IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 4 November 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 period of 60 days, which will end on 11 January 2023. The record of trial was docketed with this Court on 13 September 2022. On the date requested, 120 days will have elapsed from the date of docketing.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 November 2022.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

7 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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 7 November 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*,	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 4 January 2023

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 a second enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 10 February 2023. The record of trial was docketed with this Court on 13 September 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed from the date this case was docketed.

On 20 April 2022, consistent with his pleas, Appellant was convicted by a general court-martial at Fairchild Air Force Base, Washington, of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual conduct, in violation of Article 120, UCMJ. The military judge sentenced Appellant to a total confinement sentence of 16 months, to be reduced to the grade of E-1, to be reprimanded, and to be discharged from the service with a dishonorable discharge.

The record of trial consists of three volumes. The transcript is 133 pages. There are four

Prosecution exhibits, 16 Defense exhibits, four appellate exhibits, and five court exhibits. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Specifically, undersigned counsel is preparing to file a supplement to a petition for grant of review in the United States Court of Appeals for the Armed Forces that is currently due to be filed on January 10, 2023. *See United States v. Kim*, No. 23-0058. That case has docket priority over the instant case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 January 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

5 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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 5 January 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 3 February 2023

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 a third enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 12 March 2023. The record of trial was docketed with this Court on 13 September 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed from the date this case was docketed.

On 20 April 2022, consistent with his pleas, Appellant was convicted by a general court-martial at Fairchild Air Force Base, Washington, of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual conduct, in violation of Article 120, UCMJ. The military judge sentenced Appellant to a total confinement sentence of 16 months, to be reduced to the grade of E-1, to be reprimanded, and to be discharged from the service with a dishonorable discharge.

The record of trial consists of three volumes. The transcript is 133 pages. There are four

Prosecution exhibits, 16 Defense exhibits, four appellate exhibits, and five court exhibits. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete his review of Appellant's case. Specifically, undersigned counsel recently filed a supplement to a petition for grant of review in the United States Court of Appeals for the Armed Forces on 10 January 2023. *See United States v. Kim*, No. 23-0058. Undersigned counsel also recently filed a reply brief in this Court on 30 January 2023. *See United States v. Barnes*, ACM 40252. Additionally, undersigned counsel is detailed to *United States v. Welsh*, ACM S32719 (f rev), and *United State v. Sayers*, ACM 40142 (f rev). Finally, undersigned counsel is a reserve judge advocate who is not currently on orders.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 3 February 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

6 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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 6 February 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 5 March 2023

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 a third enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 11 April 2023. The record of trial was docketed with this Court on 13 September 2022. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed from the date this case was docketed.

On 20 April 2022, consistent with his pleas, Appellant was convicted by a general court-martial at Fairchild Air Force Base, Washington, of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual conduct, in violation of Article 120, UCMJ. The military judge sentenced Appellant to a total confinement sentence of 16 months, to be reduced to the grade of E-1, to be reprimanded, and to be discharged from the service with a dishonorable discharge.

The record of trial consists of three volumes. The transcript is 133 pages. There are four

Prosecution exhibits, 16 Defense exhibits, four appellate exhibits, and five court exhibits. Appellant is currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters. Specifically, undersigned counsel is detailed to *United States v. Welsh*, ACM S32719 (f rev), and *United State v. Sayers*, ACM 40142 (f rev). Those cases had docket priority over the Appellant's case, as those cases were on return from remand. Both cases recently have been submitted on return from remand, and thus, as a result, the Appellant's case will have docket priority. Moreover, undersigned counsel was also co-counsel on an answer to a writ-appeal petition for review, which was filed on 21 February 2023 in the United States Court of Appeals for the Armed Forces. *M.W. v. United States and Marshall R. Robinson*, No. 23-0104/AF.

Finally, undersigned counsel is a reserve judge advocate who is not currently on orders. Undersigned counsel has nearly completed his review of the record of trial, but will still need additional time to draft and complete the brief in this case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 March 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

6 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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 6 March 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 4 April 2023

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 a fifth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 11 May 2023. The record of trial was docketed with this Court on 13 September 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed from the date this case was docketed.

On 20 April 2022, consistent with his pleas, Appellant was convicted by a general court-martial at Fairchild Air Force Base, Washington, of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual conduct, in violation of Article 120, UCMJ. The military judge sentenced Appellant to a total confinement sentence of 16 months, to be reduced to the grade of E-1, to be reprimanded, and to be discharged from the service with a dishonorable discharge.

