UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32722**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Jacob R. BENNETT	)	
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 7th day of February, 2023,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review.

The Special Panel in this matter shall be constituted as follows:

POSCH, TOM E., Colonel, Senior Appellate Military Judge
MERRIAM, ERIC P., Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **JACOB R. BENNETT,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 Case No. ACM S32722 Filed on: 7 April 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a first enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 60 days, which will end on 17 June 2022. The record of trial was forwarded this Court on 17 February 2022. As of 18 April 2022, 60 days will have elapsed. On the date requested, 120 days will have elapsed from the date this case was received by this Court.

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

Respectfully Submitted,

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

E-Mail: nicole.herbers@us.af.mil

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 7 April 2022.

NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

11 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JACOB R. BENNETT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32722 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 11 April 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM S32722**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Jacob R. BENNETT	)	**CHANGE**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of May, 2023,

ORDERED:

The record of trial in the above-styled matter is withdrawn from its earlier Special Panel assignment dated 7 February 2023 and is referred to a new Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
MERRIAM, ERIC, Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

SEAN J. SULLIVAN, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **JACOB R. BENNETT,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 Case No. ACM S32722 Filed on: 8 June 2022

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 17 July 2022. The case was docketed on 17 February 2022. From the date of docketing to the date of this filing, 111 days have elapsed. On the date requested, 150 days will have elapsed from the date this case was received by the Court.

On 30 December 2021, Appellant was tried by a special court-martial composed of a military judge alone at Wright-Patterson Air Force Base, Ohio. Consistent with his plea, Appellant was convicted of one charge and one specification in violation of Article 86, Uniform Code of Military Justice (UCMJ) and one charge and four specifications in violation of Article 112a, UCMJ. R. at 59. He was convicted of failure to go on divers occasions and wrongful use of cocaine on two separate dates, wrongful use of fentanyl, and wrongful use of marijuana. The specification under Charge III for child endangerment through culpable negligence was withdrawn and dismissed

with prejudice pursuant to the plea agreement. R. at 58 and 119. The military judge sentenced him to 100 days confinement on the Specification of Charge I, and 100 days on Specifications 1-4 of Charge II, to run concurrently, a reduction to the grade of E-1, and a bad conduct discharge. R. at 118. The convening authority took no action on the findings or the sentence. ROT, Vol. 1, Convening Authority Decision on Action dated 12 January 2022.

The record of trial consists of 14 prosecution exhibits, 3 defense exhibits, and 2 appellate exhibits; the transcript is 119 pages. The Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters as a Reservist. Counsel has reviewed Appellant's record of trial but has not yet finalized coordination with the Appellant on the matters to be raised. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully brief Appellant's case and advise Appellant regarding potential errors.

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

Respectfully Submitted,

NICOLE J. HERBERS
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 8 June 2022.

Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) JACOB R. BENNETT, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM S32722 Panel No. 2

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

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

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

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 8 June 2022.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Airman Basic (E-1) **JACOB R. BENNETT**, United States Air Force, *Appellant*	**MERITS BRIEF** Before Panel No. 2 No. ACM S32722 Filed on: 29 June 2022

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

Submission of Case without Specific Assignments of Error

The undersigned appellate defense counsel attests she has, on behalf of AB Jacob R. Bennett, Appellant, carefully examined the record of trial in this case. AB Bennett does not admit that the findings and sentence are correct in law and fact, but submits the case to this Honorable Court on its merits with no specific assignments of error.[1]

Pursuant to Rule 18.2 of this Court's Rules of Practice and Procedure, AB Bennett raises the issue in the attached Appendix A.

[1] AB Bennett has conformed this merits brief to the format in Appendix B of this Honorable Court's Rule of Practice and Procedure. AB Bennett understands this Court will exercise its independent "awesome, plenary, and de novo power" to review the entire record of this proceeding for factual and legal sufficiency, and for sentence propriety, and to "substitute its judgment" for that of the court below, as is provided for and required by Article 66(d), UCMJ, 10 U.S.C. §866(d) (2019)]. *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990); *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via electronic mail to the Court and served on the Appellate Government Division on 29 June 2022.

