

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

Misc. Dkt. No. 2026-05

Malik J. ROBINSON

Staff Sergeant (E-5), U.S. Air Force, *Petitioner*

v.

UNITED STATES

Respondent

Petition for a New Trial Pursuant to Article 73, UCMJ

Decided 5 October 2026

Military Judge: Tyler B. Musselman (motions); Pilar G. Wennrich (motions and arraignment); Charles E. Weidie.

Sentence: Sentence adjudged on 4 August 2023 by SpCM convened at Joint Base Charleston, South Carolina. Sentence entered by military judge on 28 August 2023: Confinement for 131 days and reduction in pay grade to E-2.

For Petitioner: Captain Joshua L. Lopes, USAF; Mr. Dwight H. Sullivan, Esquire.

For Respondent: Major Heather R. Bezold, USAF; Mary Ellen Payne, Esquire.

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

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

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.3**

KINDNESS, Judge:

A special court-martial composed of officer members convicted Petitioner, contrary to his pleas, of one specification of malingering, in violation of Article 83, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 883; one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892; and one specification of false official statement, in violation of Article 107, UCMJ, 10 U.S.C. § 907.¹ Petitioner elected sentencing by a military judge, who sentenced him to confinement for 131 days and reduction to the grade of E-2. The convening authority took no action on the findings or sentence.

On 29 May 2024, Petitioner submitted a notice of direct appeal to this court pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A).² While pending our Article 66(d), UCMJ, review of Petitioner's case,³ on 30 April 2026, Petitioner filed with the Judge Advocate General of the Air Force a separate petition for a new trial pursuant to Article 73, UCMJ, 10 U.S.C. § 873, and Rule for Courts-Martial (R.C.M.) 1210(f)(2), based on newly discovered evidence. Pursuant to Article 73, UCMJ, the Judge Advocate General referred the petition to this court for action. After careful consideration, we find Petitioner has satisfied the high burden of demonstrating grounds for granting a new trial and we remand the case to the Judge Advocate General for corrective action as described in our decretal paragraph.

I. BACKGROUND⁴

A. Petitioner's Pretrial Conduct and Medical Treatment

Petitioner entered the United States Air Force on 1 July 2018, serving as an Administration Journeyman. After four years and one month of active duty service, Petitioner promoted to the rank of Staff Sergeant and embarked on an overseas assignment to Izmir Air Station (AS), a small military outpost in Turkey. In late July 2022, Petitioner reported experiencing suicidal ideations

¹ Unless otherwise noted, all references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

² *United States v. Robinson*, No. ACM 24044 (f rev).

³ On 6 June 2025, this court remanded Petitioner's case to the Chief Trial Judge, Air Force Trial Judiciary, for correction under R.C.M. 1112(d) to rectify inaudible portions of the trial audio recordings. After corrections to the record had been made, the case was re-docketed with this court on 18 July 2025. Petitioner filed his assignments of error brief with this court on 14 April 2026.

⁴ The filings and record of this petition include personal health information (PHI). This opinion touches on PHI only to the extent necessary to address Petitioner's claims for a new trial.

following a breakup with his stateside girlfriend and was sent to Incirlik Air Base (AB) for mental health treatment. This episode commenced many months of mental health treatment for Petitioner at multiple locations, by various medical providers, offering differing diagnostic assessments of his condition.

Petitioner was initially treated at Incirlik AB by a licensed clinical social worker, where he was described as exhibiting psychotic behaviors, including responding to internal stimuli, rocking back and forth, and suffering from non-linear thought. After experiencing an acute episode at the military medical facility at Incirlik AB, Petitioner was sent to a civilian medical facility located in Adana, Turkey, for evaluation. He was assessed at this facility as experiencing a bipolar manic episode with psychotic features. After being discharged from this civilian facility, Petitioner was transferred to a military medical facility at Landstuhl, Germany, for further assessment. While at Landstuhl, Petitioner did not display erratic behavior and was returned to Incirlik AB. Notably, the medical staff at Landstuhl reported concerns to Petitioner's command that he exhibited indicators of malingering.