The record of trial consists of three volumes. The transcript is 133 pages. There are four

Prosecution exhibits, 16 Defense exhibits, four appellate exhibits, and five court exhibits. Appellant is no longer confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters. Specifically, undersigned counsel is detailed to *United States v. Welsh*, ACM S32719 (f rev), and *United States v. Sayers*, ACM 40142 (f rev). Those cases had docket priority over the Appellant's case, as those cases were on return from remand. Recently, this Court issued a decision in *United States v. Sayers*, ACM 40142 (f rev). Undersigned counsel has been busy reviewing that decision and determining whether any additional steps should be taken in that case. Moreover, undersigned counsel is detailed to *United States v. Barnes*, ACM 40252, which has docket priority over this case, although that case has already been submitted to this Court.

Finally, undersigned counsel is a reserve judge advocate who is not currently on orders. Undersigned counsel has nearly completed his review of the record of trial, but will still need additional time to draft and complete the brief in this case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 April 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

5 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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 5 April 2023.

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 40329**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Devontaye T. HARDEN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 4 April 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 7th day of April, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **11 May 2023**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court's Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.

FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*,	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force *Appellant*	)	No. ACM 40329 Filed on: 4 May 2023

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 a sixth enlargement of time to file an Assignment of Errors (AOE). Appellant requests an enlargement period of 30 days, which will end on 10 June 2023. The record of trial was docketed with this Court on 13 September 2022. From the date of docketing to the present date, 233 days have elapsed. On the date requested, 270 days will have elapsed from the date this case was docketed.

On 20 April 2022, consistent with his pleas, Appellant was convicted by a general court-martial at Fairchild Air Force Base, Washington, of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual conduct, in violation of Article 120, UCMJ. The military judge sentenced Appellant to a total confinement sentence of 16 months, to be reduced to the grade of E-1, to be reprimanded, and to be discharged from the service with a dishonorable discharge.

The record of trial consists of three volumes. The transcript is 133 pages. There are four

Prosecution exhibits, 16 Defense exhibits, four appellate exhibits, and five court exhibits. Appellant is no longer confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters. Specifically, undersigned counsel is detailed to *United States v. Welsh*, ACM S32719 (f rev), and *United States v. Sayers*, ACM 40142 (f rev). Those cases had docket priority over the Appellant's case, as those cases were on return from remand. Recently, this Court issued a decision in *United States v. Welsh*, ACM S32719 (f rev) and in *United States v. Sayers*, ACM 40142 (f rev). Undersigned counsel has been busy reviewing those decisions and determining whether any additional steps should be taken in those cases. Moreover, undersigned counsel is detailed to *United States v. Barnes*, ACM 40252, which has docket priority over this case, although that case has already been submitted to this Court.

Undersigned counsel has discussed this specific request with the Appellant. Specifically, (1) undersigned counsel has advised the Appellant of his right to a timely appeal; (2) undersigned counsel advised Appellant about this specific request for an enlargement of time, and (3) the Appellant agrees with the request for the enlargement of time.

Finally, undersigned counsel is a reserve judge advocate who is not currently on orders. Undersigned counsel has completed his review of the record of trial, but will still need additional time to finalize completion of the brief in this case. Undersigned counsel anticipates that no further enlargements of time should be necessary subsequent to this request.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 4 May 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

5 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEVONTAYE T. HARDEN, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40329 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.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
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 5 May 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* *v.* Senior Airman (E-4) **DEVONTAYE T. HARDEN**, United States Air Force, *Appellant*	**MERITS BRIEF** Before Panel No. 2 No. ACM 40329 Filed on: 12 June 2023

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 he has, on behalf of Senior Airman (SrA) Devontaye T. Harden, Appellant, carefully examined the record of trial in this case. SrA Harden 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, SrA Harden raises two issues in the attached Appendix A.

[1] SrA Harden has conformed this merits brief to the format in Appendix B of this Honorable Court's Rule of Practice and Procedure. SrA Harden 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(c), UCMJ, 10 U.S.C. §866(c) (2012) [now 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,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

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 12 June 2023.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
AF/JAJA
United States Air Force

APPENDIX A

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

I.

TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING PRESENTENCING ARGUMENTS BY CLAIMING SENIOR AIRMAN HARDEN HAD LOW REHABILITATIVE POTENTIAL WHERE NO EVIDENCE OF THE LACK OF REHABILITATIVE POTENTIAL WAS PRESENTED AND BY IMPROPERLY LINKING SENIOR AIRMAN HARDEN'S REHABILITATIVE POTENTIAL SOLELY TO THE SEVERITY AND NATURE OF THE OFFENSES IN VIOLATION OF R.C.M. 1001(B)(5)(C).

Additional Facts

Consistent with his pleas, SrA Harden was convicted at a general court-martial by a military judge alone of one charge and four specifications of abusive sexual contact, in violation of Article 120, Uniform Code of Military Justice (UCMJ), and one additional charge and one specification of abusive sexual contact, in violation of Article 120, UCMJ. Volume (Vol.) 1, Record of Trial (ROT), Entry of Judgment. The charges related to five incidents where SrA Harden had touched or slapped the buttocks of five different women. *See* Prosecution Exhibit (Pros. Ex.) 1.