Respectfully submitted,

NICOLE J. HERBERS, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

APPENDIX A

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

AB BENNETT'S SENTENCE IS INAPPROPRIATELY SEVERE BASED ON THE MATTERS IN MITIGATION PRESENTED, WHICH INCLUDED INCREASING ANXIETY, DEPRESSION, AND PERSONAL STRUGGLES THAT BEGAN BEFORE, AND CONTINUED THROUGHOUT, THE CHARGED TIMEFRAME.

Standard of Review

The standard of review for sentence appropriateness is de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006); *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005).

Facts

AB Bennett was convicted, pursuant to his pleas, of failure to go on diverse occasions between on or about 4 October 2021 and on or about 19 October 2021 in violation of Article 86, Uniform Code of Military Justice (UCMJ) and of four specifications of drug abuse in violation of Article 112(a), UCMJ. R. at 59, Entry of Judgement (EOJ), ROT Vol. 1. The first drug use was on 18 September 2021. R. at 24. The failure to go specification spanned 4 October to 19 October 2021. R. at 18. The other three drug uses were on 9 October and 20 October 2021. R. at 29, 33, 38. The military judge sentenced AB Bennett to reduction in pay grade to E-1, confinement for 100 days, and a bad conduct discharge.[2] R. at 118.

During AB Bennett's sentencing case, the Defense submitted Defense Exhibit C, a treatment summary for AB Bennett from his treating psychologist. Defense Exhibit (DE) C.

[2] AB Bennett was sentenced to the minimum term of confinement pursuant to the plea agreement, which was 100 days per specification under Charge II, and 100 days confinement for the Specification under Charge I, to run concurrently. EOJ, ROT Vol. 1., Appellate Exhibit I.

AB Bennett sought treatment on 24 September 2021 due to worsening symptoms of depression and anxiety. *Id*. Six days later, 30 September 2021, AB Bennett returned for an acute visit because his depression and anxiety symptoms were manifesting in more pronounced ways—sleep disturbances resulting in tardiness. *Id*. At that appointment, he also reported non-suicidal self-injury in July 2021, thus his level of care was escalated to the Mental Health Center. *Id.* His appointment for 1 October 2021 was incorrectly scheduled, thus he had to wait an additional two weeks for service. *Id.* Once he was assessed on 13 October 2021, he was diagnosed with Adjustment Disorder with Mixed Anxiety and Depressed Mood. He participated in 5 sessions of combined psychotherapy and pharmacotherapy and had a record of treatment compliance. *Id.* AB Bennett was actively seeking mental health care from 24 September 2021 through the end of charged timeframe (20 October 2021).

On or about 18-19 September 2021, AB Bennett used cocaine with his then girlfriend, civilian K.J.. Prosecution Exhibit (PE) 1, page 2. AB Bennett failed to go to his appointed place of duty on 4 October, 5 October, 7 October, 8 October, 15 October, 18 October and 19 October 2021. *Id.* at 1. On 20 October 2021, AB Bennett used cocaine laced with Fentanyl. *Id.* at 2. Between 29 September and 20 October 2021, AB Bennett used marijuana. *Id.* at 3. There are three discrete acts of use of drugs, two uses of cocaine and one of marijuana. The use of Fentanyl is not a discrete use, but was laced in with the cocaine used on October 20, 2021. R. at 33.

