a fairly innocuous, if annoying, action. It was so minor that Inv SG did not think it would be necessary to open an investigation into it. (R. at 647).

In his written statement on 22 August 2022, Appellant said that RE turned toward Appellant, RE had a look in his eyes like he might hit Appellant and "telegraph[ed]" with his right shoulder that he might hit Appellant. (Pros. Ex. 6). The CCTV footage proved this false. At 01:30, Appellant appeared on camera walking toward RE. (Pros. Ex. 1). At the time, RE was facing the group of men outside the vape store and was not interacting with Appellant. (Id.) At

01:42, RE sprayed JS with water. (Id.) Appellant leaned his right shoulder back and clenched his fist at 01:43 *before RE ever turned toward Appellant.* (Id.) RE did not even appear to be looking at Appellant before Appellant struck him. (Id.) Appellant could not have reasonably believed RE was about to inflict bodily harm on him when RE was not even interacting with Appellant and so could not have been acting in self-defense.

Furthermore, even if Appellant immediately went after RE because he felt "threatened" by the push in the bar (R. at 587), Appellant cannot make a claim of self-defense against a retreating target – Appellant said that RE left the bar where he pushed Appellant and RE was walking away. (R. at 588). Appellant had to follow RE down the street and hit him at the intersection. (R. at 738-739). Appellant had no reason to apprehend that he was in danger of bodily harm at that point, and he told Inv SG that he hit RE because he wanted to "just shut it down. . . I just wanted to stop it." (R. at 594). That basis had nothing to do with a reasonable belief that Appellant was in danger of bodily harm from RE.

Appellant also admitted to security forces that he must not have perceived RE as a threat because Appellant kept a hold of his bag of food when approaching RE. (R. at 595). When watching the CCTV footage of the assault with Inv SG, Appellant drew attention to the fact that he kept his food in his hand on the video. According to Appellant, Appellant was still holding onto his food because RE was not really threatening him at the time. (R. at 595). Appellant would have put his things down if RE was actually a threat. (Id.) This proved beyond a reasonable doubt that Appellant did not actually believe RE was about to wrongfully inflict bodily harm on him because Appellant pursued RE and, if RE was really a threat, Appellant would have put his food down before engaging with him.

Turning to the witnesses testimony, JR and JS were "shocked" that Appellant punched RE in response to what was going on. (R. at 474, 531). As JR testified, throwing water was "not that big of a deal" and "words are words." (R. at 489). While JS and EM felt Appellant was behaving aggressively, they also described him as being unpredictable and doing a "shimmy" kind of dance while talking to them. (R. at 508, 530). In addition, Appellant did not mention a belief that others were in danger of bodily harm from RE in his interview with security forces. (R. at 631-632). These facts proved beyond a reasonable doubt that RE's drunken behavior did not cause Appellant or others to reasonably believe RE was about to inflict bodily harm on them.

In his first interview with Inv SG less than a handful of days after the incident, Appellant said what drove him in that situation was the push that had happened back at the bar, which RE had already left. (R. at 588). Appellant testified to the same thing on the stand. (R. at 738-739). Appellant was not going after RE to make sure another group of people was safe; he was going to "shut that shit down." (R. at 584). That was not acting in self-defense or defense of others; that is responding in anger to feeling disrespected. Appellant did not apprehend that RE was about to inflict bodily harm on him or anyone else before punching him, and so both defenses failed at the first prong.

2. *Appellant did not believe the force he used was necessary for protection against bodily harm.*

However, even assuming that Appellant met the first prong, the evidence showed that Appellant did not believe the force behind his punch to RE's face was necessary to protect himself or others from bodily harm by RE. Appellant argues that the Government only offered "scant evidence to prove that a single blow was greater than the force [Appellant] was lawfully able to employ under these circumstances." From Prosecution Exhibits 1 and 2, Appellant did not actually believe this amount of force was necessary. There was no urgency to the situation

requiring an immediate punch to the face. As stated above, Appellant did not perceive RE as a threat. He was approaching RE to "shut it down" and "stop it." (R. at 594). Appellant could not have actually believed a punch to the face was necessary to protect himself or others because Appellant punched RE without a reasonable belief that RE was going to inflict bodily harm on himself or others.

Spraying water on someone from a handheld water bottle would not have created a belief in Appellant's mind that he needed to punch RE to protect himself or others from bodily harm. While Appellant denied using "a knockout punch" (R. at 745, 748), Appellant is 220 pounds, Appellant considered RE to be "medium size[d]," and Appellant knew RE was drunk. (R. at 569, 589, 731). Taking these factors into account, Appellant could not have actually believed the force he put behind his punch was necessary to protect himself. The force Appellant used was so hard that JS believed RE was not "conscious" after the blow, which went far beyond the force called for over a water splash. (R. at 551). Just because a single blow may not be enough to produce grievous bodily harm does not mean it cannot be too much force. JS also testified that the punch was not necessary to protect him and his friends from harm. (R. at 554). Furthermore, there were other options available to Appellant before throwing so hard a punch. These included: taking the water bottle from RE; grabbing RE and moving him as Appellant and his friends had already done once at My Place without issue (R. at 731); or restraining RE's hands so that he could not throw the punch Appellant claimed RE had "telegraphed." (Pros. Ex. 6). Any of these might have been the force necessary to protect against bodily harm, and Appellant used none of them despite his training in de-escalation. (R. at 761). Appellant testified that when he said he wanted to "shut it down," Appellant "felt that I could talk to [RE] and do that, but I didn't." (R. at 754). That is an admission that Appellant thought he would be able to talk to RE

about his behavior, which shows Appellant did not actually believe a punch was necessary to protect against bodily harm.

RE was severely hurt by the force of Appellant's punch to RE's head. JB testified that RE was still bleeding despite the bandages put on his head before getting in the ambulance. (R. at 440). While RE was not concussed, he required six stitches to the top of his head to stop the bleeding. (R. at 656). Spraying water on JS did *not* make Appellant believe he needed to punch RE hard enough to cause him to fall to the ground and hit his head.

The witnesses' statements, CCTV footage, and evidence of RE's injury proved beyond a reasonable doubt that Appellant's punch to RE, knocking him to the ground, was well beyond the necessary force Appellant or JS would have been entitled to use against RE for dancing around and spraying water, and so Appellant fails the second prong of self-defense or defense of others.

Appellant was not acting in self-defense or defense of others when he punched RE. Appellant did not reasonably believe RE was going to inflict bodily harm on him or others. If this Court believes Appellant did reasonably believe bodily harm was going to come from RE, then Appellant still used far more force than he believed was necessary to protect himself or others. The defense of self-defense and defense of others were addressed and disproven beyond a reasonable doubt at trial. In Appellant's own words, he "made a bad decision" that day. (R. at 580). This Court should not be clearly convinced that the guilty verdict was contrary to the weight of the evidence. Accordingly, Appellant is not entitled to relief under this assignment of error.

III.

TRIAL DEFENSE COUNSEL STRATEGICALLY WITHHELD EVIDENCE OF GOOD MILITARY CHARACTER TO PREVENT HARMFUL REBUTTAL EVIDENCE OF APPELLANT'S PREVIOUS VIOLENT CONDUCT.

Additional Facts

In response to Appellant's allegation of ineffective assistance of counsel (IAC), Appellant's trial defense counsel, MB and JB, provided declarations to this court on 6 October 2025. (*Capt MB Declaration*, dated 1 October 2025 and *Maj JB Declaration*, dated 2 October 2025).

On 1 December 2022, the Government notified trial defense counsel of their intent to admit evidence under Mil. R. Evid. 404(b). (App. Ex. VI). This notice included the Government's intent to introduce evidence that in December of 2021, Appellant was drunk and disorderly at the Turumi Lodge, Osan AB. (Id.) This included the allegation that Appellant touched PM, a civilian employee, without her consent and attempted to intimidate her by stating he could steal from her store because "if she called Security Forces, he was Security Forces and he could embarrass her if he wanted, or words to that effect." (Id.) The Government intended to offer these facts to establish "a pattern of [Appellant] of drinking to excess and then believing that his occupation as a Security Forces member entitled him to take certain unlawful actions." (Id.)

On 15 December 2025, trial defense counsel filed a motion to exclude this evidence under MRE 404(a) as impermissible propensity evidence. (Id.) The military judge declined to rule on the motion on the grounds that it was not ripe. (R. at 16).

The Government did not introduce evidence of the "Turumi incident" from December of 2021 in their case in chief. However, Capt MB and Maj JB remained cognizant that they could open the door to that evidence in rebuttal if they admitted evidence of Appellant's good military character during their case in chief. (*Capt MB Declaration* and *Maj JB Declaration*). Maj JB was concerned given the nature of the uncharged misconduct, which was that Appellant had acted violently while intoxicated. (*Maj JB Declaration*). Capt MB was specifically tracking that the Government intended to argue that the uncharged Turumi incident was "quite similar" to the charge offense of assault consummated by battery. (*Capt MB Declaration*). Capt MB believed that the evidence of Turumi incident would be "highly unfavorable" because the defense team's theory for the court-martial was the defense of "self-defense" and "defense of others." (Id.). Capt MB understood that they would have to persuade the panel to interpret the two video recordings of Appellant striking RE as showing Appellant acting in self-defense. (Id.). Capt MB believed that any benefit their case would receive from introducing Appellant's good military character would be undercut by introduction of uncharged misconduct involving an allegation that Appellant was intoxicated and belligerent. (Id.)

