UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Myles L. PHIPPS	)	**Misc. Dkt. No. 2024-10**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**ORDER**
	)	
	)	
	)	
	)	**Panel 2**

Petitioner is currently the accused at a special court-martial facing one charge and one specification of wrongful use of a controlled substance in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. Trial is scheduled to begin on 2 December 2024.

On 26 September 2024, Petitioner filed with this court a petition for extraordinary relief in the nature of a Writ of Mandamus and a Motion to Stay Proceedings. This court docketed the petition on 27 September 2024. On 30 September 2024, the Government opposed Petitioner's Motion to Stay Proceedings.

Petitioner requests that we "direct[ ] the Trial Court to immediately stay ongoing court-martial proceedings and dismiss the charges for lack of *in personam* jurisdiction." Petitioner maintains he was "lawfully discharged from the United States Air Force" after his final outprocessing appointment on his date of separation "before any action by the Air Force with a view to trial."*

On 6 September 2024, Petitioner filed with the trial court a motion to dismiss for lack of *in personam* jurisdiction. The Government opposed the motion. After receiving briefs, evidence, and argument from the parties, on 19 September 2024 the military judge denied the motion. Petitioner requested reconsideration on 24 September 2024, which request was denied on 26 September 2024.

Having considered the filings, it is by the court on this 1st day of October, 2024,

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* After his prayer for relief, Petitioner requested appointment of appellate defense counsel to represent him in this petition pursuant to Article 70(c)(1), UCMJ, 10 U.S.C. § 870(c)(1). We note this court does not have such authority under Article 70, UCMJ.

ORDERED:

Petitioner's Motion to Stay Proceedings dated 26 September 2024 is hereby **DENIED**.

No briefs will be permitted absent leave of the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Myles L. PHIPPS	)	**Misc. Dkt. No. 2024-10**
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Petitioner	)	
	)	
	)	
	)	**NOTICE OF DOCKETING**
	)	
	)	

On 26 September 2024, this court received a petition for extraordinary relief in the nature of a Writ of Mandamus and a Motion to Stay Proceedings in the above-styled case.

Accordingly, it is by the court on this 27th day of September, 2024,

ORDERED:

The case is assigned Misc. Dkt. No. 2024-10 and referred to Panel 2.

No briefs in response to this petition will be filed unless ordered by the court.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Petitioner*	)	**UNITED STATES OPPOSITION TO MOTION TO STAY**
v.	)	Before Panel No. 2
In re Myles L. Phipps, Staff Sergeant (E-5) United States Air Force *Respondent*	)	Misc. Dkt. No. 2024-10 30 September 2024

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

Pursuant to Rule 23(c) and 23.2 of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Petitioner's Motion to Stay Trial Proceedings, dated 26 September 2024.

Opposition to Motion to Stay

"Issuance of an extraordinary writ staying court-martial proceedings requires the careful exercise of discretion." United States v. Beck, 56 M.J. 426, 427 (C.A.A.F. 2002). A party requesting a stay bears "the burden of showing that the circumstances justify an exercise of that discretion." Nken v. Holder, 556 U.S. 418, 433-34 (2009). "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant." Virginian R. Co. v. United States, 272 U.S. 658, 672 (1926). "The propriety of [a stay] is dependent upon the circumstances of the particular case." Nken, 556 U.S. at 434 (quoting Virginian R. Co., 272 U.S. at 672-73).

The Supreme Court provided general guidance for federal district and appellate courts on when to grant a stay in Hilton v. Braunskill, 481 U.S. 770, 776 (1987), which the Nken court upheld as the "traditional test." 556 U.S. at 433. The Hilton guidance reviewed Federal Rule of Appellate Procedure 8 and not a Rule for Courts-Marital, but the guidance is highly persuasive.

Because Article 36, Uniform Code of Military Justice (UCMJ), encourages alignment of the military rules and procedures with the federal courts, the Hilton standard should be applied here as well.

The traditional test provided four factors for issuing a stay:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Nken, 556 U.S. at 434 (quoting Hilton, 481 U.S. at 776). "The first two factors of the traditional standard are the most critical," and for the first factor "[i]t is not enough that the chance of success on the merits be 'better than negligible.'" Id. (citing Sofinet v. INS, 188 F.3d 703, 707 (CA7 1999) (internal quotation marks omitted). For the second factor, "simply showing some 'possibility of irreparable injury,' … fails to satisfy the second factor." Id. at 434-35 (internal citation omitted).

To prevail on the merits of a petition for a writ of mandamus, a petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." Hasan v. Gross, 71 M.J. 416, 418 (C.A.A.F. 2012) (per curiam) (citing Cheney v. United States Dist. Court for D.C., 542 U.S. 367, 380 (2004)).

A stay of proceedings is inappropriate here because, for the first Nken factor, Petitioner has not made a strong showing that he is likely to succeed on the merits for a writ. Considering the first factor in Hasan, Petitioner has other adequate means to attain relief: in the event of a conviction, Petitioner may seek ordinary appellate review of whether the Air Force had *in personam* jurisdiction over Petitioner. Petitioner has already filed and lost on a motion with the

trial judge to have his case dismissed for lack of personal jurisdiction under Rules of Courts-Martial (RCM) 907(b)(1). If Petitioner is convicted, depending on his sentence he may be entitled to direct or automatic appeal under Article 66 of the UCMJ and Rule 5 of this Court's Rules of Practice and Procedure. This Court acknowledged this possibility in Webb v. United States, 67 M.J. 765, 773 (A.F. Ct. Crim. App. 2009), where it denied a petition for a writ of mandamus for lack of personal jurisdiction "without prejudice to the petitioner's ability to raise the issue of jurisdiction in any subsequent post-trial appeal." Petitioner is unlikely to succeed on the merits of his petition because it "is not to be a substitute for an appeal even though hardship may ensue from delay and perhaps an unnecessary trial." Id. at 767 (citing Andrews v. Heupel, 29 M.J. 743, 746-47 (A.F.C.M.R. 1989)). Further, Petitioner must show a clear and indisputable right to issuance of the writ in order to prevail, and he has merely articulated a disagreement with the military judge. In sum, the unlikelihood of Petitioner prevailing on his petition makes a stay of proceedings inappropriate.

To briefly address the second Nken factor, Petitioner has not shown more than some possibility of injury, which is insufficient for justifying a stay of proceedings. While Petitioner alluded to vague career or school plans that have been halted, any accused involuntarily held on active duty pending resolution of their courts-martial may be unable to make plans for education or find new career opportunities. Petitioner's circumstances are not extraordinary or evidence of irreparable injury.

There are several means to obtain relief still available to Petitioner, and there are no extraordinary circumstances present in this case to warrant a stay.

CONCLUSION

The United States opposes Petitioner's motion for stay of proceedings pending disposition of his petition, and the United States desires to proceed with the court martial as scheduled on 2 December 2024. There is no good cause to delay the court-martial proceeding, and a stay is not warranted. For these reasons, the United States respectfully requests that this Honorable Court deny Petitioner's motion for stay in the proceeding of United States v. SSgt Myles L. Phipps.

[redacted]
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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Defense Division on 30 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

IN RE MYLES L. PHIPPS
Staff Sergeant (E-5)
United States Air Force
Petitioner

Misc. Dkt. No._____

Petition for Writ of Mandamus and Motion to Stay Proceedings

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re Myles L. Phipps Staff Sergeant (E-5) United States Air Force *Petitioner*.	)))))))))	**PETITION FOR WRIT OF MANDAMUS AND MOTION TO STAY ONGOING PROCEEDINGS** Before Panel No. _____ Misc. Dkt. _____ 26 September 2024

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

Staff Sergeant[1] Myles L. Phipps hereby petitions the Air Force Court of Criminal Appeals for extraordinary relief in the form of a Writ of Mandamus and an Order to Stay Ongoing Proceedings pursuant to 28 U.S.C. § 1651(a) and Rule 19 of this Honorable Court's Rules of Practice and Procedure.

INTRODUCTION

Petitioner was lawfully discharged from the United States Air Force at 0845 hours on 3 April 2024. By that time, Petitioner was in receipt of a valid certificate of discharge, a final accounting of pay, and completed the appropriate clearing process under Air Force regulations to separate him from military service. Consequently, Petitioner is not subject to jurisdiction under the UCMJ. The Trial Court denied Petitioner's Motion to Dismiss for Lack of *In Personam* Jurisdiction based on a mistaken conclusion of law. Petitioner therefore respectfully petitions this Honorable Court for extraordinary relief.