The use of cocaine and Fentanyl giving rise to Specifications 3 and 4 of Charge II resulted in AB Bennett overdosing in the Walgreens parking lot. PE 3, R. at 30, 35. SMSgt B.S., the First Sergeant for AB Bennett's unit, attempted to contact AB Bennett over the phone after learning of the overdose. PE 6. AB Bennett sounded stressed on the phone with SMSgt B.S.; he was sobbing uncontrollably. *Id.* SMSgt B.S. then responded to AB Bennett's home for a welfare check. *Id.*

SMSgt B.S. observed AB Bennett with disheveled appearance, unsteadiness and he was somewhat incoherent. *Id.* It was clear to SMSgt B.S. that AB Bennett needed medical attention. *Id.* Instead, the unit got probable cause to search his blood, and ordered him to the medical facility for that purpose. *Id.* He was also held and placed immediately into pretrial confinement. *Id.* At this point, it was clear to the unit that AB Bennett was struggling with his responsibilities as a single father and junior airman, which manifested in his difficulty with finances, childcare arrangements, and timeliness due to oversleeping. PE 2, 10, 11, 13, and 14. SMSgt B.S. saw AB Bennett's home was in disarray and he could tell he was in distress and in need of medical attention on 20 October 2021. PE 6. Further, his Commander, Lt Col Nicole Schatz, testified that AB Bennett was moved duty sections because of family issues. R. at 103. She testified he was a single father, and he did not have daycare set up, so he was moved to Monday through Friday, normal business hours. *Id.* He was again moved sections. *Id.* She also testified he was having financial issues, so they referred him to Airman Family Readiness to work on a budget. *Id.* AB Bennett spoke at his unsworn where he noted that his girlfriend had taken off with his possessions in August of 2021 when he was at work, and he had to start over with himself and his young son while also paying regular bills. R. at 97-98. AB Bennett was not actually referred to mental health care, drug rehabilitation, ADAPT, nor any other supportive agency despite the unit's awareness of his drug involvement, tardiness, and home life disruptions. Lt Col Schatz testified she had started a command directed mental health referral but did not complete it. R. at 104. She did not complete a referral to ADAPT. R. at 104. Instead, AB Bennett was placed in pretrial confinement. R. at 107.

Law and Analysis

Appellate courts have not only the power, but also the independent duty, to consider the

appropriateness of adjudged sentences. *See United States v. Baker*, 29 M.J. 121, 123 (C.M.A. 1989). This Court may affirm only such findings and sentence as it finds correct in law and in fact and determines, on the basis of the entire record, should be approved. Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2019). Sentence appropriateness is assessed by considering the Appellant, the nature and seriousness of the offenses, the Appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015). It is a long held belief, than an accused who "commits criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than an accused who has no such excuse", thus evidence of an accused's background and character is relevant in sentencing. *See Loving v. United States*, 68 M.J. 1, 15 (C.A.A.F. 2009) (citing *Boyde v. California*, 494 U.S. 370, 382 (1990)).

A bad-conduct discharge, 100 days confinement, and reduction in pay grade to E-1 was inappropriately severe given the matters in mitigation and extenuation, which clearly documented mental health concerns, attempts to seek care, and no unit support for the underlying basis for his misconduct— poor coping for the increasing family/life stressors—which manifested in insomnia, depression, and anxiety.

The record documents anxiety and depression, which was manifesting in insomnia and as a result being late for work. DE C. The unit was aware of the family and life stressors AB Bennett was facing, yet as Lt Col Schatz testified, provided minimal support in the form a referral to a budget class and two switches in sections to assist with scheduling issues related to childcare. There was no completed referral to ADAPT or to Mental Health. There was no action taken after his first drug involvement, which was in August of 2021, when he was cited by civilian authorities for possession of marijuana. PE 8.

The context of the criminal acts of drug use and failure to go is central to crafting an appropriate sentence for AB Bennett. Sentence appropriateness is to be assessed utilizing all matters contained within the record of trial. *Snelling*, 14 M.J. at 268. An accused's mental health conditions, and to the extent the criminal conduct is attributable to those conditions, can lessen the culpability of the accused. *Loving*, 68 M.J. 1. AB Bennett had a multitude of significant life stressors and that he was not coping with them well—known to his unit—and for which they took no substantial or meaningful action outside of a change in duty section, referral to a budget class, Reprimands, and Pretrial Confinement. The Government, with all its resources, in August of 2021, when the Accused was left with nothing due to his girlfriend taking his possessions and when he was cited for possession of marijuana by civilian authorities, did not step in to assist AB Bennett. AB Bennett, instead, took the initiative in September 2021, after he knew his depression and anxiety was impacting his work, and sought mental health care. Even with those absences in September, and knowing his living situation, the Unit did not step in to de-escalate the situation. The charged timeframe is encompassed by his treatment for depression and anxiety, where he was admittedly not coping well and turned to illicit drugs. The matters in mitigation and extenuation presented outweighed the nature and severity of his conduct because his criminal conduct was within this period of mental health and personal life crisis, such that a punitive discharge is inappropriate in this case.