Appellant had also made the decision to testify on his own behalf, which Capt MB knew "was necessary in order to address the offense of false official statement that he was ultimately acquitted of, and also to support the theory of self-defense and defense of others." (*Capt MB Declaration*). Capt MB was concerned that trial counsel would "paint[] [Appellant] as a violent individual," which could have included using Appellant's deployment to combat zones and the Turumi incident. (Id.) Capt MB thought it likely that trial counsel "was ready to leap on [the Turumi incident] if circumstances rendered it 'ripe' for admission." (Id.) Maj JB was likewise concerned by trial counsel's ability to rebut evidence of Appellant's good military character by

portraying him a "violent, skillfully trained to intimidate others, and generally a threat to others." (*Maj JB Declaration*). Maj JB was also tracking an allegation that Appellant had previously been "identified as receiving controlled Air Force testing material." (*Maj JB Declaration*).

To avoid "invoking good military character evidence," Maj JB had Appellant testify to his "decorated career, the lives he impacted, and his service to country" during preliminary questions. (Id.) This was done to prevent Appellant from having his credibility damaged. (Id.).

Standard of Review

Allegations of ineffective assistance are reviewed de novo. United States v. Palacios-Cueto, 82 M.J. 323, 327 (C.A.A.F. 2022) (citations omitted).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. U.S. CONST. amend. VI; Strickland v. Washington, 466 U.S. 668, 686 (1984). "In order to prevail on a claim of ineffective assistance of counsel (IAC), an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). "Appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance . . . of fallible lawyers." United States v. DiCupe, 21 M.J. 440, 442 (C.M.A. 1986) (quotations omitted) (citing United States v. DeCoster, 624 F.2d 196, 208 (D.C.Cir.1979)). If an appellant has made an "insufficient showing" on even one of the elements, this Court need not address the other. Strickland, 466 U.S. at 697.

In assessing the effectiveness of counsel, courts "*must* indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland,

466 U.S. at 671 (emphasis added); *see also* Harrington v. Richter, 562 U.S. 86, 105 (2011) ("Even under de novo review, the standard for judging counsel's representation is a most deferential one."). Counsel's performance is not deficient "when they make a strategic decision to accept a risk or forego a potential benefit, where it is objectively reasonable to do so." United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Military courts use a three-part test to determine whether the presumption of competence has been overcome: (1) are Appellant's allegations true, and if so, is there a reasonable explanation for counsel's actions; (2) if the allegations are true, did defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers; and (3) if defense counsel was ineffective, whether there a reasonable probability that, absent the errors, there would have been a different result. United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (citing United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)) (quotations omitted).

Analysis

A. Trial defense counsel's performance was not deficient.

1. Trial defense counsels' decision to exclude evidence of good military character from their case in chief had a reasonable explanation.

Appellant's claim fails because there was a "reasonable explanation for counsel's actions." *See* Gooch, 69 M.J. at 362. The trial defense team analyzed the Government's case and determined that the best way forward was with self-defense and defense of other arguments. (*Capt MB Declaration*). Trial defense counsel reasonably believed introducing evidence of Appellant's good military character would open the door to the Turumi, negatives inferences that could be drawn

from Appellant's combat history, and the allegation that he received controlled testing material. (*Capt MB Declaration* and *Maj JB Declaration*). Because Appellant's defense hinged on a self-defense argument in which Appellant could not be painted as the aggressor, trial defense counsels' decision to withhold good military character evidence had a reasonable explanation. This was particularly true because Appellant was testifying in his own defense and the trial defense team was reasonably concerned about Appellant's credibility being damaged if, in exchange for good military character evidence, the panel learned of the Turumi incident or if he was questioned about his combat training and experience. (Id.) The Turumi incident in particular would have damaged Appellant's defense, as it would have portrayed him as a belligerent drunk who, if trial counsel was permitted to argue as they stated in the Mil. R. Evid 404(b) notice, used his position as a member of Security Forces to commit crimes. (App. Ex. VI).Trial defense counsel reasonably believed introducing evidence of Appellant's good military character at findings would have opened the door to the Turumi incident and other evidence that Appellant is violent. This evidence would have undercut their self-defense argument rather than yield a benefit to Appellant. Trial defense counsels' strategic decision to withhold evidence of Appellant's good military character during findings had a reasonable explanation

2. Trial defense counsels' performance did not fall measurably below the standard expected of fallible lawyers.

"After a losing effort, hindsight usually suggests other ways that might have worked better; but that is not the measure of ineffective assistance of counsel." United States v. Sanders, 37 M.J. 116, 118 (C.M.A. 1993). However, even with the benefit of hindsight, Capt MB and Maj JB's strategy is still the soundest option that they could have taken.

Trial defense counsel were aware of the danger the Turumi incident, Appellant's history in combat zones, and his training could pose to his possible acquittal on the basis of self-defense.

They also knew that, based on the military judge's finding that the evidence was not "ripe" under MRE 404(b), they had to be very careful not to open the door for trial counsel to rebut evidence of good military character with Appellant's combat history, training in intimidation, or the Turumi incident. (*Capt MB Declaration* and *Maj JB Declaration*). The record shows "trial defense counsel zealously defended their client in this case" by introducing evidence that Appellant acted in self-defense. United States v. Brozzo, 2003 CCA LEXIS 187, at *9 (A.F. Ct. Crim. App. Aug. 26, 2003). (See Issue II above). Trial defense counsel ensured that they did not open the door for trial counsel to "jump" on the Turumi incident, which they knew from the Mil. R. Evid. 404(b) notice was trial counsel's plan, by withholding evidence of Appellant's good military character until sentencing. This was a sound strategic decision that any reasonable attorney would have made.

Trial defense counsel's performance did not fall below the standard of fallible attorneys because they had a coherent strategy based on self-defense.

B. Appellant has not demonstrated a reasonable probability that his charges would have been dismissed but for trial defense counsel's performance.

To establish prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is one sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Appellant can only speculate as to what effect his good military character would have had on the panel. And this speculation must be undercut by the fact that there's little doubt the Government *would* have introduced the Turumi incident and possibly attacked his history in combat zones and with intimidation training in rebuttal. The Turumi incident in particular would

have damaged Appellant's credibility on the stand if trial counsel had confronted evidence of good military character with evidence of drunken belligerence and misuse of his position in Security Forces. (App. Ex. VI). And even if the defense had introduced evidence of good military character, it would not have changed the strong video evidence the Government introduced supporting that Appellant did not act in self-defense. Appellant cannot show a reasonable *probability* that introducing evidence of his good military character would have yielded a different result at his trial.

C. Conclusion.

Appellant's IAC claim fails all three prongs of the Gooch test. 69 M.J. at 362. It does not follow that, because Appellant is displeased with the result, his trial defense team's strategy was unreasonable or ineffective. From the record, Capt MB and Maj JB made strategic choices to prevent the panel from hearing of Appellant's prior uncharged conduct, which would have undermined his self-defense argument. This Court should deny this assignment of error.

IV.

THE MILITARY JUDGE DID NOT IMPERMISSIBLY IMPEDED PUBLIC ACCESS TO MASTER SERGEANT BANKS'S TRIAL.

Additional Facts

Prosecution Exhibits 1 and 2 contained closed-circuit television videos from 13 August 2022. Prosecution Exhibit 1 contains a few minutes of video with RE prior to Appellant's arrival on camera. Appellant is then shown arriving on camera and shortly afterward, punching RE and knocking him to the ground. (Pros. Ex. 1). Prosecution Exhibit 2 shows the punch from a different angle.

During a motions hearing, the military judge stated he wanted the VTC screen playing Prosecution Exhibits 1 and 2 "positioned so the members and everyone can see it. But the gallery doesn't necessarily need to see this, in my opinion. Defense Counsel, do you have any objection to that [course of action]?" (R. at 36). The area defense counsel said "[n]o, Your honor." (Id.) The military judge then stated again that he wanted to make sure the area defense counsel and Appellant could see the screen but did not "really want it shown to the gallery." (Id.) The military judge and trial counsel arranged the screen and a laptop to allow the defense to see Prosecution Exhibit 2 while it played. (R. at 36-37). The military judge asked the area defense counsel again if they had "any issue with that [course of action]?" (R. at 37). The area defense counsel said "no, sir." (Id.) The military judge asked the area defense counsel "[w]ill you please try to ensure to the maximum extent possible that others are not viewing the video?" (Id.) The area defense counsel said "yes, sir." (Id.) The area defense counsel then asked a person present in the court room to reposition to comply with the military judge's instructions. (R. at 38).