[1] Petitioner annotates his assigned rank on the filing to ensure clerical consistency. However, as provided *infra,* Petitioner does not concede that he is currently a lawful Staff Sergeant in the United States Air Force.

STATEMENT OF THE ISSUE

WHETHER THE GOVERNMENT FAILED TO MEET ITS BURDEN BY A PREPONDERANCE OF THE EVIDENCE TO DISPROVE THAT PETITIONER WAS IN RECEIPT OF A VALID DISCHARGE CERTIFICATE BEFORE IT INITIATED ACTION WITH A VIEW TO TRIAL.

HISTORY OF THE CASE

On 17 June 2024, Maj K.N.S. preferred one charge with one specification against Petitioner, alleging a violation of Article 112a, UCMJ.[2] The Special Court-Martial Convening Authority referred the case to trial on 24 June 2024,[3] and trial on the merits is currently docketed for 2 December 2024.

On 6 September 2024, Trial Defense Counsel filed a Motion to Dismiss for Lack of *In Personam* Jurisdiction.[4]

On 13 September 2024, the Government submitted its Response, opposing the Defense's prayer for dismissal.[5]

On 17 September 2024, an Article 39(a), UCMJ, session was held, where additional evidence and argument was provided on this motion.[6]

On 18 September 2024, the parties submitted additional documentation for consideration on the Motion.[7]

On 19 September 2024, the Trial Court denied the Defense's Motion.[8]

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[2] Attach. 3., at 19.
[3] *Id*.
[4] App. Ex. VI.
[5] App. Ex. VII.
[6] Attach. 3.
[7] Attach. 4, 5, and 7, and reflected in the Ruling in Attach. 3.
[8] Attach. 3.

On 24 September 2024, Trial Defense Counsel moved the Trial Court to reconsider its ruling.[9]

On 26 September 2024, the Trial Court denied the Defense's Motion for Reconsideration.[10]

STATEMENT OF FACTS

Petitioner's initial date of enlistment was 4 April 2017.[11]

On 18 February 2024, Petitioner began the necessary steps to separate from the United States Air Force by facilitating the preparation of his final accounting of pay.[12]

On 6 March 2024, Petitioner's Request and Authorization for Separation was approved. In Box 13 of the form, it projected his expiration of term of service (ETS) as the separation date: "03 APR 2024." Box 29 cited "DAFI 36-3211" as the authority for the separation.[13]

On 8 March 2024, his Department of Defense Form 214 (DD Form 214) Worksheet was completed.[14]

On 27 March 2024, during an involuntary urinalysis, Petitioner allegedly provided a urine sample at the Drug Demand Reduction Program (DDRP) at Eglin AFB, Florida. Subsequently, but prior to 4 April 2024, the Air Force Drug

[9] Attach. 8.
[10] Attach. 9.
[11] Attach. 3, at 1.
[12] Attach. 3., at 2.
[13] Attach 3., at 3.
[14] Attach. 3., at 4.

Testing Laboratory (AFDTL), in turn, notified the DDRP that it detected cocaine in Petitioner's sample.[15]

On 1 April 2024, a Financial Operations Technician at the Comptroller Squadron completed Petitioner's Final Separation Worksheet, calculating his final pay as $3,142.84.[16]

On 2 April 2024, at 0659, Petitioner received official notice via email from the Total Force Service Center that his DD Form 214, which summarized his military service and certified his discharge, was now official.[17]

The email from the Total Force Service Center provided Petitioner with instructions on how to download his official DD Form 214, which would only become available 24 hours after his effective date of separation (DOS).[18]

The Air Force no longer delivers physical copies of the DD Form 214; instead, members receive a link to download the form, which becomes available 24 hours after their DOS and remains accessible for up to 60 days.[19]

While a member must wait 24 hours after their DOS to download a copy, a DD Form 214 becomes final at midnight on a member's DOS.[20]

In Petitioner's case, this occurred at the period of darkness 2-3 April 2024—not 3-4 April 2024.[21]

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[15] Attach. 3., at 5.
[16] Attach 3., at 6.
[17] Attach. 3., at 7.
[18] *Id.*
[19] DAFI 36-3202, *Certificate of Release or Discharge from Active Duty* (25 Jun. 2024), ¶ 3.6.1.1.
[20] Attach. 4.
[21] App. Ex. XIX. See also, Attach. 4 and Attach 5.

The Air Force tracks all its required separation clearance processes through a digital platform known as 'vMPF'.[22]

Petitioner was not required to attend a face-to-face final out-processing appointment,[23] however he was mandated to attend a Final Records Review appointment.[24]

A Final Records Review appointment cannot be completed until (1) duty day prior to a member's departure date.[25]

On 2 April 2024, by 1415 hours, Petitioner had completed all tasks on the vMPF checklist, less attending his Final Records Review appointment with his Commander's Support Staff (CSS).[26]

On the morning of 3 April 2024, at 0845 hours, Petitioner reported to his pre-scheduled Final Records Review appointment with TSgt K.R., his CSS.[27]

As Petitioner completed all necessary steps on his vMPF checklist, TSgt K.R. conducted his final records review satisfactorily, cleared him from the Air Force, and advised him that he was now discharged.[28]

Petitioner's Common Access Card (CAC) was set to expire on 4 April 2024.[29]

Air Force members separating at their ETS, unlike those separated prematurely, are allowed to retain their CAC post-separation.[30]

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[22] Attach 3., at 8.
[23] *Id.*, at 9.
[24] *Id.*, at 11.
[25] App. Ex. VI, Attach. 1.
[26] Attach. 3., at 11.
[27] *Id.*
[28] *Id.*
[29] *Id.*, at 17.
[30] Testimony of MSgt R.M.C., Section Chief, Career Development, 96th Force

Later in the morning of 3 April 2024, Mr. M.C., the local DDRP Manager, notified investigators at the 96th Security Forces Squadron via email that Petitioner had tested positive for cocaine at a level of 352 ng/mL.[31]

At approximately 0947 hours, Security Forces investigators initiated their investigation, notifying Petitioner's first sergeant, who then recalled Petitioner.[32]

Later that day, 3 April 2024, at the behest of the 96th Training Wing Staff Judge Advocate, a representative of the Eglin AFB Legal Office requested via the local Military Personnel Flight (MPF) that the Air Force Personnel Center (AFPC) Separations Branch extend Petitioner's ETS involuntarily.[33]

Members from the Legal Office did not learn until months later that Petitioner had already out-processed in the morning of 3 April 2024.[34]

At 1510 hours, AFPC personnel granted the Legal Office's request, administratively extending Petitioner's ETS and attempting to reinstate his Defense Finance and Accounting Service (DFAS) profile as an active-duty member.[35]

An internal audit trail conducted months later by AFPC Separations Policy Personnel and completed by an AFPC Total Force Support Center Supervisor, confirmed that Petitioner's DD Form 214 had published in his Air Force Automated

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Support Squadron, at Article 39(a), UCMJ, session on 17 Sep 2024.
[31] Attach 3., at 12.
[32] *Id.*, at 13.
[33] *Id.*, at 14.
[34] Statement by Trial Counsel during oral argument at Article 39(a) session on 17 Sep 2024.
[35] Attach 3., at 15.

Records Management System (ARMS) record by the time AFPC imposed Petitioner's involuntary ETS extension.[36]

On 4 April 2024, an AFPC Separations Policy official manually removed Petitioner's published DD Form 214 from his ARMS record.[37]

Consequently, on 4 April 2024, Petitioner received an email from the Total Force Service Center informing him that his DD Form 214 had been voided and removed from his official service records maintained in ARMS.[38]

On 5 April 2024, an off-cycle deposit of $3,142.84 was credited to Petitioner's bank account.[39]

On 17 September 2024, at the Article 39(a), UCMJ, session regarding this matter, the Government stipulated that Petitioner received a final accounting of pay and completed the Air Force's clearing process for separation from service.[40]

JURISDICTION & BASIS FOR WRIT

Petitioner is entitled to the issuance of a writ of mandamus because the military court's exercise of jurisdiction over him is unlawful, and he has no other adequate means to obtain relief. Under the All Writs Act, 28 U.S.C. § 1651(a), this Honorable Court has the authority to issue a writ of mandamus if it is "necessary or appropriate in aid of its jurisdiction." *Chapman v. United States*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016). The purpose of a writ is "to confine an inferior court to a

[36] App. Ex. XIX.
[37] *Id.*
[38] Attach 3., at 16.
[39] *Id.*, at 18.
[40] Statement by Trial Counsel during oral argument.

lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

However, "[t]he writ of mandamus is a drastic instrument," *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983), and "only exceptional circumstances … will justify the invocation of this extraordinary remedy." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380 (2004) (citations omitted). Accordingly, to justify reversal of a military judge's discretionary decision by mandamus, the decision "must amount to more than even 'gross error'; it must amount 'to a judicial usurpation of power' or be 'characteristic of an erroneous practice which is likely to recur.'" *Labella*, 15 M.J. at 229 (citations omitted).