When Petitioner returned to Incirlik AB, he met with the same clinical social worker he had met with previously, and she observed that his clinical appearance had improved. When questioned about his change in presentation, Petitioner stated that he had previously exaggerated his symptoms and denied being suicidal, as initially reported. Petitioner was then informed that he was being returned to Izmir AS to resume military duties. While Petitioner was sitting in a medical waiting room, he fled the medical facility on foot and was apprehended by military authorities near the installation gate. At this point, medical providers at Incirlik AB initiated a Medical Evaluation Board (MEB) for Petitioner and arranged for his transport to a civilian behavioral healthcare facility in San Antonio, Texas, for inpatient care. At the time of his departure from Incirlik AB, medical records indicate Petitioner was diagnosed with adjustment disorder with anxiety.

On 12 September 2022, Petitioner was admitted to a civilian healthcare center in San Antonio, Texas, where medical records indicate he was diagnosed with "major depressive disorder, recurrent severe, with psychosis." In October 2022, Petitioner transferred to the Wilford Hall Ambulatory Surgical Center at Lackland Air Force Base (AFB), Texas. There he awaited Permanent Change of Station (PCS) orders from Izmir AS, Turkey, to Joint Base (JB) Charleston, South Carolina.⁵ While being treated at Lackland AFB, his MEB continued to process.

⁵ Joint Base Charleston was redesignated on 10 August 2026 as Joint Base Lindsey Graham.

After some administrative delay, Petitioner was reassigned from Izmir AS, by way of Lackland AFB, to JB Charleston. Petitioner's transition to his new duty station did not go smoothly—he reported in late, he did not possess a military identification card, he did not comport with grooming standards, and he did not possess a complete uniform. Additionally, Petitioner arrived under the misconception that he would perform little or no duty while he awaited his medical separation from the Air Force. Conversely, his unit expected him to perform daily duties in the Medical Group. Finally, when Petitioner filed his travel voucher with the local comptroller, it was discovered that he had misused his government travel card to make personal expenditures while he was assigned temporary duty at Lackland AFB.⁶

On 19 December 2022, after his arrival at JB Charleston, Petitioner resumed routine care for an unspecified psychotic disorder. He participated in regular treatment team meetings with his military leadership and mental health providers; he held individual sessions with his psychiatrist, Dr. CB, and clinical psychologist, Dr. KR; and he participated in group therapy. When his attending psychiatrist met Petitioner for the first time, Dr. CB took note of Petitioner's poise, good mood, organized speech, and logical thought pattern—signs that seemed inconsistent with his medical history. Similarly, Dr. KR observed that Petitioner presented clearly and logically, noting his behavior seemed atypical of someone suffering from psychosis. Despite this inconsistency, Dr. CB and Dr. KR maintained Petitioner's diagnosis as unspecified psychosis.

Over a period of months, Dr. CB and Dr. KR revised their assessments of Petitioner's diagnosis based on their clinical observations. Consequently, on 22 February 2023, Petitioner was informed in a treatment team meeting that his diagnosis was being changed from bipolar disorder with psychosis to unspecified personality disorder with antisocial characteristics—a change that resulted in the termination of Petitioner's pending MEB. Petitioner expressed concern about the change in diagnosis and confronted his providers about the underlying reasoning, specifically protesting the potential loss of medical benefits and compensation derived from this change. These interactions caused Dr. CB to determine that Petitioner was malingering because he believed Petitioner demonstrated a motivation to feign mental illness to achieve secondary gain.

The next morning, Petitioner stormed over to the mental health clinic to demand a copy of Dr. CB's narrative summary changing his medical diagnosis.

⁶ These unauthorized credit card charges would later form the basis of a criminal charge for dereliction of duty, under Article 92, UCMJ, against Petitioner at his court-martial. Contrary to his plea, Petitioner was convicted of this offense.

He proceeded to the clinic despite being told over the telephone to wait for his medical appointment scheduled later that day. Petitioner encountered medical staff outside the facility, and they blocked his entry while he exhibited confrontational behavior for several minutes.⁷

Apart from Petitioner's ongoing mental health episodes, his unit leadership also asserted that he failed to perform satisfactorily when performing military duties. Evidence revealed that Petitioner lacked attention to detail, often sought to avoid duty or would leave work early, and was perceived as not being truthful with his leadership. On one occasion, Petitioner was accused of lying to his First Sergeant and immediate supervisor about being held "at gunpoint" after a fight ensued at the base gymnasium during a pick-up basketball game, prompting Petitioner to request being relieved of performing duty because of the mental strain the incident had caused him.⁸

On 17 March 2023, Petitioner was involuntarily committed to a civilian behavioral health facility in South Carolina for inpatient treatment after he expressed both suicidal and homicidal ideations toward coworkers. During inpatient treatment, his treating physician opined that Petitioner was mentally ill and should be involuntarily committed to outpatient treatment for exhibiting "psychotic, bizarre behavior." Ten days later, on 27 March 2023, Petitioner was released from the civilian behavioral health facility. The same day, his squadron commander ordered him into pretrial confinement at the Charleston Naval Consolidated Brig, where he remained until his court-martial commenced.