Prior to opening statements, trial counsel asked if they should prepare the VTC screen before the members came into the courtroom. (R. at 418). Trial counsel intended to play Prosecution Exhibits 1, 2, 7, and to display Prosecution Exhibit 8 during opening statements. (Id.) The military judge said "I would prefer that the gallery not really watch it, to be honest. So I will just direct to the maximum extent possible that the gallery does not view the embedded videos, that would be acceptable." (Id.) The area defense counsel did not object, even when the military judge then asked if there was anything else to take up before calling the members. (R. at 418-419).

During the Government's case-in-chief, Prosecution Exhibit 1 was played during JB's testimony. (R. at 445). The military judge stated "I'm trying to display the video so that it does not display to the gallery. I don't believe that the gallery needs to see this video, to be honest." (R. at 445). The military judge continued, "I would just ask the gallery that either position yourselves so you're not viewing the video that's being displayed, or look away whenever the video is being displayed." Prosecution Exhibit 1 and 2 were played under these instructions from the military judge with no objection from the area defense counsel. (R. at 446-447). At the military judge's request, trial counsel later used a laptop to display Prosecution Exhibit 1 during JR's testimony, but it is not clear from the record if the VTC was also used. (R. at 475).

Standard of Review

Whether an appellant has waived an issue is a legal question that this Court reviews de novo. United States v. Davis, 79 M.J. 329, 331 (C.A.A.F. 2020). "Waiver is the intentional relinquishment or abandonment of a known right." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). "[A] valid waiver leaves no error for [the Court] to correct on appeal." United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009) (internal quotation marks omitted) (citation omitted).

This Court reviews forfeited objections for plain error. United States v. Lopez, 76 M.J. 151, 154 (C.A.A.F. 2017). Thus, Appellant must show that: (1) there was error; (2) the error was plain or obvious; and (3) the error was materially prejudicial to his substantial rights. Id. When a constitutional issue is viewed for plain error, the analysis considers whether the error was harmless beyond a reasonable doubt. United States v. Jones, 78 M.J. 37, 45 (C.A.A.F. 2018).

Law and Analysis

In all criminal prosecutions, including court-martial, an accused has the right to a public trial. U.S. Const. amend. VI; United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985).

R.C.M. 806(a) states that in general, "courts-martial shall be open to the public," to include "members of both the military and civilian communities." The discussion section of R.C.M. 806(b)(1) provides that:

> The military judge must ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected. Public access to a session may be limited, specific persons may be excluded from the courtroom, and, under unusual circumstances, a session may be closed.

The discussion section in R.C.M. 806(b)(4) states the "accused may waive his right to a public trial." It also says that, with respect to closing the trial, the "most likely reason for a defense request to close court-martial proceedings is to minimize the potentially adverse effect of publicity on the trial." Id.

Waiver

First, this Court should find that Appellant affirmatively waived his right to a public trial specifically with respect to the military judge's decision that the gallery not view Prosecution Exhibits 1 and 2. "When an appellant does not raise an objection . . . at trial, [Courts] first must determine whether the appellant waived or forfeited the objection." Jones, 78 M.J. at 44. Waiver usually occurs when there is an intentional relinquishment or abandonment of a known right. United States v. Bench, 82 M.J. 388, 392 (C.A.A.F. 2022) (internal quotations and citations omitted). When an appellant fails to raise a constitutional objection at trial, this Court considers the particular circumstances of the case to determine whether there was waiver but applies a presumption against finding a waiver of constitutional rights. Id. (applied with respect

to waiver of the Confrontation Clause). "A waiver of a constitutional right is effective if it 'clearly established that there was an intentional relinquishment of a known right.'" Jones, 78 M.J. at 44.

There was an intentional relinquishment of Appellant's full right to a public trial in this case. The first time the military judge stated that he wanted the VTC positioned so that the gallery could not see the videos, he asked the area defense counsel if they objected "to that [course of action]?" (R. at 36). The area defense counsel said "No, Your Honor." (Id.) That statement alone should satisfy this Court that Appellant waived his right to a public trial that might be implicated here.

However, the area defense counsel did more than just say he had no issue with the military judge's instruction. After trial counsel arranged the VTC for the witness and the laptop to allow the defense to see Prosecution Exhibit 2 while it played, the military judge again asked the area defense counsel if they had "any issue with that [course of action]?" (R. at 36-37). The area defense counsel said "no, sir." (R. at 37). The military judge then asked the area defense counsel "[w]ill you please try to ensure to the maximum extent possible that others are not viewing the video?" (Id.) The area defense counsel said "yes, sir," and then took affirmative action to obey the military judge's instruction by asking a person present in the court room to reposition so they could not view the videos. (R. at 37-38). Even with the presumption against a waiver of constitutional rights, these actions were a clear intentional relinquishment of the right to a public trial under the Sixth Amendment and R.C.M. 806. United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009).

This Court should not find that Appellant only forfeited this right just because the opportunity to object arose again during opening statement and during the Government's case-in-

chief. Prior to opening statements and immediately after once again directing trial counsel to position the VTC so the gallery could not see Prosecution Exhibits 1 and 2, the military judge again asked the area defense counsel if there was anything to take up before bringing in the members. (R. at 418-419). Once again, the area defense counsel said "No, Your Honor." (R. at 419).

When the military judge stated he did not believe the gallery needed to see Prosecution Exhibit 1 or 2 during the Government's case-in-chief, the area defense counsel did not object. (R. at 446-447). The area defense counsel had already told the military judge three times that there was no issue with the videos being played out of sight of the gallery. This single instance where the military judge did not ask again should not transform the prior waivers into forfeiture.

Forfeiture

However, in the event that this Court finds Appellant did not waive his right to a public trial with respect to the videos in Prosecution Exhibits 1 and 2, this Court should not grant Appellant any relief under plain error.

First, it was not error for the military judge to limit the gallery's view of Prosecution Exhibits 1 and 2. While the military judge did not articulate on the record why he did not believe the gallery should see the evidence,[3] the record available to the Court shows that the evidence was violent in nature. Prosecution Exhibits 1 and 2 both showed Appellant walking up to RE and striking him hard enough across the face that RE fell to the ground and remained there unmoving. Prosecution Exhibit 2 provided a different angle of the altercation that included Appellant standing over RE's prone body with his arms out. The most likely explanation is that

[3] If Appellant had objected to the military's actions, then it is highly likely that the military judge would have explained his rationale on the record. This is another reason why this Court should find the issue waived.

the military judge wished to "ensure that the dignity and decorum of the proceedings are maintained and that the other rights and interests of the parties and society are protected," and he did this by blocking the gallery's view of Prosecution Exhibits 1 and 2. R.C.M. 806(b)(1), Discussion.

Because this was not a closure of the courtroom, the facts of United States v. Ortiz, 66 M.J. 334, 336 (C.A.A.F. 2008) and United States v. Hasan, 84 M.J. 181, 207 (C.A.A.F. 2024) do not translate well to this case. In both Ortiz and Hasan, a military judge closed the courtroom to either allow a witness to testify without the gallery or to speak with a pro se accused and preserve his rights. Ortiz, 66 M.J. at 337; Hasan, 84 M.J. at 207.

While some cases involving obstructing the gallery's view have involved contraband evidence such as child pornography, *see* United States v. Toschiaddi, 2009 CCA LEXIS 246, at *25 (N-M Ct. Crim. App. July 16, 2009), that does not mean a judge cannot limit the gallery's view of other types of evidence if the situation calls for it. In People v. Robles-Sierra, 488 P.3d 337, 341 (Colo. App. 2018), the Court of Appeals of Colorado specifically asked, "Does preventing members of the gallery from seeing something shown to witnesses and jurors constitute a closure?" While that case, like Toschiaddi, dealt with exploitation of children, the court did not limit its holding to only cases involving child pornography. When the accused argued that "the public right extends to the presentation of evidence," the court found that "argument proves too much." Id. Instead, the court found that while the "portion of a trial when evidence is presented should be open to the public, . . . it doesn't follow that the right extends to the viewing of all exhibits by the public as those exhibits are introduced or discussed." Id. The court went on to cite Toschiaddi for the premise that the "public trial right is concerned with the

public's *presence* during (or access to) the trial. So where no one is excluded from the courtroom, it simply isn't implicated." Id.

As the Navy-Marine Corps Court of Criminal Appeals held in Toschiaddi, this Court should not find the military judge committed plain error in "restricting the spectators' view of" the videos of Appellant punching RE. 2009 CCA LEXIS 246, at *25. This restriction did not amount "to a closure of the courtroom" and the military judge "acted within his discretion to maintain the dignity and decorum of the court-martial proceedings." Id. at *25-26.