To prevail, Petitioner must show that (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances. *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012).

An assertion that a member pending trial has been discharged and is no longer subject to court-martial jurisdiction is appropriate for consideration under this authority and warrants grant of a petition for extraordinary relief. *Webb v. United States*, 67 M.J. at 767 (A.F. Ct. Crim. App. 2009) (citing *Smith v. Vanderbush*, 47 M.J. 56 (C.A.A.F. 1997) (writ of prohibition appropriate where Army took no action to halt pending discharge of soldier facing court-martial, and soldier subsequently legally discharged)); see also *Wickham v. Hall*, 12 M.J. 145 (C.M.A. 1981) (member alleged court-martial lacked jurisdiction to try her for fraudulent separation).

Petitioner's case warrants the issuance of a writ of mandamus, as he has no other means to obtain relief from the unlawful exercise of court-martial jurisdiction. Petitioner has exhausted all remedies available at the Trial Court, and allowing the court-martial to proceed without jurisdiction will continue to cause irreparable harm that cannot be remedied later on appeal. Petitioner will continue to suffer the mental agony of being involuntarily conscripted, which has already forced him to forgo a career opportunity, schooling plans, and professional advancement. Petitioner had finalized plans to relocate to Ohio to reunite with his family but remains confined by the uncertainty of these proceedings. As established in *Webb*, where a nearly identical assertion was raised, immediate action is necessary and appropriate to protect Petitioner's rights.

Petitioner's right to relief is clear and indisputable. As established *infra*, Petitioner was validly discharged from the Air Force on 3 April 2024, after satisfying all requirements under 10 U.S.C. § 1168(a) and DAFI 36-3211, para. 3.9.3. Given that Petitioner's discharge was executed in accordance with all legal requirements and prior to any action with a view toward trial, his right to relief is clear and indisputable as established under *Vanderbush*, *Webb*, and *Wickham*. Finally, as further provided *infra* and established by the aforementioned cases, grant of this writ is not only appropriate but necessary to prevent the unlawful usurpation of court-martial jurisdiction and to prevent irreparable harm.

BASIS FOR GRANTING STAY

In *Hilton v. Braunskill*, the Supreme Court provided general guidance for federal district and appellate courts on when to grant a stay. *Id*. 481 U.S. 770, 776

(1987). Although *Hilton* reviewed Federal Rule of Appellate Procedure 8 and not a Rule for Courts-Martial, its guidance is highly persuasive. And because Article 36, UCMJ, encourages alignment of the military rules and procedures with the federal courts, the *Hilton* standard should be applied here as well. *Hilton* provided the following factors for determining whether a stay should be issued:

(1) whether the applicant has made a strong showing that he is likely to succeed on the merits;

(2) whether the applicant will be irreparably injured absent a stay;

(3) whether issuance of the stay will substantially injure interested parties; and

(4) where the public interest lies.

Id.

In this case, a stay of the ongoing proceedings is warranted. First, as detailed *infra*, Petitioner has made a strong showing that he is likely to succeed on the merits of his claim. Given the statutory and regulatory provisions supporting Petitioner's assertions, as well as established precedent, he is more than likely to prevail on the merits.

Second, Petitioner will suffer irreparable injury absent a stay, as already provided *supra*. Third, issuance of the stay will not substantially injure the Government. The Government has no legitimate interest in prosecuting an individual over whom it lacks jurisdiction. Furthermore, resolving this matter now will prevent unnecessary expenditure of Government resources on a trial that is fundamentally defective.

Fourth, granting the stay serves the public interest. The public has a profound interest in maintaining the integrity of the military justice system and to prevent wasteful Government expenditure.

Therefore, Petitioner respectfully requests that this Honorable Court exercise its authority under the All Writs Act to issue a writ of mandamus, directing the Trial Court to immediately stay ongoing court-martial proceedings and dismiss the charges for lack of *in personam* jurisdiction.

REASONS FOR GRANTING RELIEF

The Court should grant the Petition for Writ of Mandamus and Motion to Stay Proceedings because Petitioner was lawfully discharged from the United States Air Force by 0845 hours, 3 April 2024, before any action by the Air Force with a view to trial.

Law on UCMJ Jurisdiction; Generally

Under RCM 907(b)(1), "[a] charge or specification shall be dismissed at any stage of the proceedings if the court-martial lacks jurisdiction to try the accused for the offense."

Among the requisites for valid court-martial jurisdiction, "the accused must be a person subject to court-martial jurisdiction." RCM 201(b)(4).

The UCMJ wields jurisdiction over "[m]embers of a regular component of the armed forces, including those awaiting discharge after expiration of their terms of enlistment …" Article 2(a)(1), UCMJ, 10 U.S.C. § 802(a)(1)

Jurisdiction under the Code is severed when "… such person's military service has been terminated in accordance with law or regulations promulgated by the Secretary concerned." Article 2(c), UCMJ, 10 U.S.C. § 802(c)

Absent some saving circumstance or statutory authorization, discharge from the military terminates *in personam* jurisdiction, even for offenses allegedly committed prior to the discharge. *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985). See *United States v. Reid*, 46 M.J. 236, 238 (C.A.A.F. 1997).

On the other hand, "if jurisdiction has attached prior to discharge, it continues until termination of the prosecution." *United States v. Smith*, 4 M.J. 265, 267 (C.M.A. 1978).

This is likewise outlined in RCM 202(c)(1), which provides, in relevant part, that "[w]hen jurisdiction attaches over a Servicemember on active duty, the Servicemember may be held on active duty over objection pending disposition of any offense for which held and shall remain subject to the UCMJ during the entire period." RCM 202(c)(1).

However, retention beyond a servicemember's ETS is discretionary and not self-executing. *Smith v. Vanderbush*, 47 M.J. 56, 58 (C.A.A.F. 1997).

Placing a valid administrative hold on a Servicemember's discharge paperwork *before* [emphasis added] separation, if done with a view toward trial, is sufficient to attach jurisdiction and prevent discharge. *United States v. Williams*, 53 M.J. 316, 317 (C.A.A.F. 2000). See, e.g., *United States v. Wheeley*, 6 M.J. 220 (C.M.A. 1979) (criminal investigations).

Conversely, if the servicemember is properly discharged from the military, jurisdiction is severed. *United States v. Hart*, 66 M.J. 273, 275 (C.A.A.F. 2008). For example, when a Servicemember was arraigned for court-martial but was not placed on an administrative hold, and he subsequently received a valid, unconditional discharge while awaiting trial, that discharge became effective upon delivery and terminated jurisdiction. *Smith v. Vanderbush*, 47 M.J. 56, 59 (C.A.A.F. 1997).

Law on Effective Moment of Discharge

The UCMJ does not clearly delineate the precise moment discharge is effectuated. *Hart*, 66 M.J. at 273. The mere arrival of a member's ETS does not equate to a discharge. *Webb v. United States*, 67 M.J. 765, 768 (A.F. Ct. Crim. App. 2009). Rather, a DD Form 214 is valid when it is issued by a competent discharge authority and complies with applicable service regulations. *United States v. Wilson*, 53 M.J. 327, 333 (C.A.A.F. 2000).

To determine the precise moment of discharge, this Honorable Court has divided cases into two categories: (1) so-called "early out" cases, where members separate before their scheduled DOS, and (2) "ETS cases" in which discharge occurs upon a member's ETS. *Webb*, 67 M.J., at 771. In ETS cases, this Honorable Court has looked solely to whether the mandates of 10 U.S.C. § 1168(a) were met. *Id.*

10 U.S.C. § 1168(a) provides as follows:

> "A member of an armed force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or his next of kin or legal representative."

Id.

In *Webb*, an ETS case, this Honorable Court ruled that the validity of a discharge certificate under 10 U.S.C. § 1168(a) is contingent on whether it complies with the regulations promulgated by the Secretary of the Air Force under statutory authorization. *Id*. 67 M.J., at 772. Therefore, the inquiry into whether the petitioner effectively separated required judicial review and application of Air Force Instructions on military separations to determine if the discharge certificate conformed to the regulatory framework prescribed by the Secretary. *Id*.