Given the matters presented in mitigation and extenuation, AB Bennett's underlying mental health disorders, lack of unit support early on when he was clearly struggling, his initiative in seeking support and complying with treatment (both in terms of regular attendance and medication compliance), the misconduct occurring within this time of mental health crisis, and his

young age[3]—twenty-three years at the time of the offenses—AB Bennett's adjudged sentence including a bad conduct discharge is inappropriately severe.

WHEREFORE, AB Bennett requests this Court exercise its authority under Article 66 to modify his sentence.

[3] *See* PE 12, providing AB Bennett's date of birth. The offenses occurred between on or about 16 September 2021 and on or about 20 October 2021. ROT Vol. 1, Charge Sheet.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES ANSWER TO ASSIGNMENT OF ERROR**
v.	)	No. ACM S32722
Airman (E-3) **JACOB R. BENNETT**, USAF, *Appellant.*	)	Before Panel No. 2 14 July 2022

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

Assignment of Error[1]

[WHETHER APPELLANT'S] SENTENCE IS INAPPROPRIATELY SEVERE BASED ON THE MATTERS IN MITIGATION PRESENTED, WHICH INCLUDED INCREASING ANXIETY, DEPRESSION, AND PERSONAL STRUGGLES THAT BEGAN BEFORE, AND CONTINUED THROUGHOUT, THE CHARGED TIMEFRAME.

Statement of the Case

Appellant offered a plea agreement (PA) where he would plead guilty to the Specification of Charge I. (App. Ex. I at 1.) This offense alleged that on multiple occasions Appellant failed to go to his appointed place of duty in violation of Article 86, Uniform Code of Military Justice (UCMJ). (ROT, Vol. 1, Charge Sheet at 1.) Appellant also offered to plead guilty to Charge II and its Specifications. (App. Ex. I at 1.) These specifications alleged that Appellant wrongfully used of controlled substances in violation of Article 112(a), UCMJ. (ROT, Vol. 1, Charge Sheet at 1-3.) In particular, Specifications 1 and 2 alleged that Appellant used cocaine in September and October 2021, respectively. (Id.) Specification 3 alleged that Appellant used fentanyl and Specification 4 alleged that Appellant used marijuana. (Id.) In exchange, the convening

[1] Raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

authority agreed to withdraw and dismiss the Specification of Charge III with prejudice.[2] (Id. at 1.)

The parties agreed that, for each offense, Appellant would be sentenced to concurrent terms of confinement between 100 and 180 days.[3] (App. Ex. I at 2.) There were no other limitations on punishment beyond those inherent in the forum and the charges themselves. (Id.) Appellant later entered guilty pleas consistent with the PA, and was convicted and sentenced by a military judge sitting as a special court-martial. The adjudged sentence was a bad conduct discharge, five concurrent terms of 100 days confinement, and reduction to E-1. (R. at 118.) He was given 71 days of pretrial confinement credit. (Id.)

Statement of Facts

Presentencing Evidence

The parties executed a stipulation of fact. (Pros. Ex. 1.) Appellant admitted that he failed to report for duty seven times – 4, 5, 7, 8, 15, 18, and 19 October 2021. (Id. at 1.) Each time Appellant "did not show until between 1000 hours and 1300 hours." (Id.) During his providence inquiry, Appellant elaborated, asserting that "most of the time" he was "just sleeping and [] would wake up and report in around between 10 or 1." (R. at 19.) On 15 October 2021, Appellant "told his supervisor that he was present for a[n] 0800 appointment at the Airman and

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[2] This Specification alleged child endangerment in violation of Article 119b, UCMJ.