If this Court finds it was error to restrict the gallery's view of the videos, it should not find that this error was clear or obvious. While the Supreme Court and CAAF have made clear that the right to a public trial extends to courts-martial, the scope of that right is not clear. United States v. Miller, 2025 CAAF LEXIS 803, at *6 (C.A.A.F. Sep. 24, 2025) (while the right applies to "the presentation of evidence to the jury" the Supreme Court "has never clarified how far the right extends beyond that core application.") And unlike closing a courtroom entirely, there is no test to determine when limiting the public's view of a piece of evidence will be error. *See* R.C.M. 806(b)(2); Waller v. Georgia, 467 U.S. 39, 48 (1984) (before closure, the party must show an overriding interest likely to be prejudiced, closure must not be broader than necessary, reasonable alternatives must be considered, and the court must make findings to support closure). "An error is not 'plain and obvious' if, in the context of the entire trial, the accused fails to show the military judge should be faulted for taking no action even without an objection." United States v. Burton, 67 M.J. 150, 153 (C.A.A.F. 2009). While the situation is inverted here because as the military judge *took* an action without receiving an objection, the premise still applies. Not only did the area defense counsel fail to object to the military judge's restriction on the gallery's view of the videos, but the area defense also affirmatively stated multiple times that he had no

objection or issues with the military judge's instruction and took action to effectuate those instructions. (R. at 36-38).

It was not clear or obvious error for the military judge to restrict the gallery's view of videos depicting Appellant punching RE, and this Court should not find plain error.

Finally, if this Court finds that the error was clear and obvious, it should not find that the error materially prejudiced a substantial right. Contrary to Appellant's argument, this error did not deny the public access to Appellant's trial and therefore should not implicate the Sixth Amendment. People v. Robles-Sierra, 488 P.3d 337, 341 (Colo. App. 2018). Instead, this Court should analyze whether there was material prejudice to a substantial right using the standard outlined in Molina-Martinez v. United States, 578 U.S. 189 (2016). This error was, at most, a violation of R.C.M. 806. *See* Toschiaddi, 2009 CCA LEXIS 246, at *24-26 (analyzing whether the issue was a violation of R.C.M. 806).

The military judge's decision to restrict the gallery's view of Prosecution Exhibits 1 and 2 did not have any outcome on the proceeding. Molina-Martinez, 578 U.S. at 194. The members were given full access to Prosecution Exhibits 1 and 2 for their deliberations. Whether or not the public could see the videos while they were played in the courtroom would have no articulable effect on how the members considered them, and this Court should not grant Appellant any relief for prejudice to a substantial right.

If this Court considers this error to be of constitutional magnitude under the Sixth Amendment, it should still decline to grant Appellant any relief under Waller and Weaver v. Massachusetts, 582 U.S. 286, 297 (2017). As articulated by CAAF, our Supreme Court has found that, while closing a courtroom is a structural error, it does not automatically result in reversal. Hasan, 84 M.J. at 206. As this Court held in Hasan, through Waller, the remedy for "a

violation of the public-trial guarantee . . . should be appropriate to the violation." Id. (internal citations and quotations omitted). A "remedy should not be imposed that 'would be a windfall for the defendant, and not in the public interest.'" Id., quoting Waller, 467 U.S. at 49-50.

As was the case in Hasan, reversal in Appellant's case "would be grossly disproportionate to the violation." Id. First, the military judge did not close the hearing; he only directed that the gallery be unable to see the evidence as it was played in the courtroom. (R. at 38, 418, 475). This action should be considered a "reasonable alternative" to closing the hearing. Hasan, 84 M.J. at 207.

With respect to the public's interest in seeing the court-martial, neither Prosecution Exhibit 1 nor 2 were sealed. The portion of the transcript in which the witnesses testified regarding the content of the video was neither closed nor sealed. When the proceeding is unsealed, "the public can readily see what happened" and "now knows that during the [obstructed] session" the video was violent in nature. Hasan, 84 M.J. at 207 (unsealed transcript supported finding of no remedy for presumed abuse of discretion in courtroom closure). The public's confidence in the court system would not be damaged. Id. No one was removed from the gallery, and so the members in the gallery were able to hear the description of Prosecution Exhibit 1 and 2 during the court-martial. (R. at 38, 418, 475.) The evidence was still fully presented to the members, and the obstructed view by the gallery "did not involve witness testimony, the admission of evidence, or any other matter directly related to the findings or sentence in this case." Id.

This Court should decline to find plain error. In the alternative, this Court should decline to find Appellant was prejudiced by the error or deserving of a windfall through reversal of his conviction.

V.

THE GOVERNMENT DID NOT VIOLATE APPELLANT'S RIGHT TO SPEEDY APPELLATE REVIEW.

Additional Facts

On 23 December 2022, Congress amended Articles 66 and 69, UCMJ[4]. As amended, Article 66 expanded the CCA's jurisdiction to any judgment of a court-martial, irrespective of sentence, that includes a finding of guilty. Art. 66(b)(1)(A) (2022).

At the time of Appellant's trial, verbatim transcripts were not required for all findings of guilt. Department of the Air Force Manual (DAFMAN) 51-203, *Records of Trial*, dated 21 April 2021, para. 11.1.1. With respect to Appellant's conviction, a verbatim transcript would only have been required if his sentence had included death, dismissal, punitive discharge, or confinement for more than six months. Id. at 11.1.1.1. Since it did not, the court reporter prepared and completed the summarized transcript on 2 June 2023. (ROT, Vol 3, *Report's Chronology*).

Appellant filed a Notice of Appeal on 10 October 2023, and his case was docketed with this Court on 24 October 2023. (*Notice of Docketing*, 24 October 2023). The court reporter received notification of the request for verbatim transcript on 16 November 2023. (ROT, Vol 3, *Court Reporter Chronology*). A verbatim transcript had not been prepared because prior to Appellant's filing his notice of appeal, the Government had no cause to prepare a verbatim transcript in his case under the guidance in DAFMAN 51-203, para. 11.1.1.1.

From 16 November 2023 to 21 June 2024, the court reporter was either in court, on leave, working on transcripts from earlier courts, in temporary duty status, or working on the transcript

[4] National Defense Authorization Act for Fiscal Year 2023 (FY23 NDAA), Pub. L. No. 117-263, §544, 136 Stat. 2395 (Dec. 23, 2022).

for this case. (ROT, Vol 3, *Court Reporter Chronology*). In total, the court reporter worked on 4 other transcripts in addition to Appellant's and sat in two other courts-martial during that time. Id. The court reporter first sent the transcript to counsel for edits on 1 May 2024 and received edits back from trial counsel on 2 May 2024. (Id.) The court reporter sent the transcript to counsel on 10 June 2024 and requested certifications, which were provided on 17 June 2024 by trial counsel and 21 June 2024 by the defense counsel. (Id.) The court reporter uploaded the documents to WebDocs and sent all the documents to the legal office the same day. (Id.)

On 26 June 2024, this Court ordered that the ROT be forwarded to the Court by 26 July 2024. (*Court Order*, dated 26 June 2024). In the event that the ROT was not with the Court by that day, this Court ordered the court reporter to provide a memorandum for record on the status of the ROT. (Id.) This Court ordered such updates to be provided every seven days thereafter until the ROT was returned to the Court. (Id.)

On 26 July 2024, appellate government counsel complied with this Court's order and provided a status update, which was that the ROT was forwarded to JAJM via DoD Safe and would be uploaded to the eROT SharePoint website. (*Motion to Attach*, dated 26 July 2024). On 1 August 2024, appellate government counsel provided the second motion to attach (*Motion to Attach*, dated 1 August 2024), which this Court granted on 6 August 2024. (*Granted Motion*, 6 August 2024). The court reporter provided a memorandum to this Court that the base legal office had sent the ROT to JAJM via the SharePoint site and by hardcopy. (*Motion to Attach*, dated 1 August 2024).

Appellant demanded speedy appellate review on 1 August 2024, which this Court granted on 13 August 2024. (App. Br. at 20.)

On 8 August 2024, appellate government counsel provided a third motion, which the Court granted on 13 August 2024, wherein the court reporter stated that the base legal office had provided the tracking number for the ROT. (*Motion to Attach*, dated 8 August 2024). The court reporter made the same update through a motion to attach on 19 August 2024. (*Motion to Attach*, dated 19 August 2024).

Appellate government counsel made another motion to attach on 23 August 2024, which this Court granted on 4 September 2024, wherein the court reporter explained that the ROT had not been uploaded correctly into the SharePoint. (*Motion to Attach*, dated 22 August 2024). The base legal office removed the incorrect ROT to reformat the audio and reupload the ROT. (Id.) The court reporter stated she would provide the audio following a temporary duty assignment on 26 August 2024. (Id.)

On 2 September, appellant government counsel made another motion to attach, which this Court granted on 11 September 2024, in which the court reporter stated that the base legal office was granted access to the audio on 27 August 2024, and the office hoped that the ROT would be corrected and uploaded by the next week. (*Motion to Attach*, dated 2 September 2024).

Appellate government counsel provided a final motion to attach on 6 September 2024, which this Court granted on 16 September 2024, in which the court report stated the base legal office was still correcting the ROT and so it would not be uploaded by Friday, 6 September 2024. (*Motion to Attach*, dated 6 September 2024).