Regulations Promulgated Under the Secretary of the Air Force

Department of Air Force Instruction (DAFI) 36-3211, promulgated "by order of the Secretary of the Air Force," specifies the exact method, effective date, and effective time that discharge is effectuated upon Air Force members. DAFI 36-3211, *Military Separations*, ¶ 3.9. (24 Jun. 2022). It provides, in relevant part, as follows: "Method. Issue separation orders for regular component… and other separation documents as prescribed by AFI 36-3202." *Id*., at ¶ 3.9.1.

DAFI 36-3211 further provides: "Effective Date. The member will be notified of the separation date and this date will be stated on the separation order." *Id*., at ¶ 3.9.2.

Most importantly, the DAFI prescribes the precise moment of separation: "Effective Time. Separation is effective at 2400 hours on DOS*; however, for UCMJ purposes, separation is effective upon receipt of a discharge certificate issued under proper authority, a final accounting of pay, and completion of the clearing process established by the USAF* or USSF." *Id*., at ¶ 3.9.3. (emphasis added).

The DAFI then elaborates that notice of separation may be "[a]ctual, by giving a copy of the separation order … or, "[c]onstructive, when actual delivery cannot be made (see guidance in AFI 36-3202)." *Id.*, at ¶ 3.9.4.2.

We therefore turn to DAFI 36-3202, similarly promulgated "by order of the Secretary of the Air Force," which instructs on how the Air Force will deliver the DD Form 214 to the member. DAFI 36-3202, *Certificate of Release or Discharge from Active Duty* ¶ 3.6.1.1. (25 Jun. 2024). "The DD Form 214 and DD Form 214-1 are made available to members on the effective DOS or retirement. Members are provided instructions via e-mail on how to obtain their DD Form 214." *Id.*

More specifically, Table A3.1., *Distributing the DD Form 214 and DD Form 214-1 when applicable*, under Box 1, confirms that delivery to the member-recipient is by means of a copy that is "automatically sent to ARMS by the vMPF DD Form 214 application on the date of publication." *Id.*

Petitioner Was Discharged

This Honorable Court reviews questions of personal jurisdiction *de novo* and accepts the military judge's findings of historical facts unless they are clearly erroneous or unsupported in the record. *United States v. Melanson*, 53 M.J. 1, 2 (C.A.A.F. 2000). A meticulous examination of the events on 3 April 2024 compels the conclusion that Petitioner was discharged that morning. As this is an ETS case, *Webb* controls. Applying the test from *Webb*, this Honorable Court's sole concern is whether Petitioner satisfied both requirements of 10 U.S.C. § 1168(a). However, as *Webb* noted, the validity of the discharge certificate is definitionally nested within Air Force regulations. Consequently, determining whether Petitioner was in receipt

of a valid discharge certificate hinges on DAFI 36-3211 and whether he satisfied the prerequisites outlined in DAFI 36-3211, para. 3.9.3.—namely, whether (1) Petitioner received a final accounting of pay and (2) completed the clearing process established by the USAF.

Petitioner Received Final Accounting of Pay

On 18 February 2024, Petitioner completed the necessary steps to facilitate the preparation of his final accounting of pay.[41] Further, on 1 April 2024, a Financial Operations Technician at the Comptroller Squadron completed a Final Separation Worksheet, calculating his final pay as $3,142.84.[42] The exact amount of $3,142.84 was deposited into his bank account on 5 April 2024—an off-cycle payday.[43] Obviously, the date and amount of this transaction was not a coincidence.

The finality of this accounting was later underscored by the fact that, despite AFPC Separations Policy personnel attempting to interfere with the payment in the afternoon of 3 April 2024,[44] DFAS still executed the transaction.[45] This not only proves that Petitioner's final pay was ready for delivery for purposes of 10 U.S.C. § 1168(a), but that Petitioner was actually in 'receipt' thereof, thus additionally satisfying DAFI 36-3211, para. 3.9.3. Even the Government conceded to this point at the 17 September 2024 motions hearing.[46] Thus, there can be no doubt that this requirement was satisfied prior to 0845, 3 April 2024.

[41] Attach. 3., at 2.
[42] *Id.*, at 6.
[43] *Id.*, at 18.
[44] App. Ex. VI, Attach. 10.
[45] Attach. 3., at 18.
[46] See Attach. 3., at 38.

Despite the Government's concession, the overwhelming evidence that this requirement was satisfied, and the Trial Court's observation that "[m]ost of the facts, if not all, are undisputed between the parties" and that "[t]he issue is not a factual one,"[47] the Trial Court took issue with Petitioner's final accounting of pay.[48] The Trial Court noted that Petitioner's pay indicated that he received a full day of pay for 3 April 2024, as annotated on his final separation worksheet. This observation led the Trial Court to infer that Petitioner remained on active duty for the entirety of that day, until 0001 hours of 4 April 2024. Although not explicitly stated in the Ruling, the Trial Court's reasoning appears to suggest that a discharge at 0845 should have so reflected on Petitioner's final pay and accounting worksheet. The Trial Court's reliance on this pay annotation is, as a matter of regulation and law, mistaken.

First, Petitioner's pay until midnight is fully consistent with Air Force regulations and has no bearing on UCMJ jurisdiction.

Second, a plain reading of DAFI 36-3211, para. 3.9.3, clearly establishes that UCMJ jurisdiction ends once the three enumerated requirements are satisfied. Nothing in the paragraph suggests that, for administrative purposes—such as with DFAS—Petitioner's pay cannot become effective until reconciled. If anything, the regulation's specific reference to UCMJ jurisdiction, as opposed to administrative matters, reinforces this interpretation.

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[47] *Id.*, at 39.
[48] *Id.*, at 41.

Third, even if the timing of Petitioner's pay were relevant, it does not undermine the satisfaction of the requirement for a final accounting of pay under 10 U.S.C. § 1168(a). The Trial Court itself construed para. 3.9.3. as a restatement of existing law, not as an additional requirement[49], which only further supports this conclusion. 10 U.S.C. § 1168(a) provides that a member has not been validly discharged until "his final pay *or a substantial part of that pay*, are ready for delivery to him" 10 U.S.C. § 1168(a) (emphasis added); see also *Hart*, 66 M.J. at 275; see also *Lawanson v. United States*, No. NMCCA 201200187, 2012 CCA LEXIS 345, at *23 (N.M. Ct. Crim. App. 31 Aug. 2012) (unpub. op.). The law only requires that a substantial portion of final pay is made ready for delivery. A minor miscalculation in payment, even if there was one, would not invalidate Petitioner's discharge.

As a practical observation, it is common for former Servicemembers to have their final accounting of pay adjusted after separation, whether by debt or credit to DFAS. This routine adjustment process does not automatically result in an involuntary extension of their service and UCMJ jurisdiction. Surely, former Servicemembers who have their pay adjusted do not then receive additional pay for the supplemental period between their supposed discharge and the finalization of their pay adjustment.

If the Court were to validate the Trial Court's conclusion, it would also mean that thousands of former Servicemembers who experience post-separation pay corrections unknowingly remain subject to the UCMJ, in some cases years after

[49] Attach. 3., at 40.

their supposed discharge. Such an outcome defies both reason and policy. See *United States v. Nettles*, 74 M.J. 291 (C.A.A.F. 2015) (noting that, for purposes of criminal jurisdiction, even the mandates of 10 U.S.C. § 1168 are not binding when they defy reason or policy). Such a holding would create a perpetual state of uncertainty regarding their military status, violating the principles of certainty and finality outlined in *Nettles*. *Id.*, 74 M.J. at 291 (citing *United States v. Howard*, 20 M.J. 353, 354 (C.M.A. 1985)). The mere fact that Petitioner's pay may potentially require a *de minimis* adjustment does not—and should not—invalidate a lawful separation to extend UCMJ jurisdiction. To the extent the Trial Court viewed the annotated pay as evidence of command intent to retain Petitioner until midnight, and not as a separate issue with his final accounting of pay, this issue is inextricably linked to the discharge certificate's validity and will therefore be addressed *infra*.

Petitioner Completed the Air Force's Clearing Process

DAFI 36-3211, para. 3.9.3., requires "completion of the clearing process established by the USAF" to effectively separate; Petitioner satisfied this requirement.[50] His vMPF checklist was fully completed by the afternoon of 2 April 2024,[51] providing irrefutable evidence that he had satisfied the Air Force's clearing process. Even the Government conceded this point, though it argued—and the Trial Court agreed—that Petitioner's CAC was not set to expire until 4 April 2024,[52] and that this was somehow problematic.