[3] Appellant was charged with failing to go on divers occasions, embracing each of the seven times in October 2021 that he failed to report to work on time. The maximum confinement term for that single offense was one month. MCM, A12-1. For unknown reasons, the parties agreed that Appellant would be sentenced to confinement between 100 and 180 days. (App. Ex. I at 2.) And the military judge, consistent with the PA, sentenced Appellant to 100 days confinement for the same. (ROT, Vol. 1, Entry of Judgment.) This was improper, and this Court should disapprove the period of confinement for the Specification of Charge I that exceeded one month. *See* Article 66(d)(1)(A), UCMJ (explaining this "Court may affirm only . . . the sentence or such part or amount of the sentence, as the Court finds correct in law and fact . . . ")

Family Readiness [(A&FRC)], but he did not actually attend that scheduled appointment." (Pros. Ex. at 2.) Three days later, when Appellant again failed to report for work, members from his unit went to his residence to locate him and "found [Appellant] in the backseat of a vehicle (an Uber) in civilian clothes." (Id.) The next day, when Appellant was again not at his appointed place of duty, the unit could not locate him until around noon. (Id.) Appellant was at the base medical facility "attempting to get a COVID vaccine, despite previously [telling] his unit that he was fully vaccinated." (Id.)

Appellant also stipulated about facts surrounding his drug use. Regarding his first use of cocaine, Appellant stipulated that between 18 and 19 September 2021, Appellant "tried cocaine with his civilian girlfriend, [KJ]." (Id.) He "inhaled the cocaine and after using it he felt euphoric and more talkative than usual." (Id.) About three days later, members from Appellant's unit "completed a health and wellness check at [Appellant's] residence" because he "did not report to work and did not answer his phone after multiple attempts to contact him." (Id.) Appellant "answered the door in his pajamas and flip flops" and his "pupils were enlarged." (Id.) The home "was in disarray with trash strewn everywhere" and the unit representatives believed the house "smelled [of] burnt marijuana." (Id.) This triggered a search authorization for Appellant's bodily fluids, and the results showed 2,860 nanograms per milliliter (ng/mL) of a cocaine metabolite in his system. (Id.)

About one month later, on or about 20 October 2021, Appellant used cocaine and fentanyl. (Id.) Appellant "purchased what he believed to be normal cocaine from a civilian who approached his car while he was parked at the Walgreens" in Dayton, Ohio. (Id.) Appellant was in the car with his girlfriend and two-year-old son. (Id.) Appellant "tested" the substance before leaving the parking lot and, "Soon after, he became unresponsive." (Id. at 3.) Appellant's

girlfriend called 911, and the Dayton Police Department responded. (Id.) Appellant was "unresponsive in the driver's seat upon their arrival" and "8mg of Nalzone" was administered on to help Appellant regain consciousness. (Id.) News of this incident triggered a second search authorization and blood and urine samples were collected on 21 October 2021. The results showed 28,828 ng/mL of a cocaine metabolite in Appellant's urine. (Id.) Appellant also tested positive for fentanyl with 5 ng/mL in his system. (Id.)

Sometime between 29 September 2021 and 20 October 2021, Appellant also used marijuana. (Id.) He smoked a "joint" with his girlfriend in his home, which caused him to feel "hungry, lightheaded, and dizzy . . . " (Id.) 16 ng/mL of a marijuana metabolite was also present in the UA sample that Appellant provided on 21 October 2021. (Id.)