This Court received the ROT on 10 September 2024. (*Receipt of Record of Trial – Direct Appeal*, dated 10 September 2024). After the Court received the record, Appellant requested and received 9 enlargements of time that ended on 15 August 2025.

Between docketing and this Court's receipt of the record, 322 days elapsed.

Standard of Review

This Court reviews *de novo* an appellant's entitlement to relief for post-trial delay. United States v. Livak, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing United States v. Moreno, 63 M.J. 129, 135 (C.A.A.F. 2006)).

Law and Analysis

CAAF established thresholds for facially unreasonable delay, including docketing with the Court of Criminal Appeals more than 30 days after the convening authority's action or when a Court of Criminal Appeals completes appellate review and renders its decision more than 18 months after the case is docketed with the court. United States v. Moreno, 63 M.J. 129, 142-143 (C.A.A.F. 2006). Since Moreno, post-trial processing has changed to include the requirement to issue an Entry of Judgment before appellate proceedings begin. *See* Livak, 80 M.J. at 633. This Court now applies an aggregate standard threshold of 150 days from the day an appellant was sentenced to docketing with this Court. Id.

When a case does not meet one of the above standards, the delay is presumptively unreasonable and in reviewing claims of unreasonable post-trial delay this Court evaluates (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right of timely review and appeal; and (4) prejudice. Moreno, 63 M.J. at 135 (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)). All four factors are considered together and "[n]o single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." Id. at 136.

CAAF has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for

appeal and defenses, in case of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. "The anxiety and concern subfactor involves constitutionally cognizable anxiety that arises from excessive delay and we 'require an appellant to show particularized anxiety or concern that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision.'" United States v. Toohey, 63 M.J. 353, 361 (C.A.A.F. 2006) (citing Moreno, 63 M.J. at 140). To find a due process violation when there is no prejudice under the fourth Barker factor, a court would need to find that, "in balancing the other three factors, 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." Id. at 362.

In assessing Appellant's claims, this Court must first determine whether the post-trial delay is facially unreasonable. Moreno 63 M.J. at 136. However, in United States v. Gray, this Court found that direct appeals differ in their analysis of post-trial delay. 2025 CCA LEXIS 122, at *15-16 (A.F. Ct. Crim. App. Mar. 24, 2025). Gray found that neither Livak nor Moreno were "directly applicable to [a]ppellant's case from sentencing to docketing with this Court, as these cases considered post-trial processing delays for appeals filed before Congress amended Articles 66 and 69." Id. at 15. While this Court "believe[s] it is possible that an appellant could demonstrate a case-specific facially unreasonable delay outside of Livak and Moreno that would trigger a Barker due process analysis," it found that the appellant had not demonstrated such in Gray. Id. at 16.

Appellant has used the date of docketing, 24 October 2023, as the correct trigger point for the length of post-trial delay for direct appeals, and we agree. (App. Br. at 20-21). In all, 322

days elapsed between docketing and receipt of the ROT on 10 September 2024. (*Receipt of Record of Trial – Direct Appeal*, dated 10 September 2024).

While Appellant's case is now past the eighteen-month standard set by Livak and presuming that this may constitute an unreasonable delay, the delay alone is not sufficient to justify relief—it only triggers a due process analysis. This Court should not grant Appellant any relief under the remaining Barker factors.

The second factor, the reason for delay, should not weigh heavily against the Government. Part of the delay resulted from an unexpected amendment to Article 66 and the Air Force not yet having instituted procedural guidelines to produce verbatim transcripts for all cases that might be eligible for Article 66 review. And once the court reporter received the order for a verbatim transcript, she took continual steps from 16 November 2023 until 21 June 2024 to process Appellant's case post-trial. Naturally, due to the changes to the UCMJ, court reporters across the Air Force were juggling a heavier workload, now having to go back and prepare verbatim transcripts in cases where they had already prepared summarized transcripts. From the court reporter's chronology, there is no evidence of a "deliberate attempt to delay the trial in order to hamper the defense." Barker, 407 U.S. at 531. She was consistently working on other transcripts, attending other proceedings, taking leave, or working on this transcript. (ROT, Vol 3, *Court Reporter Chronology*). While there was a delay between 21 June 2024 and receipt of the ROT on 10 September 2024, this was explained in the memorandums provided to this Court by the court reporter. As of 1 August 2024, the base legal office believed that the hardcopy ROT was en route to JAJM and uploaded to the eROT SharePoint website. (*Motion to Attach*, dated 1 August 2024). The legal office did not realize there was a problem with the upload until 23 August 2024, at which time they coordinated with the court reporter to fix an issue with the

audio. (*Motion to Attach*, dated 22 August 2024). The legal office continued to work to fix the issue and re-upload the ROT, which was accomplished by 10 September 2024. (*Motion to Attach*, dated 2 September 2024; *Motion to Attach*, dated 6 September 2024). The Government was taking steps to provide the ROT to this Court and did not deliberately attempt to create delays in the post-trial processing.

While Appellant did assert his right to a speedy trial, the third Barker should favor the Government or, at the least, not weigh heavily against the Government. The third Barker "factor calls upon [this Court] to examine an aspect of [Appellant's] role in this delay. Moreno, 63 M.J. at 138. Specifically, whether Appellant "object[ed] to any delay or assert[ed] his right to timely review and appeal prior to his arrival at this court." Id. While an Appellant is "entitled to strong evidentiary weight" in his favor when he does assert his right to a speedy trial, id. (quoting Barker, 407 U.S. at 528), he only did so a little over a month before this Court received the ROT. Appellant then consented to nine enlargements of time to file a brief. Those nine enlargements of time from 11 November 2024 (the earliest day Appellant's brief was due to this Court) and 15 August 2025 accounted for 277 days of Appellant's delay. While Appellant is correct that over twenty-one months have passed since his case was docketed, a little over nine of those months can be attributed to Appellant. Therefore, this factor should weigh in favor of the Government, or at least not weigh heavily against the Government.

Finally, the prejudice factor also favors the Government. The Supreme Court has recognized three interests that should be considered when determining prejudice due to post-trial delay: (1) prevention of oppressive incarceration pending appeal; (2) undue anxiety and concern; and (3) limiting the possibility that a convicted person's grounds for appeal and defenses, in cases of retrial, might be impaired. Barker, 407 U.S. at 532. "Of those, the most

serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." Id. Appellant was sentenced to 45 days confinement, so he has not suffered oppressive incarceration pending appeal. Id. Second, he has not alleged particularized anxiety or impairment of a retrial. He only complained that he was not entitled to excess leave by virtue of *not* receiving a punitive discharge and of being in career "limbo." Therefore, this factor should weigh in favor of the government.

United States v. Valentin-Andino provides that relief is not required, but that a CCA "may provide appropriate relief if the accused demonstrates . . . excessive delay in the processing of the court-martial." 85 M.J. 361, 365 (C.A.A.F. 2025). The Court further defined "appropriate" to mean "suitable considering the facts and circumstances surrounding that case." Id. At 367. It does not require relief be objectively meaningful, nor does it obligate a Court to explain its reasoning behind providing such relief. Id. Appellant urges this Court to consider the delay between docketing and receipt of the ROT as evidence of institutional neglect warranting relief, citing United States v. Valentin-Andino, 2024 CCA LEXIS 223, at *19 (A.F. Ct. Crim. App. Jun. 7, 2024). However, this Court should not consider the delay in this case to be evidence of institutional neglect under United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015). While the first delay was not Appellant's fault, it is clear from the court reporter chronology and the motions to attach that the Government was actively processing Appellant's post-trial. This is not a situation where post-trial processing had errors that first required a remand and later a show cause order before the ROT was completed correctly. Valentin-Andino, 2024 CCA LEXIS 223, at *11-12. Furthermore, the Air Force has since changed its policies to require verbatim transcripts in all general and special courts-martial with a finding of guilty, and so this type of delay is unlikely to reoccur and there is no evidence of institutional neglect.

Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 3 October 2024, para. 20.47.1.

In addition, the length of the delay in Appellant's case is not "'so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system." Gray, 2025 CCA LEXIS 122, at *16-17, citing Toohey, 63 M.J. at 362. CAAF has found long periods of delay that did not constitute relief. In United States v. Williams, the Appellant was subjected to a 753-day delay after the conclusion of his trial, but given the lack of prejudice, CAAF affirmed the lower court's finding, rejecting the possibility of relief. 55 M.J. 302, 305 (C.A.A.F. 2001). In United States v. Anderson, a 481-day delay did not jeopardize the public's faith in the "military justice system's fairness and integrity." 82 M.J. 82, 86 (C.A.A.F. 2022).