[50] *Id.*, at 38.
[51] *Id.*, at 8 and 10.
[52] *Id.*, at 17.

To the extent that the Trial Court may have viewed Petitioner's retention of an active CAC past 0845 on 3 April 2024 as evidence that he had not completed the Air Force's clearing process, this conclusion is, as a matter of law, incorrect. The status of Petitioner's CAC is a non-sequitur in this context. As established by the testimony of MSgt R.M.C., Section Chief, Career Development, 96th Force Support Squadron, at the 17 September 2024 Article 39(a) session on this matter, it is standard procedure for Servicemembers to retain their CAC through the final hours of their service, and Petitioner was explicitly permitted to do so. His retention of an active CAC, therefore, is irrelevant to the question of whether he had completed the required steps for discharge.

Notably, the Government failed to meet their burden to present any evidence that Petitioner's digital CAC credentials remained active past 0845 hours. Nevertheless, even if we baselessly assume so and thus infer that the CAC was indicative of Petitioner's status, the irrefutable fact remains that Petitioner completed all tasks on his vMPF checklist, which, as the record shows, is the official representation of the clearing process.[53] Neither 10 U.S.C. § 1168 nor DAFI 36-3211 require that *the Air Force complete* its administrivia to effect a member's discharge. These regulations simply mandate that *the Servicemember complete* the necessary steps—and Petitioner did just that. By 0845 hours on 3 April 2024, Petitioner had no outstanding responsibilities; his part of the process was certain and final, and he held onto his CAC as he was permitted to as an ETS separatee. To the extent the Trial Court viewed the expiration date on Petitioner's

[53] *Id.*, at 8.

CAC as evidence of command intent to retain Petitioner until 0001, 4 April 2024,[54] this issue is inextricably linked to the discharge certificate's validity and will therefore be addressed *infra*.

Petitioner Was in Receipt of a DD Form 214

Having satisfied the requirements for final pay and accounting and completion of the Air Force's clearing process, we now address the first portion of the overarching issue: whether, under 10 U.S.C. § 1168(a), Petitioner's "discharge certificate or certificate of release from active duty" was "ready for delivery to him or his next of kin or legal representative." Using this Honorable Court's analytical framework in *Webb*, the validity of the certificate is nested within the criteria of DAFI 36-3211, para. 3.9.3., and therefore depends on whether Petitioner was in "receipt of a discharge certificate issued under proper authority." We will address these elements sequentially, beginning with a focus on the elements of "ready for delivery" and "receipt."

Petitioner was in receipt of his DD Form 214 by 0845 on 3 April 2024. His Request and Authorization for Separation was approved for processing on 6 March 2024.[55] Box 13 of the form projected "03 APR 2024"—his ETS—as his date of separation, with the authority cited in Box 29 as "DAFI 36-3211."[56] Box 23 could have noted a specific time of discharge, but it was left blank,[57] meaning the default rules under DAFI 36-3211 control.

[54] *Id.*, at 41.
[55] *Id.*, at 3.
[56] *Id.*
[57] App. Ex. VI, Attach. 2.

On 2 April 2024, at 0659, Petitioner received an email from the Total Force Service Center, officially notifying him that his DD Form 214 was finalized. The email stated:

> "IMPORTANT – OFFICIAL NOTIFICATION – YOUR DD FORM 214 IS OFFICIAL. YOU CAN DOWNLOAD THE OFFICIAL DD FORM 214 '24 HOURS' AFTER YOUR EFFECTIVE SEPARATION OR RETIREMENT DATE."[58]

It also provided instructions for downloading a copy:

> "Your official DD Form 214 (Copies 1 and Member-4), Certificate of Release or Discharge from Active Duty, will be available for you to access electronically via vMPF in 24 hours (AFTER YOUR EFFECTIVE DATE OF SEPARATION or EFFECTIVE RETIREMENT DATE)."[59]

This made his DD Form 214 a self-executing instrument. See, *United States v. Smith*, 4 M.J. 265, 266 n.3 (C.M.A. 1978) (self-executing orders are those that "by their own terms automatically become effective on the specified effective date without any further action being required"). See also, *United States v. Hudson*, 5 M.J. 413 (C.M.A. 1978); *United States v. Meadows*, 13 M.J. 165, 167 (C.M.A. 1982). This email constituted actual delivery under DAFI 36-3211, para. 3.9.4.1. To gain a better understanding, "aid in statutory construction may be found where… the Department of the Air Force, has indicated its construction of the language in question in other statutes or regulations." *United States v. Christian*, 22 C.M.R. 786 (U.S. A.F.B.R. 1956). Here, this email was the exact method of delivery and member-receipt prescribed under DAFI 36-3211, para. 3.9.1., in conjunction with DAFI 36-3202, para. 3.6.1.1. and Table A3.1. At the very least, this email

[58] Attach. 3., at 7
[59] *Id.*

constituted constructive delivery of Petitioner's discharge certificate per DAFI 36-3211, para. 3.9.4.2., given that in today's modern era, the Air Force no longer delivers physical copies of the discharge certificate.

If there were any doubts as to whether a DD Form 214 was timely filed in Petitioner's ARMS record, this was further evidenced by the email Petitioner received on 4 April 2024 from the Total Force Service Center, informing him that his official DD Form 214 had been voided and removed from his service records in ARMS.[60] Additionally, as confirmed by the internal audit trail from AFPC, an official DD Form 214 was indeed filed in Petitioner's ARMS record at midnight, 2–3 April 2024.[61] This affirms that the Air Force complied with its own processes for delivering the DD Form 214 to Petitioner.

The Government strawmanned Petitioner's position, contending that, had Petitioner fulfilled the other requirements sooner, he would have separated on 2 April 2024 upon receipt of the email notification.[62] This is inaccurate. Petitioner was not even allowed to schedule his Final Records Review before 3 April 2024,[63] and the Government entirely overlooks that the discharge certificate explicitly designated 3 April 2024 as Petitioner's DOS. So, to be clear, Petitioner is not asserting he was discharged on 2 April 2024 when he received the email, nor at 0001 hours on his ETS. Rather, the self-executing nature of the certificate means that once the remaining requirements—final accounting of pay and completion of

[60] *Id.*, at 16.
[61] App. Ex. XIX and Attach. 4 and Attach. 5.
[62] App. Ex. VII, at 23.
[63] App. Ex. VI, Attach 1.

the Air Force's clearing process (in this case, merely attending his Final Records Review)—were met on his ETS, his discharge was effectuated for UCMJ purposes.

Indeed, on the morning of 3 April 2024, at 0845, Petitioner satisfied the last discharge requirement imposed by the Air Force; he attended his final records review appointment at his squadron.[64] The MPF had previously informed him that a face-to-face final out was unnecessary.[65] Consequently, his final appointment with his CSS was his last task in the clearing process. During this appointment, TSgt K.R. conducted a final checklist and records review. As the duly authorized agent for critical personnel functions on behalf of their commander, she—upon satisfactory review—advised him that he was discharged.[66] The Government failed to present any evidence, nor is there any, that TSgt K.R. acted *ultra vires* or that his discharge at 0845 hours then contradicted the intent of Petitioner's commander or any other person with "proper authority" to ratify his discharge. Therefore, at that precise moment, then-SSgt Phipps lawfully became Mr. Phipps.

Despite this, the Trial Court concluded in its findings of fact that Petitioner has, to date, not had a break in service.[67] If this was a finding of fact, this is clearly erroneous, given the indisputable evidence that AFPC doctored Petitioner's record by removing his DD Form 214 a day after it had been published to ARMS.[68] Had AFPC officials not abused their authority, Petitioner's record would still accurately reflect, as it did then, that he had separated.

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[64] Attach. 3., at 10 and 11.
[65] *Id*., at 9.
[66] *Id*. at 11.
[67] *Id*. at 1.
[68] App. Ex. XIX and Attach. 4 and Attach. 5.

Even if the Trial Court's finding is not deemed clearly erroneous, it essentially represents a mistaken conclusion of law. There is no question that, for purposes of satisfying 10 U.S.C. § 1168, Petitioner's DD Form 214 was ready for delivery. Even if DAFI 36-3211, para. 3.9.3., requires a more stringent standard of actual "receipt," there is no doubt that Petitioner was, at the very least, constructively in receipt of his DD Form 214 by 0845 on 3 April 2024.