The government admitted more evidence about the charged offenses. First, there was a written statement from TSgt IG. (Pros. Ex. 2.) He described, among other things, Appellant's failure to "make his appointment" with A&FRC or "contact [] them in over a month." (Id. at 2.) Next, a Dayton Police incident report was admitted into evidence. (Pros. Ex. 3.) Described therein was Appellant's "overdose[]" in the Walgreens parking lot. (Id.) The government then provided the military judge with security camera footage from the Walgreens parking lot and body camera footage from a responding officer. (Pros. Exs. 4, 5.) Memorandums for record (MFR) from SMSgts BS and CG were admitted as Prosecution Exhibits 6 and 7, respectively. SMSgt BS described, among other things, Appellant's refusal to seek medical care following his overdose in the Walgreens parking lot. (Pros. Ex. 6 at 2.) SMSgt CG also described, among other things, Appellant's refusal of medical care. (Pros. Ex. 7 at 1-2.)

The government next admitted an incident report from the Woodville Police Department that documented Appellant's speeding and erratic driving on 18 August 2021. (Pros. Ex. 8 at 2.)

Appellant was seen "traveling at a high rate of speed" and then "slammed on the brakes, causing a loud squealing nose" that "put black rubber marks on the roadway." (Id.) Once the officer observed that Appellant's vehicle was missing a "visible license plate" he initiated a traffic stop. (Id.) Appellant provided consent to search his vehicle, and the officer "located a 1.4 gram baggie of marijuana in the trunk of the vehicle." (Id.) The police officer issued Appellant a citation for possession of marijuana. (Id.)

Prosecution Exhibit 9 was Appellant's recorded interview with security forces investigators and Prosecution Exhibit 10 was his written statement to these same individuals. The government also admitted Appellant's disciplinary history. Prosecution Exhibits 13 and 14 were Letters of Reprimand (LOR) that Appellant received for failing to go five times in September 2021. The government did not initially call any witnesses. (R. at 68.)

The defense admitted three exhibits. (Id. at 69.) Defense Exhibit A was an index of exhibits. Defense Exhibit B was Appellant's picture biography. And Defense Exhibit C was the "Treatment Summary" for Appellant. The mental health provider described Appellant receiving treatment for anxiety and depression in September and October 2021. The provider – writing in December 2021 – described Appellant's prognosis as "guarded" and opined that he would likely "require ongoing treatment in order for his symptoms to resolve." (Def. Ex. C at 2.)

Appellant also delivered an unsworn statement before the defense rested. (R. at 93-102.) Appellant used that forum to cast blame on his girlfriend for encouraging him to use cocaine, fentanyl, and marijuana. (R. at 98.) He faulted unit leadership for not referring him to the Air Force Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program immediately after he was under investigation for cocaine use, suggesting that prompt treatment would have prevented his later cocaine, fentanyl, and marijuana use. (R. at 99.)

The government called Appellant's commander, Lt Col NS, in rebuttal to describe efforts the unit took to accommodate Appellant. (Id. at 102-03.) She explained that Appellant was moved to a staff position to provide stability because he was a single father. (Id. at 103.) Appellant was having financial issues, so the unit referred him to the A&FRC to construct a budget. (Id. at 104.) And the unit also helped "with other services that came to light when [Appellant] needed it" such as issues with his vehicle. (Id.) As for Appellant's mental health and drug abuse, Lt Col NS was preparing a commander-directed mental health appointment when she learned that Appellant attended mental health services on his own. (Id.) She therefore elected to not direct mental health services. (Id.) She also noted on cross-examination that Appellant continued to have the ability to seek ADAPT services while in pretrial confinement but elected not to do so. (Id. at 107.)

Sentencing Arguments

The government argued for the maximum sentence permissible under the PA – a bad conduct discharge, 180 days confinement, two-thirds forfeitures for six months, reduction to E-1, and a reprimand. (Id. at 109.) When arguing for a bad conduct discharge, trial counsel asserted Appellant "didn't just fail to show up to work once, he failed to show up to work seven times . . . " (Id. at 109.) He then described efforts from the unit to locate Appellant whenever he failed to go, including one instance when they "found him in the backseat of a vehicle in civilian clothes." (Id. at 110.) The government also highlighted that, with respect to his cocaine use, Appellant bought and used the illicit substance in a Walgreens parking lot with his girlfriend and son in the car. (Id.) The government summarized: "The repetitive nature and necessity of punishing bad conduct warrants a Bad Conduct Discharge." (Id. at 111.)