In this case, Appellant has not experienced any prejudice to date. A remedy is not warranted. However, if this Court should conclude that some relief is appropriate in Appellant's case, it should not restore his rank. Appellant was convicted of punching a man in the street so hard that he was knocked to the ground and bleeding from a head wound that required six stitches. (R. at 656). He should not be restored to his original rank of Master Sergeant as though that offense never occurred. The convening authority already restored two ranks to Appellant between his sentence and the decision on action; this Court should not give Appellant the final rank back.

This Court should deny this assignment of error.

VI.[5]

APPELLANT HAS NOT RAISED A LEGAL ERROR FOR THIS COURT TO REVIEW OR SET ASIDE HIS CONVICTION.

Law and Analysis

This Court should deny this assignment of error because Appellant cites to no legal authority that would allow this Court to set aside his conviction based on Inv SG's investigation. (App. Appendix at 1). Whether Inv SG investigated RE or whether RE was ever held accountable for his own actions on 13 August 2022 is not relevant to Appellant's conviction.

That Appellant feels it is unfair that he is possibly the only one being "held accountable for his actions" does not create a legal basis for relief under Article 66(d) for this Court to consider. This Court should deny this assignment of error.

VII.[6]

THERE IS NO ERROR IN THE REPRIMAND LANGUAGE OR INFERENCE THAT APPELLANT'S CONVICTION IS WRONGFUL.

Additional Facts

Appellant's sentence included a reprimand. (ROT, Vol 1, *Entry of Judgement,* dated 17 March 2023).

Within the reprimand, the convening authority stated:

> As a Security Forces member, you are trained on the use of force and should understand more than most that every person has the right to be secure in their person, free from fear of bodily harm at the hands of another. Regardless of how you feel towards a situation, immediately resorting to assault to solve or deconflict a

[5] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[6] This issue is raised in the appendix pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

> situation is not the conduct expected of any Airmen, much less a Master Sergeant and trained Defender.

(Id.)

Standard of Review

Proper completion of post-trial processing is reviewed de novo. United States v. Zegarrundo, 77 M.J. 612, 613-14 (A.F. Ct. Crim. App. 2018) (citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000)).

Law and Analysis

Through this issue Appellant essentially reargues his bases for factual insufficiency, which were self-defense and defense of another. This Court should not give Issue II additional consideration through the lens of the language used in Appellant's reprimand.

R.C.M. 1111(c)(2) says that this Court "may modify a judgment in the performance of their duties and responsibilities." This Court previously found that it had the power to correct reprimands under R.C.M. 1111(c)(2) without remanding the case. United States v. Hinds, 2024 CCA LEXIS 315, at *5 (A.F. Ct. Crim. App. July 31, 2024).

With respect to Appellant's reprimand, there is no error to correct under R.C.M. 1111(c)(2). This is not a situation where Appellant is alleging an error between the reprimand language in the decision on action and the entry of judgment. *See* United States v. Mitton, 2025 CCA LEXIS 270, at *3 (A.F. Ct. Crim. App. June 16, 2025). The language in the reprimand also does not contain errors such as references to conduct for which Appellant was not convicted. *See e.g.* United States v. Johnson, 2025 CAAF LEXIS 499, at *6 (C.A.A.F. June 24, 2025). Appellant *was* a member of Security Forces and was trained in the use of force, which he does not deny. (R. at 458, 700). It was acceptable for the convening authority to mention that fact as

it pertained to Appellant's conviction for assault consummated by battery. Appellant has cited no authority to the contrary.

As there is no error to correct in the reprimand, this Court should deny Appellant's assignment of error.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 October 2025.

REGINA HENENLOTTER, Maj, USAF
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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' MOTION TO EXCEED PAGE LIMIT
v.	)	Before Panel No. 2
Master Sergeant (E-7) **TAVARIS BANKS** United States Air Force *Appellant.*	)	No. ACM 24057 24 October 2025

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

Pursuant to Rule 17.3 and 23.3(q) of this Honorable Court's Rules of Practice and Procedure, the United States moves to exceed this Court's 50-page limit on filings.

Rule 17.3 provides that "filings shall not exceed either 50 pages or 20,000 words, excluding indices, tables, attachments, and appendices." There is good cause for exceeding the page limit. Appellant's brief is 24 pages, totaling 7,345 words.[1] The United States' answer to Appellant's assignments of error—which included five substantive issues and two claims of error pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)—is 58 pages, totaling 17,947 words.

Since Appellant raised factual sufficiency, a detailed exposition of the facts is necessary. In addition, Appellant raised two issues of structural error, one issue of ineffective assistance of counsel, and one issue of post-trial delay that required a thorough recitation of the law and additional facts. Exceeding the page limit was necessary to sufficiently address each issue.

[1] Pursuant to Rule 17.3, undersigned counsel did not include the two issues raised under Grostefon in the appendix in the page and word count. Including the appendix, Appellant's brief is 26 pages totaling 7,925 words.

WHEREFORE, the United States respectfully requests that this Honorable Court grant this motion to exceed the 50-page limit.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 24 October 2025.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Master Sergeant (E-7) **TAVARIS BANKS,** United States Air Force, *Appellant*.	**REPLY BRIEF ON BEHALF OF APPELLANT** Before Panel No. 2 No. ACM 24057 7 November 2025

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

Appellant, Master Sergeant (MSgt) Tavaris Banks, pursuant to Rule 18(d) of the Joint Rules of Appellate Procedure and Rule 17.3 of this Court's Rules of Practice and Procedure, files this Reply to the United States' Answer to Assignments of Error (Oct. 24, 2025) (Ans.). In addition to the arguments in the Br. on Behalf of Appellant (Aug. 15, 2025), MSgt Banks submits the following additional arguments.

Argument

I.

This Court should set aside the findings and the sentence because the convening authority impermissibly considered race when selecting panel members, regardless of Master Sergeant Banks's previous request.

Following the holding of the United States Court of Appeals for the Armed Forces (CAAF) in *United States v. Jeter*, any consideration of race when selecting panel members is structural error. 84 M.J. 68, 73 (C.A.A.F. 2023). The Government's answer papers over the CAAF's landmark *Jeter* holding by professing a continued lack of clarity. According to the Government,

> While *Jeter* reflects that it is structural error to engage in racial discrimination in panel selection that would presumably prejudice a minority accused, it is unclear under *Jeter* and *Batson*, whether the same analysis would apply when racial discrimination was used to select a panel of diverse panel members that was

intended to benefit or level the playing field for a minority accused.

Ans. at 16–17. This claimed uncertainty ignores the CAAF's explicit holding that *Batson v. Kentucky*, 476 U.S. 79 (1986), abrogated the holding in *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964). *Jeter*, 84 M.J. at 70, 73. *Crawford* allowed consideration of race in member selection when it was in favor of an accused. *Jeter*, 84 M.J. at 72 (quoting *Crawford*, 35 C.M.R. at 13). But by finding *Crawford* abrogated, the CAAF made it clear that "[i]t is impermissible to exclude or intentionally include prospective members based on their race," even if it was intended to benefit a minority accused. *Jeter*, 84 M.J. at 73. The Government's claim that it is still unclear whether considering race constitutes structural error in all circumstances disregards the import of the CAAF's clear holding that *Crawford* has been abrogated. Consideration of race when selecting panel members is impermissible under all circumstances. *Id.* All instances of such consideration should be analyzed under the same standard, which the Government acknowledges is structural error. Ans. at 16.

The notion that an accused could invite error by requesting something that was not error at the time defies logic. Yet the Government argues that the consideration of race during member selection should be treated as invited error because MSgt Banks requested a diverse panel, which was allowed under *Crawford* before the CAAF's decision in *Jeter*. Ans. at 17–19. If the Government's approach were correct, then any requested action at trial that is later held to be an error would become invited error, disregarding the principle that "[a]n appellant gets the benefit of changes to the law between the time of trial and the time of his appeal." *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019); *see Edwards v. Vannoy*, 593 U.S. 255, 262 (2021). Since one needs to know something is error to invite that error, at least one federal circuit has recognized that the invited error doctrine requires both that the defendant caused the error and

relinquished a *known* right. *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) (citing *United States v. Olano*, 507 U.S. 725, 733 (1993)). Requesting something that was not error when requested should not later be viewed as inviting error.

The Government's argument that MSgt Banks could somehow invite error because *Batson* was already good law is similarly unconvincing. Ans. at 18–19. It claims that, even before *Jeter* held *Crawford* to be abrogated, requesting a diverse panel could invite error because "*Batson* already held that '[a] person's race simply is unrelated to his fitness as a juror.'" Ans. at 18 (quoting *Batson*, 476 U.S. at 87) (alteration in original). The CAAF itself undermined this argument in *Jeter* when it asserted that "neither the trial participants nor the lower court could have anticipated [the CAAF's] conclusion that *Crawford* is abrogated, thereby changing the legal landscape." 84 M.J. at 74. The CAAF's opinion makes clear what the Government's answer disregards: it was not error to follow *Crawford* before the CAAF's decision in *Jeter*, 84 M.J. at 74.