On 29 March 2023, the following offenses were referred to special court-martial against Petitioner: (1) one specification for malingering in violation of Article 83, UCMJ, 10 U.S.C. § 883; (2) one specification for willfully disobeying an order from a commissioned officer in violation of Article 90, UCMJ, 10 U.S.C. § 890; (3) two specifications for willfully disobeying a noncommissioned

⁷ This incident triggered Petitioner's command to administer an Article 15, UCMJ, 10 U.S.C. § 815, nonjudicial punishment, proceeding against Petitioner for feigning mental illness under Article 83, UCMJ, 10 U.S.C. § 883, and violating orders under Article 92, UCMJ, 10 U.S.C. § 892. Petitioner demanded trial by court-martial. This incident also served as the basis for several charges under Articles 90, 91, and 92, UCMJ, against Petitioner that were either withdrawn and dismissed by the Government before trial without prejudice, were dismissed by the military judge at trial pursuant to a R.C.M. 917 motion, or the panel members found him not guilty of the offense at trial. 10 U.S.C. §§ 890, 891, 892.

⁸ This assertion formed the basis for the charge and specifications referred against Petitioner for false official statement in violation of Article 107, UCMJ, 10 U.S.C. § 907. The panel members found Petitioner not guilty of making a false official statement to his First Sergeant (Charge V, Specification 1), but found him guilty of making a false official statement to his immediate supervisor (Charge V, Specification 2).

officer in violation of Article 91, UCMJ, 10 U.S.C. § 891; (4) two specifications for failing to obey a lawful order and dereliction of duty in violation of Article 92, UCMJ; and (5) two specifications for false official statement in violation of Article 107, UCMJ.

Based on Petitioner’s mental health history, on 30 April 2023, an examination under R.C.M. 706 was ordered to assess whether Petitioner was mentally responsible for the charged offenses and had the capacity to stand trial. On 9 June 2023, the board convened and determined that Petitioner met criteria for malingering; personality disorder unspecified; and adjustment disorder with mixed anxiety and depressed mood, but determined he did not suffer from a severe disease or defect. Additionally, the board found that Petitioner was competent to stand trial and was able to appreciate the nature, quality, and wrongfulness of his conduct at the time of the offenses.

B. Trial Proceedings

Petitioner’s court-martial was held between 31 July 2023 and 4 August 2023. To prove that he feigned mental derangement while in Turkey, Germany, Texas, and South Carolina, the Government presented, *inter alia*, extensive evidence through three psychiatric experts from JB Charleston, a stipulation of expected testimony from Petitioner’s attending clinical social worker at Incirlik AB, and three service members from Petitioner’s leadership team at JB Charleston. Dr. CB and Dr. KR both testified how Petitioner’s presentation in a clinical setting was incongruent with someone who suffered from psychosis because his speech and thought presentation were typically clear and logical, he communicated effectively, and was appropriately groomed. Dr. CB expressed concern for Petitioner’s failure to take prescribed medication or pursue a higher level of inpatient treatment, and cast doubt on the severity and veracity of Petitioner’s reported symptoms, like experiencing and responding to internal stimuli. The Government also introduced several medical records with entries where Petitioner had admitted to exaggerating or misrepresenting symptoms and where other providers had annotated concerns for malingering.⁹ To show that Petitioner was feigning symptoms to achieve secondary gain, the Senior Enlisted Leader and First Sergeant for the squadron testified about Petitioner’s continuous efforts to avoid going to work and to leave work early.

Petitioner’s trial defense counsel sought to counter this narrative by cross-examining the Government’s experts and introducing medical records to underscore the times that previous mental health providers had diagnosed Petitioner with severe mental conditions and to pinpoint where Petitioner had exhibited symptoms of psychosis, such as auditory hallucinations and paranoia.

⁹ These concerns often surfaced through medical notes to “r/o,” or rule out, malingering.