No Requirement for Physical Acquisition of Copy

Before we can address the validity of Petitioner's discharge certificate, we must first dispel the red herring that Petitioner's inability or failure to access the DD Form 214 prevented its legal "delivery" or "receipt."[69] 10 U.S.C. § 1168(a) mandates that the certificate of discharge be "*ready for delivery*"—not "*delivered*." Legislative history shows that 10 U.S.C. § 1168(a) is concerned not with the actual receipt of discharge documents but with facilitating the veteran's transition to civilian life. *United States v. Harmon*, 63 M.J. 98, 104 (C.A.A.F. 2006) (quoting *Hamon v. United States*, 10 Cl. Ct. 681, 683 (1986)). See also, *United States v. Sanders*, 20 C.M.R. 692, 697 (A.F.B.R. 1955) (where actual discharge is attempted and notice given, the absence of administrative orders and non-discoverability of a discharge certificate is not dispositive in determining jurisdiction). See also *United States v. Russell*, No. 2014-11, 2015 CCA LEXIS 80, at *11 n.5 (A.F. Ct. Crim. App. 3 Mar. 2015) ("Although we need not reach the issue in this case, the court remains skeptical of the Government's assertion that former servicemembers who begin terminal leave without a Department of Defense Form 214, Certificate of Release or

[69] App. Ex. VII, at 24.

Discharge from Active Duty, remain indefinitely subject to court-martial jurisdiction unless and until they have physical custody of their certificate“ (citing *Melanson*, 53 M.J. 1, 4) (finding that administrative discharge was effective at 2400 hours on date of discharge – as there, it was so directed by the Army's regulation – despite appellant receiving only a “courtesy copy“ of the certificate)). Therefore, for purposes of 10 U.S.C. § 1168(a) and DAFI 36-3211, especially when considered within the necessary and incorporated context of DAFI 36-3202, it is clear that the email notification—not the act of accessing the document—effectuates “delivery“ and “receipt.“

Reason and policy clearly dictate this construction. Otherwise, *ad absurdum*, this premise presents a preposterous syllogism:

I: Separation from the Air Force requires a valid DD Form 214;

II: The DD Form 214 is only valid upon “delivery“ and “receipt“;

III: This requires physical acquisition *before* discharge becomes effective;

IV: AFPC only makes the DD Form 214 accessible 24 hours post-separation;

V: If separation is ineffective until the member physically acquires the DD Form 214, and access is only possible 24 hours post-separation, then the DD Form 214 cannot ever accurately reflect the member's DOS unless it is amended;

VI: To amend the DD Form 214, the process would need to account for additional duty days that occur between the intended DOS and the member's physical acquisition of the form that actually results in discharge;

Conclusion: Each day post-separation necessitates a new final duty day to be reflected on the form, *ad infinitum*.

At best, this perpetual cycle of amendments stems from the 24-hour gap between a member's DOS and when the certificate becomes digitally accessible. In Petitioner's case, this would have been the difference between 3 April and 5 April 2024. At worst, members who wait until day 59 to download the form would need to amend it by 59 days, remaining unknowingly subject to UCMJ jurisdiction for 59 days past their supposed DOS. The truly unfortunate would be those who let the download link expire after 60 days—thrust into a legal limbo where they never truly separate from the Air Force, eternally bound by UCMJ jurisdiction for failing to physically acquire their discharge certificate. Under this absurd logic, if you snooze, you lose…your discharge.

The Government embraced this untenable construction of "receipt" under the principles of reason, policy, certainty, and finality that C.A.A.F. outlined in *Nettles*.[70] This argument is misguided, even by the very holding in *Nettles*. While "[i]t is strongly suggested that 'delivery' means actual physical receipt," C.A.A.F. poignantly concluded that "[t]he law has generally moved beyond imbuing formalistic acts with such significance, and we should not require what amounts to livery of seisin to effectuate a discharge." *Nettles*, 74 M.J. at 291. The Government's position, construing the requirement of "receipt" as the formal, physical acquiring of the form, seeks to revive the antiquated formalities of livery of

[70] App. Ex. VII, at 28.

seisin. The Government also never addressed how else, in 2024, the Air Force can accomplish delivery of the DD Form 214 *on* a member's DOS.

Petitioner's DD Form 214 Was Valid

Thus, we arrive at the key question: whether Petitioner's DD Form 214 was, as a matter of law, valid at 0845 on 3 April 2024. The Government argued—and the Trial Court concluded—that, as a matter of law, Petitioner's discharge certificate could not become valid before midnight following his ETS.[71] This conclusion is mistaken.

The Government's authority—and the Trial Court's ruling—that discharge cannot become effective before 2400 hours on a member's ETS rests almost entirely on *Williams*, 53 M.J. at 317. First, *Williams* is not an ETS case and is therefore nonbinding here. Second, even if it holds persuasive value, the Trial Court's wholesale application of *Williams* ignores key differences that make it grossly incongruent with the facts in Petitioner's case here.

In *Williams*, as better detailed in *United States v. Williams*, 51 M.J. 592, 595 (N-M Ct. Crim. App. 1999), the DD Form 214 was issued *ultra vires*, without the commander's approval, violating command intent. There was clear evidence that the commander acted with a view to trial before the certificate could self-execute on the member's DOS. This order of events contrasts starkly with Petitioner's case, where the discharge certificate was ratified with explicit command intent to discharge him before any such action.

[71] Attach. 3., at 41.

Additionally, *Williams* found that the Marine Corps regulation was silent on the precise moment of discharge, while the Air Force has DAFI 36-3211, para. 3.9.3., which clearly contemplates the moment a discharge becomes effective. Statutorily, discharge determinations are, by the very terms of Article 2, a service-specific inquiry for they are governed by the regulations of the Secretary concerned. DAFI 36-3211, para. 3.9.3., unlike the Marine Corps' regulation in *Williams*, provides clear instructions on when a discharge becomes effective.

Most critically, the N.M.C.C.A. observed in its opinion, with bold emphasis, that the discharge certificate in question stipulated that "**discharge was to take effect at 2359 on 15 January 1997** [sic]." *Williams*, 51 M.J. at 596. The court further noted in footnote 3 that "[t]he actual entry is 'SNM HAO EFF [servicemember home awaiting orders effective] 1630/961218 - 2359/970115.'" *Id.* In stark contrast, Petitioner's Request and Authorization for Separation, in Box 29, cited the default rules of Air Force regulations—"DAFI 36-3211"—as the authority for his separation.[72] There was no stipulation that discharge would take effect at 2400 hours. That C.A.A.F. upheld the N.M.C.C.A.'s findings in *Williams* is cited in a contextual vacuum; its application here is mistaken.

Command Intent Determines Validity

If anything, *Williams* reinforces the principle that command intent is central to the validity of a discharge certificate's execution. An unbroken line of C.A.A.F. decisions underscore the significance of command intent. For example, in *Nettles*, 74 M.J. at 291, the court held that early delivery of a discharge certificate

[72] *Id.*, at 3.

terminated jurisdiction because it aligned with command intent. Conversely, in *Harmon*, 63 M.J. at 101, the court found that informal early delivery of a certificate did not sever jurisdiction. Likewise, in *Melanson*, 53 M.J. 1, 4, the court ruled that early receipt of a duplicate discharge certificate did not terminate jurisdiction before the intended effective date. In *United States v. Batchelder*, premature delivery for administrative convenience was deemed ineffective in severing jurisdiction. *Id*. 41 M.J. 337, 339 (C.A.A.F. 1994). Finally, in *United States v. Garvin*, where a discharge certificate was mailed to the appellant against the intent of the discharge authority, the court held that his discharge was not effective. *Id*. 26 M.J. 194, 195 (C.M.A. 1988).

These cases, in synthesis, align with this Honorable Court's ruling in *Webb*—in discharge jurisprudence, command intent at the moment of discharge is key to determining the validity of a discharge certificate. Here, Petitioner's discharge certificate self-executed and was delivered in full accordance with authorized command intent by 0845 hours, 3 April 2024. In this 'chicken-or-the-egg' determination, command intent in the sequence of events is dispositive.