Judicial estoppel does not apply here because the change in MSgt Banks's position resulted from a change in the law. MSgt Banks recognizes that his position that consideration of race during member selection constitutes reversible error differs from his request for diverse panel members at trial. Contrary to the Government's argument, this change should not evoke the doctrine of judicial estoppel because MSgt Banks is merely recognizing a post-trial change in the law, not "changing positions according to the exigencies of the moment." Ans. at 19–20 (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). Whether judicial estoppel applies when a change in position results from a change in the law appears to be an issue of first impression for military appellate courts. But this Court can look to the opinions of federal circuit courts, which military courts "often both review and give persuasive weight." *Tovarchavez*, 78 M.J. at 466 (citing *Loving v. United States*, 62 M.J. 235, 248, 259 (C.A.A.F. 2005)). Multiple federal circuit courts of appeals

have held that "judicial estoppel is inappropriate when a party is merely changing its position in response to a change in the law." *Longaberger Co. v. Kolt*, 586 F.3d 459, 470 (6th Cir. 2009), *overruled on other grounds by Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Ben. Plan*, 577 U.S. 136, 141 (2016); *see Biomedical Patent Mgmt. Corp. v. California*, 505 F.3d 1328, 1341–42 (Fed. Cir. 2007) (affirming lower court's rejection of judicial estoppel because the inconsistency between a party's positions "is excused by an intervening change in the law") *Jarrard v. CDI Telecomms., Inc.*, 408 F.3d 905, 915 (7th Cir. 2005) ("Judicial estoppel should not be used to work an injustice, particularly when the defendants' change in position resulted from circumstances outside their control--namely, a change in controlling state law." (internal citation omitted)); *United States v. Vastola*, 989 F.2d 1318, 1324 (3d Cir. 1993) (declining to apply judicial estoppel where a change in the government's position was based on a change in the law); *Arizona v. Shamrock foods Co.*, 729 F.2d 1208, 1215 (9th Cir. 1984) (reversing lower court's holding that a party was judicially estopped from changing its recovery theory where the change was in response to a change in the law).

The Sixth Circuit in *Longaberger* observed that one party's arguments, "though facially inconsistent, were not an attempt to abuse the judicial process through cynical gamesmanship." 586 F.3d at 470. Rather, the change in the party's position was a response to the change in the law. *Id.* at 470–71. The same is true here. MSgt Banks's seemingly inconsistent position on appeal is not gamesmanship; it is a response to an intervening change in the law brought about by *Jeter*. Recognizing a change in the law and adapting a position accordingly is not one of the "litigatory shenanigans" from which judicial estoppel is meant to shield the courts. *Jarrard*, 408 F.3d at 915. Consequently, this Court should not apply judicial estoppel here.

Furthermore, other federal circuit courts have held that judicial estoppel only bars changes

in factual positions, not legal positions. *See Folio v. City of Clarksburg*, 134 F.3d 1211, (4th Cir. 1998) ("[T]he [party] is merely presenting inconsistent legal theories, a practice that is not proscribed by judicial estoppel."); *Okland Oil Co. v. Conoco Inc.*, 144 F.3d 1308, 1325 (10th Cir. 1998) (finding that, under Oklahoma law, judicial estoppel only prevents inconsistent positions regarding matters of fact). Here, MSgt Banks has not changed his position as to a matter of fact. The change from requesting diverse panel members to asserting that considering race when selecting panel members constitutes reversible error is only a change in a legal position reflecting *Jeter's* change to the law. This is another reason for this Court to decline to apply judicial estoppel here.

Taken together, the Government's various arguments against relief would create an avenue for tolerating impermissible racial considerations when selecting panel members. If the courts cannot act where a convening authority considered race simply because the accused requested such considerations, then an accused could decide to ignore *Jeter* and seek racial discrimination in panel member selection. If the convening authority acquiesced and the Government said nothing, the Courts of Criminal Appeals would seemingly be powerless to correct such an obvious error, despite their broad review authority under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866.

For example, an accused might request a panel made up of only white members—a clearly discriminatory and obviously impermissible request. *Jeter*, 84 M.J. at 73. But if the convening authority acknowledged this request and then appointed an all-white panel, without explicitly saying they were considering race, then the Government's approach would not allow for any corrective action on appeal because of the accused's request. It cannot be that easy to evade the CAAF's unequivocal edict that "[i]t is impermissible to exclude or intentionally include

prospective members based on their race." *Id.* Allowing such an end run around *Jeter* would cause the judicial process itself to suffer, contrary to the Government's argument. Ans. at 19. This court should uphold the *Jeter* standard by finding that consideration of race in member selection requires correction on appeal, regardless of an accused's request.

The record here establishes a prima facie showing that the convening authority considered race when selecting panel members. The Government's attempt to argue otherwise because the convening authority did not say he was considering race is unpersuasive. Ans. at 22. While the Government quotes an abbreviated definition of "prima facie" from the pocket edition of Black's Law Dictionary, *id.*, the full definition of the term when it is used as an adjective is: "Sufficient to establish a fact or raise a presumption unless disproved or rebutted; based on what seems to be true on first examination, even though it may later be proved to be untrue." *Prima Facie*, *Black's Law Dictionary* (11th ed. 2019). If the convening authority had to say he was using race when selecting panel members, that would be a higher standard. But *Jeter* makes it clear that only "a prima facie showing that race played a role in the panel member selection process" is necessary to give rise to "a presumption . . . that the panel was not properly constituted." 84 M.J. at 70. Here, MSgt Banks noted that he is African-American and requested members who were diverse in race and ethnicity. Request for a Diverse Panel, Jan. 27, 2023. The convening authority acknowledged that request and then selected two new members, both of whom are Black. Replacement of Court Members – United States v. Master Sergeant Tavaris Banks, Jan. 30, 2023. Thus, it seems on first examination that the convening authority was doing exactly what MSgt Banks requested and considering race to select racially diverse members, as *Crawford* allowed at the time. 35 C.M.R. at 13. This is a prima facie showing that race played a role in the selection process, giving rise to the presumption that the panel was not properly constituted. *Jeter*, 84 M.J. at 70.

The Government's attempts to rebut this presumption fall short. The convening authority saying that he considered the factors in Article 25, UCMJ, cannot mask the plain fact that, after acknowledging MSgt Banks's request, he did exactly what was requested. Ans. at 22. Moreover, any presumption that convening authorities act in accordance with Article 25, UCMJ, does not change the analysis because the law at the time allowed convening authorities to consider race when selecting panel members under Article 25 if it was in favor of the accused. *Id.* (citing *Untied States v. Bess*¸80 M.J. 1, 10 (C.A.A.F. 2020)); *Crawford*, 35 C.M.R. at 13. The only reasonable conclusion is that the convening authority presumptively considered race to exclusively select members from the same racial minority as MSgt Banks, which MSgt Banks requested and the law at the time allowed. This is a plain error at the time of appellate consideration. *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008) (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). Contrary to the Government's argument, it is unnecessary to show prejudice from this structural error. *Contrast* Ans. at 22 (arguing that MSgt Banks suffered no prejudice), *with United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (stating that no prejudice is required to reverse a structural error). Following *Jeter*, this Court should grant "automatic relief" and set aside the findings of guilty and the sentence. 84 M.J. at 74–75 (quoting *Weaver v. Massachusetts*, 582 U.S. 286, 301 (2017)).

II.

The findings of guilty for the charge and specification of assault consummated by a battery are factually insufficient because the Government failed to prove that Master Sergeant Banks was not acting in self-defense or defense of another, and Master Sergeant Banks correctly raised this issue.

The Government's argument overlooks key evidence that points to self defense and defense of another. It focuses significantly on Prosecution Exhibits 1 and 2, arguing that they do not show RE threatening anyone. Ans. at 26. But these exhibits are surveillance footage taken from a

distance, where it is difficult to discern details in the behavior of the individuals depicted. *See* Pros. Exs. 1, 2. In contrast, Defense Exhibit B is a video of RE taken from close range, depicting his conduct as it appeared to others on the street, including MSgt Banks. RE himself acknowledged that he appeared aggressive in that video. R. at 664–65. Tellingly, the Government did not mention Defense Exhibit B in its argument on factual sufficiency. Ans. at 23–30. This Court cannot ignore evidence that shows RE's demeanor and his aggression at the time of the offense, as the Government seems to do.

Witness testimony also presents a more detailed description of RE's actions. One witness, JS, testified that RE was acting even more aggressively than depicted in Defense Exhibit B. R. at 539. JS also felt threatened and was concerned that RE might attack or otherwise escalate the situation further. R. at 532, 542–44. Another witness, EM, found it necessary to place himself between JS and RE out of concern that RE might attack again. R. at 504–06. The Government acknowledged these witness accounts in its statement of facts, but it only mentioned them in passing in its factual sufficiency argument. Ans. at 6–8, 28. These accounts show that RE was acting much more aggressively than the Government recognizes.