Trial defense counsel also revealed that Dr. CB and Dr. KR failed to conduct scientific testing to confirm or rule out whether Petitioner was malingering even though these tests were readily available and routinely applied in the field. Furthermore, trial defense counsel offered testimony from a work acquaintance from Izmir AS, who later served as Petitioner's escort to Incirlik AB, Landstuhl, and San Antonio, to share his lay observations of Petitioner's progressive mental and emotional decline. Finally, the Defense offered testimony from a forensic psychologist, Dr. RD, who emphasized the indicators of genuine mental illness in Petitioner's medical record, including the administration of antipsychotic medications, observations of rambling speech, emotional instability, disorganized behavior, delusional thoughts, paranoia, and hallucinations. Dr. RD also rebutted a key portion of the Government's experts' testimony by explaining that psychotic symptoms can be subtle and unfold over time. Dr. RD further expressed concern over the lack of professional rigor expended by Petitioner's clinical psychiatric team at JB Charleston to obtain a clearer diagnostic picture, including reviewing all medical records, interviewing friends and family members, talking to past treatment providers, and conducting scientific testing.

At the conclusion of the litigated trial, the panel members found Petitioner guilty of malingering in the continental United States, in violation of Article 83, UCMJ, but not guilty of malingering within the continents of Asia and Europe. He was also convicted of misusing his government travel card to pay for personal travel in violation of Article 92, UCMJ, and for making a false official statement to his immediate supervisor about being held at gunpoint at the base gymnasium in violation of Article 107, UCMJ. The panel members found Petitioner not guilty of the remaining charges, and the military judge sentenced him to 131 days' confinement and reduction to the paygrade of E-2. The military judge signed the entry of judgment on 28 August 2023.

C. Post-Trial

Shortly after his court-martial adjourned, on 28 August 2023, Petitioner was admitted for mental health treatment at a civilian health and wellness center in Charleston, South Carolina. While there, medical providers diagnosed Petitioner with schizophrenia unspecified and major depressive disorder. At the end of his treatment on 14 September 2023, Petitioner's diagnosis was revised to reflect unspecified psychosis.

On 22 September 2023, Petitioner was discharged from active duty in the United States Air Force.

On 29 March 2024, the Department of Veterans Affairs, Veterans Benefits Administration, officially adjudicated Petitioner's military disability claim and determined that he had a service-connected disability of schizophrenia,

resulting in a one hundred percent disability rating. This service-connected disability rating was retroactively applied to 23 September 2023.

On 30 April 2026, Petitioner timely filed the petition for a new trial currently before us, which we docketed on 1 May 2026. Hundreds of pages of supplemental medical records were submitted as part of this petition. These records show that by 5 October 2023, Petitioner had begun receiving treatment at the Veterans Affairs Medical Center in Charleston, South Carolina, after his military discharge. After a comprehensive diagnostic assessment and clinical behavioral treatment, Petitioner’s treating psychiatrist diagnosed him with schizophreniform disorder, likely schizophrenia, with auditory hallucination, anxiety, and depression.

The medical records submitted with this petition for a new trial indicate that Petitioner continued to struggle with mental illness long after his court-martial and discharge from the military. Treatment records from a civilian detention center in South Carolina show that on 4 January 2025, Petitioner was arrested on three counts of attempted murder, and assault and battery in the third degree for striking three women with his car in a McDonald’s parking lot because one of the victims wore a shirt that “triggered him.” Petitioner has remained in civilian pretrial incarceration for these allegations since January 2025 and has continued to receive extensive mental health treatment. Petitioner’s attending board certified forensic and general psychiatrist has observed Petitioner engage in behaviors emblematic of schizophrenia and he has been diagnosed with chronic schizophrenia with persistent hallucinations.

II. DISCUSSION

A. Law

R.C.M. 1210(f)(2) establishes the grounds for granting a new trial based on newly discovered evidence. To prevail under this standard, the petition must demonstrate:

- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2).

“Requests for a new trial . . . are generally disfavored, and are granted only if a manifest injustice would result absent a new trial . . .” *United States v.*

Leipart, No. ACM 39711, 2023 CCA LEXIS 39, at *56 (A.F. Ct. Crim. App. 26 Jan. 2023) (unpub. op.) (citing *United States v. Hull*, 70 M.J. 145, 152 (C.A.A.F. 2011)).