Our courts have never established a rigid rule that applies a universally fixed time to determine the moment of discharge. In *Howard*, 20 M.J. 353, the Court of Military Appeals addressed "the narrow question" of identifying the moment of discharge. *Id.* The appellant received his discharge certificate in the morning of 22 August 1984, completing all separation processes. *Id.* Later that day, his commander, believing discharge was effective only at midnight per Army regulations, attempted to revoke it after learning Howard was under investigation

for wrongful possession of a military identification card. *Id.* The court ruled that discharge became effective upon delivery of the discharge certificate, not at midnight, and since Howard had received his certificate and left the base before any action with a view to trial was initiated, the court-martial no longer had jurisdiction, despite his possession of the ID card. *Id.*

Ultimately, while commanders have the authority to discharge, once that action is triggered, they cannot 'unring the bell.' See also *United States v. Scott*, 29 C.M.R. 462, 464 (U.S. C.M.A. 1960) (holding that jurisdiction to try a Servicemember by court-martial terminates with the delivery of a valid discharge certificate, not—as the service regulation required—at midnight on the date of separation). Petitioner's case is even stronger than *Howard* and *Scott* because DAFI 36-3211, para. 3.9.3., does not set discharge, for UCMJ purposes, at midnight as the Army's regulation did in those cases. To the contrary, Air Force Instruction expressly provides for discharge to occur earlier, upon the satisfaction of the three enumerated requirements.

This case mirrors the facts in *Webb*, save for one critical distinction: timing. This difference explains why, in Petitioner's case—unlike in *Webb*—his discharge was properly authorized by 0845 hours. The facts here are even more favorable to Petitioner than those in *Vanderbush*, 47 M.J. at 58, where even though preferral and referral of charges occurred before discharge, the member was still separated because the command's intent clearly indicated that, despite those proceedings, the discharge should be effectuated.

It is for this reason that the Trial Court's reliance on the expiration date on Petitioner's CAC, his annotated pay, and initial date of enlistment[73] is mistaken. It disregards the most fundamental principles in military discharge jurisprudence—command's intent to discharge him and the clear provisions of DAFI 36-3211 that govern when a discharge becomes effective. In Petitioner's case, his commander intended to discharge him, no action was taken to attach court-martial jurisdiction before that time, and his discharge complied with Air Force regulations.

DAFI 36-3211, para. 3.9.3., Controls

The Government argued—and the Trial Court agreed—that separation is not "effective" until 2400 hours, and therefore, self-execution and constructive receipt of the DD Form 214 did not occur until 0001 on the day following the member's DOS.[74] Strikingly, the Government's response completely failed to address para. 3.9.3. of DAFI 36-3211. Instead, the Government cited the Total Force DD Form 214 Certificate of Release or Discharge from Active Duty Personnel Services Delivery (PSD) Guide, which states, "A signed DD Form 214 becomes official at midnight on the date of separation/document closeout date." However, contrary to the Government's interpretation,[75] the PSD Guide does not support its position.

The plain text of the Guide indicates that the document closes out *on* the DOS—not the day *after*.[76] As an elementary principle, the commencement of a new day—such as celebrating New Year's—begins at midnight. In this case, the

[73] *Id.*, at 41.
[74] *Id.*
[75] App. Ex. VII, at 21.
[76] *Id.*, at Attach 1.

document closeout occurred at midnight on 2–3 April 2024, not 3–4 April 2024.[77] To further clarify this, AFPC indeed confirmed that Petitioner's discharge certificate closed out at midnight on 2-3 April 2024. This is precisely why Petitioner's certificate was already electronically filed in his ARMS record on 3 April 2024.[78] Notwithstanding linguistic acrobatics, even the plain text of the PSD Guide confirms that Petitioner had an official DD Form 214 by 0845 hours on 3 April 2024.

Arguendo, even if the PSD Guide explicitly contradicted Petitioner's assertions, "it cannot override the terms of the higher level AFI." *Webb* 67 M.J. at 770 (holding that, where a PSD Guide contradicted the terms of the AFI, the AFI remained controlling). Discharge determinations are dictated by regulations promulgated by the Secretary concerned—not by the AFPC commander's Guide. Therefore, the Government's reliance on the PSD Guide is misplaced.

The Government also based its argument on DAFI 36-3202, para. 3.2.3., which authorizes AFPC to remove a DD Form 214 from a member's vMPF and ARMS record "if an issuing authority learns … that the airman, for whatever reason, will not separate on the effective date recorded in block 12b (separation date this period)."[79] This citation overlooks the fact that no provision in DAFI 36-3202, or any other Air Force regulation, permits AFPC personnel to do so after a member has been discharged. Allowing such authority would improperly transfer military recall powers to AFPC personnel, away from the Secretary of the Air Force or Convening Authorities.

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[77] Attach. 4.
[78] *Id*. and Attach 5.
[79] App. Ex. VII, at 25.

In fact, regulatory history strongly indicates that post-discharge annulments by AFPC are prohibited. DAFI 36-3211's predecessor, AFI 36-3208, contained a provision allowing for the rescission of voluntary separation approval when it was in the best interest of the Air Force. Specifically, it provided that "[d]ischarge authorities may withdraw an approved voluntary separation that has not been executed when reasons exist that make withdrawal in the best interest of the Air Force."[80] The Secretary's removal of this provision in DAFI 36-3211 implies, by *argumentum ex silentio*, a clear prohibition of post-issuance annulments. The Government's position ultimately called for the Trial Court to follow selective provisions of certain Air Force regulations (e.g., rescission of pre-executed discharge certificates and permissibility of involuntary ETS extensions), while simultaneously ignoring the binding instructions in DAFI 36-3211.

DAFI 36-3211: The Framework, Not a Restatement

The Trial Court, on the other hand, did acknowledge the text of DAFI 36-3211, para. 3.9.3., albeit it dismissed it as "simply re-stating the law outlined in 10 U.S.C. § 1168(a), the discussion under RCM 202(a), and relevant case law."[81] As a foundational principle, service regulations carry the force of law in discharge inquiries. *Christian*, 22 C.M.R. at 784. This principle is reinforced in *Webb*, where this Honorable Court held that Air Force regulations controlled the lawfulness of a discharge. Consequently, this Honorable Court is bound by the plain text of DAFI 36-3211, para. 3.9.3., which unequivocally states that, "for UCMJ

[80] App. Ex. VI, Attach. 15.
[81] Attach. 3., at 40.

purposes, separation is effective upon" the satisfactory completion of its enumerated requirements. The Trial Court's interpretation of para. 3.9.3. strays from basic rules of construction.

In para. 3.9.3. of DAFI 36-3211, the Secretary explicitly chose to differentiate the effective time of discharge for UCMJ purposes from other administrative purposes. The Secretary could have remained silent on the issue, allowing the Code, the Rules, and existing precedent to control, but instead made a deliberate decision to clarify this distinction. Furthermore, the Secretary could have set 2400 hours as the effective time for all discharges and simply ended the first clause of para. 3.9.3. with a period, but again, chose not to.

Thus, the key question is whether the second clause of para. 3.9.3. represents the Secretary's intent to (1) provide a clear and precise moment of discharge to ensure certainty, finality, and to aid commanders, prosecutors, courts, and members in determining UCMJ jurisdiction, as in this case, or (2) ambiguously, superfluously, and maladroitly suggest that, for UCMJ purposes, courts should defer to general principles of military discharge jurisprudence—which, of course, courts already know to do. The only plausible interpretation is the first.

The text in para. 3.9.3. is clear and unambiguous and should be interpreted as written. Absent a compelling reason to the contrary, clear and plain language must be given its ordinary meaning. Moreover, we must avoid an interpretation that renders the entire paragraph superfluous. This observation is compounded by the Trial Court's misapplication of *Williams*; if it were already the case that discharge is always effective at 2400 hours on a member's DOS, the first and second

clauses of para. 3.9.3. would simply restate in two different ways what existing case law already provides. So, what, then, was the good Secretary instructing us? Under the Trial Court's reading, why does the first clause end with a semicolon? Why does the second clause begin with "however," a conjunctive adverb that clearly functions as a transitional marker? And how does that distinctive "however" logically contrast its substance from the first clause?

The Trial Court's reading effectively adds nonexistent language, suggesting that discharge is effective administratively at 2400 hours, but for UCMJ purposes, it could extend longer until its requirements are met. These words were not published anywhere in para. 3.9.3., and we should not insert them where the plain text is already perfectly clear. The only plausible interpretation is that, in para. 3.9.3., the Secretary offered specific instructions to ensure certainty and finality in precisely these circumstances.