The Government also tries to assert an inappropriately high standard for factual sufficiency review. It claims that MSgt Banks merely disagrees with the findings but has not "establish[ed] a specific showing of a deficiency in proof." Ans. at 25 (citing *United States v. Valencia*, 85 M.J. 529, 535 (N-M. Ct. Crim. App. Dec. 5, 2024)). While some measure of disagreement is inherent in any factual insufficiency argument, MSgt Banks expressed more than a "general disagreement with a verdict" by specifically articulating how the evidence failed to disprove the defenses of self-defense and defense of another beyond a reasonable doubt. *Valencia*, 85 M.J. at 535; Br. on Behalf of Appellant at 9–12. By so doing, he "identif[ied] a weakness in the evidence admitted at trial to

support an element (or more than one element) and explain[ed] why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *17–18 (A.F. Ct. Crim. App. Apr. 29, 2024) (quoting *United States v. Harvey*, 83 M.J. 685, 691 (N-M. Ct. Crim. App. 2023)), *aff'd*, 85 M.J. 414 (C.A.A.F. 2025). Since that is the standard articulated by this Court for determining when an appellant made "a specific showing of a deficiency of proof," MSgt Banks made the requisite showing. *Id.* This Court should find that MSgt Banks made a specific showing of a deficiency of proof, analyze the factual sufficiency of the evidence, and hold that the evidence is factually insufficient to support the findings.

III.

Trial defense counsel's explanation for not utilizing evidence of Master Sergeant Banks's good military character during findings is grounded in a misunderstanding of the law.

The trial defense counsel's explanation for not offering evidence of MSgt Banks's good military character, which was adopted wholesale by the Government, displays a misunderstanding of the applicable law. Ans. at 31–37. Trial defense counsel knew that the Government had evidence of an uncharged incident at the Turumi Lodge on Osan Air Base in which MSgt Banks was allegedly drunk, touched a civilian employee without her consent, and attempted to intimidate her by invoking his status as a member of Security Forces. Ans. at 31–32 (citing App. Ex. VI; Declaration of Capt MB; Declaration of Capt JB). Trial defense counsel expressed concern that introducing evidence of good military character would open the door and allow the Government to introduce damaging evidence of this uncharged misconduct. Ans. at 32 (citing Declaration of Capt MB; Declaration of Capt JB). The Government points to this as a reasonable strategic decision and claims that "there's little doubt the Government *would* have introduced the Turumi

incident." Ans. at 34–36 (emphasis in original). But this concern was unreasonable because "[e]xtrinsic evidence of prior acts of misconduct is not admissible to combat opinion or reputation evidence." *United States v. Kerr*, No. ACM 32249, 1997 CCA LEXIS 603, at *8 (A.F. Ct. Crim. App. Dec. 12, 1997) (citing *United States v. Reed*, 44 M.J. 825, 826 (A.F. Ct. Crim. App. 1996)). Moreover, this Court has held that even if character affidavits contain more than just opinion and reputation evidence, the Government may not rebut with specific acts evidence. *Id.* Thus, extrinsic evidence about specific acts at the Turumi Lodge would have been inadmissible to rebut evidence about MSgt Banks's good military character, especially if it was limited to reputation and opinion.

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under [Strickland v. Washington, 468 U.S. 668 (1984)]." *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Here, trial defense counsel's misunderstanding of the law and the resulting failure to offer beneficial evidence fell measurably below the performance ordinarily expected of fallible lawyers. *United States v. Palik*, 84 M.J. 284, 289 (C.A.A.F. 2024) (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)). Preventing the admission of harmful extrinsic evidence only required exercising appropriate limits on the good military character evidence, not foregoing it altogether. As long as the Defense did not introduce evidence of specific acts of good conduct, the Government could not introduce extrinsic evidence about the Turumi Lodge incident. *See United States v. Hensley*, No. ACM 34000, 2001 CCA LEXIS 191, at *9 (A.F. Ct. Crim. App. June 21, 2001) (holding that evidence of uncharged misconduct was properly admitted to rebut evidence of good military character that included specific acts of good conduct).

Based on the testimony offered during presentencing proceedings, it is clear that available witnesses, including MSgt Banks's former commander and an officer whom he mentored while

she applied to a medical commissioning program, were prepared to offer favorable opinion and reputation evidence regarding his good military character. R. at 907–14, 917–22. The Government could have inquired about specific instances of conduct when cross-examining these witnesses, Mil. R. Evid. 405(a), but there is no indication that the character witnesses were aware of the alleged incident at the Turumi Lodge. A simple denial of knowing about an incident on cross-examination would be far less harmful than the extrinsic evidence that the trial defense counsel erroneously believed would be admitted if they offered evidence of good military character. Trial defense counsel should have offered appropriately tailored evidence of good military character, but instead, they decided to offer none at all based on a misunderstanding of evidentiary rules. MSgt Banks's counsel were wrong in their assessment that offering any evidence of good military character would open the door to damaging extrinsic evidence of specific acts. Their additional concerns about negative inferences from his combat history and an "allegation that he received controlled testing material"—another specific act—were similarly unfounded. Ans. at 34–35. Such evidence would also not have been allowed to rebut reputation and opinion testimony about MSgt Banks's good military character.

This was a close case, as evidenced by the mixed findings returned by the members. R. at 885. The specification for assault consummated by a battery turned largely on the issues of self-defense and defense of another, and trial defense counsel's strategy focused on those defenses. Ans. at 34. A servicemember with good military character employs force lawfully, so there is at least a reasonable probability that introducing evidence of MSgt Banks's good military character would have tipped the scales as to these defenses and resulted in a different outcome. *Palik*, 84 M.J. at 289. MSgt Banks therefore received ineffective assistance of counsel, and this Court should

set aside the findings and the sentence.

IV.

The military judge did not have a valid reason to prevent observers in the gallery from viewing Prosecution Exhibits 1 and 2, and this issue was not waived.

Preventing members of the public from viewing evidence introduced at trial requires overcoming the requirements for public trials in both the Sixth Amendment and the Rules for Courts-Martial (R.C.M.). U.S. Const. amend. VI; R.C.M. 806(a). The Government speculates that the military judge here was maintaining "the dignity and decorum of the proceedings" by preventing the public from viewing "evidence [that] was violent in nature." Ans. at 42–43. The evidence in question—Prosecution Exhibits 1 and 2—showed surveillance camera views of the single blow at issue in this case. They did not involve gratuitous violence that would have imperiled the dignity and decorum of the proceedings. Indeed, testimony repeatedly described this incident in open court without concerns from the bench. The Government's speculated reason for the military judge's departure from the public trial requirements does not pass muster.

Moreover, MSgt Banks did not waive this issue. As the Government acknowledges, "waiver of a constitutional right is effective if it 'clearly established that there was an intentional relinquishment of a known right.'" Ans. at 41 (quoting *Untied States v. Jones*, 78 M.J. 37, 44 (C.A.A.F. 2018)). In fact, there is "a presumption against finding a waiver of constitutional rights." Ans. at 40 (citing *United States v. Bench*, 82 M.J. 388, 392 (C.A.A.F. 2022)). When attempting to overcome this presumption, the Government can only point to fleeting moments when trial defense counsel summarily agreed with the military judge's directions or offered no objection. Ans. at 41–42. There was no inquiry into whether MSgt Banks knew that these directions would result in some deprivation of his constitutional right to a public trial. Without evidence that he intentionally

relinquished a known right, there is no waiver. This court should review this issue for plain error and set aside the findings and the sentence because the military judge inappropriately prevented members of the public from viewing evidence displayed in open court.

V.

The Government's unreasonable delay in forwarding the record of trial to this Court denied Master Sergeant Banks his right to speedy appellate review and warrants relief.

The Government effectively concedes that the post-trial delay in this case is sufficiently excessive to trigger a due process analysis. Ans. at 52. Despite acknowledging that 322 days elapsed between docketing and receipt of the record, which is attributable to the Government, the Government urges the Court to focus on MSgt Banks's requested enlargements of time, which totaled forty-five fewer days than the Government's delay. Ans. at 51–53. And the Government's only explanation for the delay is that the single court reporter assigned to transcribe the proceedings was also busy with other matters. Ans. at 52–53. Considering the vast resources available to the United States Government, allowing it to cause nearly eleven months of delays because a single employee is too busy would "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Gray*, No. ACM 40648, 2025 CCA LEXIS 122, at *15 (A.F. Ct. Crim. App. Mar. 24, 2025) (quoting *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006)). The Government's assurances that changes in Air Force policy will prevent such delays in the future do not relieve the delay in the instant case. Ans. at 54–55. This Court should exercise its authority under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), to grant appropriate relief for excessive post-trial delay.

Conclusion

MSgt Banks respectfully requests that this Court set aside the findings and the sentence.

Respectfully submitted,

[redacted]

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 7 November 2025.

Respectfully submitted,

[redacted]

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 24057**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Tavaris BANKS	)	**CHANGE**
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 15th day of December, 2025,

ORDERED:

The record of trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge
MCCALL, KRISTIN K.B., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

[redacted]

JACOB B. HOEFERKAMP, Capt, USAF
Chief Commissioner