B. Analysis¹⁰

1. Was “new evidence” discovered after trial?

R.C.M. 1210(f)(2)(A) only permits evidence that was discovered *after* trial to constitute a basis for a new trial. Because of the extensive amount of mental health evidence that was introduced by the Government and the Defense at Petitioner’s trial through exhibits and testimony, we must determine whether the evidence submitted in the petition constitutes “new” evidence under the Rule or is simply an extension of the previously known and admitted evidence.¹¹

Petitioner attached 568 pages of documents to the appellate record to support his petition for a new trial. We turn our attention to Appendices A–E for the purpose of analyzing whether these records constitute new evidence. Petitioner’s trial concluded on 4 August 2023. By 23 August 2023, after trial and while still on active duty, Petitioner was admitted to another civilian behavioral health facility where he was treated until 14 September 2023. During this period of care, Petitioner was diagnosed by a civilian provider with unspecified psychosis and was prescribed an antipsychotic medication.

Petitioner completed his last day on active duty on 22 September 2023. By 5 October 2023, Petitioner had begun mental health treatment through the South Carolina Department of Veterans Affairs and was provisionally diagnosed with unspecified psychosis and treated with an antipsychotic medication. On 29 December 2023, his attending clinical psychiatrist modified Petitioner’s prior diagnosis (unspecified psychosis) to reflect schizophreniform

¹⁰ We embark on the following analysis without remanding this case to the Chief Trial Judge, Air Force Trial Judiciary, for additional factfinding pursuant to *United States v. DuBay*, 17 C.M.A. 147, 149 (C.M.A. 1967), because the post-trial affidavits and medical records submitted by Petitioner are factually adequate on their face to state a claim of legal error and the Government has not contested the factual underpinnings of these records. See *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997); Article 66(f)(3), UCMJ, 10 U.S.C. § 866(f)(3). Instead, the Government contests how these new facts should be interpreted through the legal framework set forth in Article 73, UCMJ, and R.C.M. 1210. Therefore, we interpret this controversy as a legal dispute between the parties rather than a factual disagreement.

¹¹ The Government’s opposition to the petition for a new trial treats the evidence submitted by Petitioner as new evidence, but contends that his new diagnoses probably would not have produced a substantially more favorable result.

disorder, likely schizophrenia, with auditory hallucination, anxiety, and depression.

Moreover, on 29 March 2024, the Department of Veterans Affairs, Veterans Benefits Administration, finalized its rating decision for Petitioner’s military service, covering the period between 26 June 2018 and 22 September 2023. According to this decision, Petitioner was found to have a service-connected disability for schizophrenia and was assigned a one hundred percent disability rating, retroactive to 23 September 2023—one day after his departure from active duty and 50 days after his court-martial adjourned. Consequently, although Petitioner’s official disability rating was not issued until over five months after Petitioner had separated from active duty, his service-connected disability—schizophrenia—was established within two months after his court-martial and was rooted in diagnoses, symptoms, and behaviors Petitioner exhibited while on active duty.

Based on these facts, we find that the disability decision establishing a service connection for schizophrenia from the Department of Veterans Affairs constitutes evidence that was discovered *after* trial. In reaching this decision, the Department considered many of the same treatment records of Petitioner that were in controversy at trial, but the holistic evaluation and decision affirming his schizophrenia disability was not rendered until after trial was complete. We also find that *new* evidence has been introduced of Petitioner exhibiting signs of and being diagnosed with forms of psychosis immediately after his trial and soon after he was discharged from the Air Force during his treatment periods at a civilian behavioral health facility in Charleston and the South Carolina Department of Veterans Affairs. Although this new evidence continues a circuitous pattern of mental health practitioners ascribing varying diagnoses, these new diagnoses stand on their own, were generated shortly after Petitioner’s trial after clinical observation, and coalesce around Petitioner exhibiting symptoms and behaviors indicative of severe mental illness.

Throughout trial, the Government forcefully sought to prove that Petitioner was feigning mental derangement to avoid military duty by discrediting the severity of his mental illness, including discrediting that he suffered from a malady such as schizophrenia. Yet, after trial, the sole Government agency responsible for the delivery of disability compensation for veterans with service-connected diseases and injuries determined that Petitioner qualified for one hundred percent disability due to schizophrenia. This agency determination directly contradicts the evidence that was presented by the Government at trial and, under these unique circumstances, constitutes new evidence. *See United States v. Harris*, 61 M.J. 391, 398–99 (C.A.A.F. 2005) (finding a post-trial mental health evaluation which demonstrated petitioner’s mental health condition was of greater severity than known at trial constituted new evidence and was grounds to grant a new trial); *United States v. Van Tassel*, 38 M.J. 91,

96–97 (C.M.A. 1993) (finding post-trial affidavits submitted by doctors who opined that petitioner’s mental health condition was more severe than known at trial constituted new evidence).