Regardless, it does not matter if this Honorable Court were to agree with the Trial Court's reading of para. 3.9.3. as a restatement of the law. With a correct understanding of the facts in *Williams* and adhering to *stare decisis* in the line of cases that compel consideration of command intent, Petitioner would certainly be deemed discharged. As noted *supra*, the requirements of 10 U.S.C. § 1168(a) are far less stringent than those outlined in DAFI 36-3211. Thus, the delivery of Petitioner's discharge certificate via email notification satisfies the lower statutory threshold, and the Trial Court's concerns about discrepancies in his final accounting of pay would certainly be irrelevant under this broader legal standard.

Misapplication of Reason and Policy

The Trial Court's default to the Government's conclusion of reason and preferred policy is mistaken. "If this were a question of first impression we might be persuaded by the eloquent arguments of government counsel. However,… [service regulations] should not be disregarded by a court except for cogent and compelling reasons." *Christian* 22 C.M.R. at 784. As noted *supra*, the Secretary's instructions are clear, unambiguous, and authorized by Congress. The Government's arguments bypasses both *stare decisis* and the regulation's plain language and does not meet the high threshold required under *Christian* to justify such a departure.

The Government argued,[82] and the Trial Court agreed,[83] that "the idea that a member's separation is effective, for purposes of the UCMJ, the moment they complete their final out-processing appointment would go against reason and policy," as employed under *Nettles*. Firstly, *Nettles* does not concern an Active-Duty member's ETS; it addresses discharge requirements for reservists. C.A.A.F. explicitly distinguished this at the outset of its analysis, noting there are "strong reasons for taking a different approach" in such cases. *Id.,* 74 M.J. at 291. The Trial Court's reliance on *Nettles* rests on *dicta* from an explicitly non-binding case.

Even if this Honorable Court finds the principles of *Nettles* persuasive, the Trial Court's application contravenes the actual holding and rationale in *Nettles*. As C.A.A.F. noted, "[t]he overarching interest implicated by… discharge

[82] App. Ex. VII, at 28.
[83] Attach. 3., at 43.

jurisprudence is the need -- of both servicemember and service -- to know with certainty and finality… when that status changes." *Id*., 74 M.J. at 291 (citing *Howard*, 20 M.J. 353, 354) (emphasizing the importance of pinpointing the moment of discharge, as it marks the exact point when full rights have been transferred). C.A.A.F. further elaborated that "certainty provides clear guideposts for prosecutors and commanders when taking actions with a view towards litigation (*thus preventing the waste of time and resources*). Certainty and finality are also important to the Servicemember, of course, so that he can guide his conduct with awareness of the potential (or not) for criminal liability under the UCMJ." *Id.* (emphasis added).

The Trial Court's conclusion that defaulting to 2400 hours achieves certainty and finality in cases where the separation time is unclear misinterprets the very rationale of *Nettles*. The purpose of *Nettles* is to protect an accused from ambiguous exposure to UCMJ jurisdiction. Instead, the Trial Court shifted those principles, using "certainty" to extend jurisdiction where the facts would indicate otherwise—precisely the outcome *Nettles* sought to avoid. If the Trial Court found para. 3.9.3. unhelpful, it should have construed it in Petitioner's favor. See also *United States v. Webb*, No. ACM 39904, 2021 CCA LEXIS 607, at *14 (A.F. Ct. Crim. App. 18 Nov, 2021) (that the rule of lenity, like the vagueness doctrine, protects individuals' rights to fair notice and requires ambiguities to be resolved in the defendant's favor) (internal quotation marks and citation omitted).

The Trial Court shared the Government's concern that it would "greatly strain"[84] the Air Force if the Air Force had to record each member's out-processing time for UCMJ purposes. This Honorable Court should find this argument utterly unconvincing. This prudent and *de minimis* clerical task is likely already completed when the DD Form 214 is filed in ARMS, the vMPF checklist is digitally signed, and the final pay worksheet is finalized. Regardless, it is a negligible burden that pales in comparison to the grave due process interests at stake. See *Toth v. Quarles*, 350 U.S. 11, 23, 76 (1955) (noting the preferred Constitutional safeguards that civilian jurisdiction offers). There is not a single provision of law or regulation that authorizes disregarding the UCMJ and the Secretary's clear instructions simply because it potentially calls for CSS personnel to notate yet one more checkbox.

The Trial Court's concern that "some members would be subject to jurisdiction later than others"[85] due to varying out-processing times overlooks the practical realities of Air Force separation. As a matter of law and policy, discharge cannot ever occur without ratification by an authorized command official. No Air Force member can unilaterally schedule an out-processing appointment to evade UCMJ jurisdiction. As current Air Force policy stands, a Final Records Review appointment cannot even be scheduled until the member's last day of service.[86] While an out-processing appointment can sometimes consummate a discharge, completing it does not, *ipso facto*, result in one.

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[84] App. Ex. VII, at 29.
[85] Attach. 3., at 43.
[86] App. Ex. VI, Attach. 1.

There is no legal or policy basis requiring all military members to separate simultaneously. Servicemembers have long separated at different times for various reasons, and this has never been seen as an issue of fairness, certainty, finality, reason, or policy. The courts in *Howard* and *Scott* clearly did not share this concern, as they neither relied on nor even raised it. The Trial Court's insistence, on the other hand, that discharge must occur at 0001 *after* a member's ETS disregards the core principles of discharge jurisprudence—command intent at the time of discharge and the Secretary's regulations. Ironically, in *Nettles*, C.A.A.F. focused extensively on command intent when it found the Air Force lacked *in personam* jurisdiction. *Id*. 74 M.J. at 292-93.

Ultimately, Petitioner seeks to honor precedent, not overturn it. Administrative convenience cannot override well established jurisprudence that discharge becomes effective upon statutory compliance, as defined by the service regulation and ratified by command intent. Petitioner's discharge was authorized and fully compliant with Air Force regulations at 0845 hours, 3 April 2024. A subsequent case of regret by the commander – absent a lawful recall – does not retroactively invalidate a discharge.

RELIEF SOUGHT

Petitioner respectfully requests this Honorable Court: (1) order an immediate stay of his ongoing court-martial proceedings pending resolution of this issue; and (2) order the trial court to dismiss the pending charge and its specification.

REQUEST FOR APPOINTMENT OF APPELLATE COUNSEL

Pursuant to Article 70(c)(1), UCMJ, Petitioner respectfully requests the appointment of appellate defense counsel to represent him in this matter.

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 Judge C[redacted] and the Government Trial and Appellate Division on 26 September 2024.

[redacted]

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APPENDIX – ATTACHMENTS

1. App. Ex. VI, Defense Motion to Dismiss for Lack of *In Personam* Jurisdiction, 6 Sep 24, 60 pages w/ 15 attachments.

2. App. Ex. VII, Government Response to Defense Motion, 13 Sep. 24, 13 pages w/ 4 attachments.

3. Trial Court's Ruling, 19 Sep. 24, 6 pages.

4. Email "When DD Form 214 Becomes Effective," 18 Sep. 24, 8 pages.

5. Email "Defense Telephonic Interview (US v Phipps)," 18 Sep. 24, 2 pages.

6. App Ex XIX: "Tracking 214 Issues," 12 Sep. 24, 2 pages.

7. Supplementary Affidavit, 18 Sep. 24, 1 page.

8. Defense Motion for Reconsideration, 24 Sep. 24, 4 pages.

9. Ruling on Defense Motion for Reconsideration, 26 Sep. 24, 2 pages.

Attachments:

1. vMPF Out-Processing Checklist, 2 Apr 24, 5 pages
2. Request and Authorization for Discharge, 6 Mar 24, 2 pages
3. DD Form 214 Worksheet, 8 Mar 24, 2 pages
4. Excerpt of ROI, 3 Apr 24, 4 pages
5. Final Accounting of Pay, 1 Apr 24, 1 page
6. AFPC Notification, 2 Apr 24, 2 pages
7. Final Records Review, 2 Apr 24, 1 page
8. DDRPM Notice, 3 Apr 24, 1 page
9. AF Form 3985, 3 Apr 24, 2 pages
10. AFPC Legal Coordination, 3 Apr 24, 4 pages
11. SJA Request, 3 Apr 24, 1 page
12. AFPC Notification of Voidance, 4 Apr 23, 1 page
13. Bank Account Summary, 26 Aug 24, 1 page
14. MFR, TSgt R[redacted], 29 Aug 24, 2 pages
15. Excerpt of AFI 36-3208, 9 Jul 24, para. 3.5.1., 1 page

CERTIFICATE OF SERVICE

I certify that I have served a true copy (via email) and (a redacted) electronic filing of the above motion on the Military Judge and Trial Counsel on 6 September 2024.

[redacted]

MENDEL TAUB, Capt, USAF
Defense Counsel