The defense recommended the minimum amount of confinement permitted under the PA (i.e., 100 days) along with reduction to E-1 and a reprimand. (Id. at 112.) Trial defense counsel did not directly address the propriety of a bad conduct discharge, but did highlight that Appellant was convicted of using rather than introducing or distributing various controlled substances. (Id. at 114.) She also reminded the military judge of Appellant's mental health concerns. (Id.) Additionally, while trial defense conceded that Appellant "had repetitive and isolated bad conduct," she opined the unit "did not do enough to support him." (Id. at 115.)

Argument

APPELLANT'S SENTENCE WAS APPROPRIATE.

Standard of Review

Sentence appropriateness is reviewed de novo. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law and Argument

This Court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d), UCMJ. Courts "assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (internal citations omitted). Although this Court has broad discretion in determining whether a particular sentence is appropriate, it cannot engage in exercises of clemency. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010).

A bad conduct discharge "is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature." R.C.M. 1003(b)(8)(C).

In this case, Appellant was convicted of failing to report to work and using no fewer than three controlled substances. The former category of crimes were minor, as a punitive discharge was not an authorized punishment and confinement was limited to one month. MCM, Part V, para. 1(e) (defining "minor offenses" as "[o]rdinarily" those that do not authorize a dishonorable discharge or more than one-year confinement); MCM, A12-1. Even so, Appellant committed this crime seven times in short succession and the unit was required to expend time and effort to address his misconduct. Moreover, Appellant's record of service contained two LORs issued the previous month for the same crime, which reinforced the appropriateness of confinement for Appellant.

Appellant's four drug offenses were not minor. These were felony-level crimes for which the law authorized, among other things, five years confinement and a dishonorable discharge for each offense. MCM, A12-4. At trial and on appeal, Appellant attempted to cast blame on others for his intentional choice to use controlled substances in September and October 2021. This argument glosses over the fact that Appellant alone is responsible for his criminal conduct, and he committed acts for which the law imposes serious consequences. To that end, the facts surrounding Appellant's use of controlled substances show why a punitive discharge was appropriate. For instance, Appellant continued to abuse multiple drugs – cocaine, fentanyl, and marijuana – despite knowing he was already under investigation for misconduct. He also purchased and used drugs in a Walgreens parking lot while his son sat in the backseat of his car. A bad conduct discharge was not just authorized for Appellant's repeated and flagrant drug use, it was imminently justified.

These facts notwithstanding, Appellant asks this Court to disapprove the punitive discharge because, in his telling, the sentence "was inappropriately severe given the matters in

mitigation and extenuation" that "clearly documented mental health concerns, attempts to seek care, and no unit support for the underlying basis for his misconduct – poor coping for the increasing family/life stressors – which manifested in insomnia, depression, and anxiety." (App. A. at 4.) But these "arguments are ones already considered by the convening authority and military judge." United States v. Jackson, 2022 CCA LEXIS 309, at *24 (A.F. Ct. Crim. App. 25 May 2022) (unpub. op.) This Court has broad discretion to determine whether a particular sentence is appropriate, but is it not authorized to engage in exercises of clemency. Nerad, 69 M.J. at 146. Appellant raising the same arguments about extenuation and mitigation that were already considered by the sentencing authority when fashioning an appropriate sentence is tantamount to asking this Court for something it cannot do – grant clemency.

The bottom line is that Appellant providently pled guilty to intentional and repeated criminal acts. His use of cocaine, fentanyl, and marijuana were felony-level offenses. And the sentence – including the bad conduct discharge – was within the bounds of what was agreed upon by the parties in the PA. The United States therefore asks this Court to approve the adjudged sentence.

FOR THESE REASONS, the United States asks this Court to affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 14 July 2022.

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