2. Could Petitioner have discovered this evidence at the time of trial in the exercise of due diligence?

The record shows that Petitioner’s trial defense counsel zealously pursued a strategy that directly challenged the malingering charge, *i.e.*, refuting that Petitioner was feigning mental derangement by establishing that he suffered from severe mental illness. Despite the Defense’s best efforts to research, understand, and present Petitioner’s mental health history in a light most advantageous to their client’s defense, they were limited by the varied, and sometimes competing, medical assessments that were rendered by providers leading up to trial. Additional efforts could not have uncovered this new evidence and counsel performed effectively with the facts and within the constraints that existed at that time. Therefore, we find this new evidence could not have been discovered by the Petitioner in the exercise of due diligence.

3. Would the newly discovered evidence probably produce a substantially more favorable result?

The last factor under R.C.M. 1210(f)(2)(C) requires this court to examine whether the new evidence is cumulative, credible, and material when determining the likelihood of producing a substantially more favorable result for an accused. *See United States v. Bacon*, 12 M.J. 489, 492 (C.M.A. 1982) (explaining the evidence in support of a petition for new trial may be judged in terms of credibility and materiality); *United States v. Dyer*, 16 M.J. 894, 895 (C.M.R. 1983) (reviewing the newly discovered evidence in terms of materiality and credibility); *United States v. Prescott*, Misc. Dkt. No. 2022-03, 2022 CCA LEXIS 343, at *12–15 (A.F. Ct. Crim. App 10 Jun. 2022) (unpub. op.) (examining a petition for new trial based on post-trial mental health information in terms of materiality). Although controverted evidence of Petitioner suffering from severe mental illness was introduced at trial, we do not find that the new evidence is cumulative. Instead, we find the evidence to be credible and material.

In terms of credibility, the evidence is relevant to disprove specific elements of the convicted offenses, the evidence was primarily produced for the purpose of medical diagnosis and treatment rather than in anticipation of litigation, and the medical records demonstrate clinical familiarity with Petitioner’s medical history and condition over a period of time. Moreover, the determination by the Department of Veterans Affairs comes from the Government agency charged with making final disability determinations for injuries and disabilities that are deemed connected to military service.

Next, the evidence is material. The crux of the Government’s case was that Petitioner feigned mental illness to avoid military duty. An independent governmental determination from the Department of Veterans Affairs contradicts an essential element of the offense of malingering and supports that Petitioner *was* suffering from severe mental illness during the charged timeframe. This new evidence does not simply chronicle a continuum of competing mental health diagnoses to collaterally attack adverse findings rendered below, nor does it merely impeach the testimony of the Government’s experts. This evidence undercuts the Government’s theory of criminality and deprived Petitioner of the opportunity to present a more clear-eyed defense, particularly when the Government’s case was anchored in the testimony from Dr. CB and Dr. KR. This conclusion is buttressed by the medical opinions rendered by medical professionals who treated Petitioner *after* his court-martial and separation from the Air Force. Moreover, the disability decision issued by the Department of Veterans Affairs annotated the underlying records which formed the basis of its decision, and a substantial portion of this information was rooted in Petitioner’s treatment records created before, during, and shortly after the charged timeframe. In light of the erratic and progressive nature of Petitioner’s particular mental health condition, the persistent nature of his post-trial mental health issues, and the post-trial continuity of care corroborating his mental illness, contrasted against Petitioner being convicted of faking the existence or severity of mental illness, this court finds that a new trial is warranted based on the unique facts of this case.

Our role is not to decree how the newly-discovered evidence affects our judgment of Petitioner’s case. *Dyer*, 16 M.J. at 896. Instead, “[o]ur inquiry is whether a significant chance existed that this evidence, as developed by a skilled counsel, could have induced a substantially more favorable result for [Petitioner].” *Id.* Believing as we do that the severity of Petitioner’s mental illness turned upon which expert and diagnosis the court members chose to believe, we find the new evidence would probably produce a substantially more favorable result for Petitioner. *Id.*; *Harris*, 61 M.J. at 397–98.

III. CONCLUSION

The petition for a new trial is **GRANTED**. Based on this decision, we do not address Petitioner’s pending assignments of error with this court under Article 66(b)(1), UCMJ, as these are now moot. The findings and the sentence

are **SET ASIDE** and the case is returned to The Judge Advocate General for remand to a convening authority who may order a new trial consistent with this opinion.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court