After accepting SrA Harden's guilty plea, the military judge began presentencing proceedings. The government's presentencing case was limited to the introduction of four exhibits: (1) a stipulation of fact, (2) SrA Harden's personal data sheet, (3) his Enlisted Performance Reports, and (4) his personal information file. Record (R.) at 21, 25, 85-92. The government did not present any witness testimony.

Despite not offering any testimony, during closing arguments, trial counsel argued against "the rehabilitative potential of the accused." R. at 122. Trial counsel acknowledged that SrA

Harden had pleaded guilty but argued that SrA Harden initially lied to the first police officer who spoke with him about the first incident and that he went on to commit similar offenses four more times. R. at 122. Trial counsel then argued that SrA Harden lied to the police again when he was pulled over in a traffic stop relating to one of the other incidents in January 2022 and when he was initially questioned by Air Force Office of Special Investigation agents. R. at 122.

Trial counsel then argued that SrA Harden needed time to rehabilitate in confinement and suggested that "30 months of confinement is sufficient." R. at 123. During the defense's closing arguments, defense counsel requested confinement time of no more than seven months. R. at 125. The military judge ultimately sentenced SrA Harden to serve 16 months of total confinement time. R. at 132.

Standard of Review

Improper argument is a question of law that this Court reviews de novo. *United States v. Marsh*, 70 M.J. 101, 104 (C.A.A.F. 2011) (citation omitted). Where no objection is made to the improper argument, this Court reviews for plain error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). The existence of plain error depends upon three things: "(1) there is error, (2) the error is clear or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019).

Law

"Trial prosecutorial misconduct is behavior by the prosecuting attorney that 'oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.'" *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005) (quoting *Berger v. United States*, 295 U.S. 78, 84 (1935)). Trial counsel is "prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence."

United States v. Schroder, 65 M.J. 49, 58 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014). To assess the prejudicial impact of the improper argument, this Court balances three factors: (1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184. Where improper argument occurs during sentencing, this Court must determine whether it can be confident that the appellant "was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (citation omitted). Further, "[i]n assessing prejudice, we look at the cumulative impact of any prosecutorial misconduct on the accused's substantial rights and the fairness and integrity of his trial." *Fletcher*, 62 M.J. at 184.

Rules for Courts-Martial (R.C.M.) 1001(b)(5) permits evidence of an accused's rehabilitative potential to be presented at presentencing. "Rehabilitative potential" is defined as an accused's "potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society." R.C.M. 1001(b)(5). Such evidence may be presented in the form of opinion testimony so long as the testifying witness possesses "sufficient information and knowledge about the accused to offer a rationally-based opinion that is helpful to the sentencing authority." R.C.M. 1001(b)(5)(A) and (B).

However, a witness' opinion "regarding the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." R.C.M. 1001(b)(5)(C). "[A]n opinion on rehabilitative potential based solely on the severity of the offenses [is] not helpful to a court-martial within the meaning of Mil. R. Evid. 701 . . . because it provides no rational insight into an individual's personal circumstances." *United*

States v. Kirk, 31 M.J. 84, 88 (C.M.A. 1990); *see also United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986).

Analysis

Trial counsel's presentencing argument concerning SrA Harden's rehabilitative potential constituted prejudicial error. Trial counsel in essence argued that SrA Harden had low rehabilitative potential, and thus needed a prolonged confinement. Counsel pointed to the fact that SrA Harden committed offenses on five different occasions and lied to law enforcement officers at the initial stages of the investigation of these incidents. R. at 122-23. This argument constituted clear error for at least two reasons.

First, trial counsel's argument about SrA Harden's rehabilitative potential was erroneous because the government presented no evidence about SrA Harden's rehabilitative potential during presentencing. Specifically, no opinion testimony about SrA Harden's rehabilitative potential was presented during presentencing. R.C.M. 1001(a)(1)(A) permits trial counsel to present "*evidence* of rehabilitative potential" during presentencing. (Emphasis added.) R.C.M. 1001(b)(5)(A) provides that "[t]rial counsel may present, by testimony or oral deposition in accordance with R.C.M. 702(g)(1), evidence in the form of opinions concerning the accused's previous performance as a servicemember and potential for rehabilitation."

But the government failed to present any witness testimony at all during presentencing, much less specific opinion testimony relating to SrA Harden's potential for rehabilitation. Without the admission of any evidence of SrA Harden's rehabilitative potential before the military judge, trial counsel erred in arguing about his rehabilitative potential and implicitly asserting that it was low. *See Schroder*, 65 M.J. at 58 (holding that trial counsel is "prohibited from injecting into argument irrelevant matters, such as personal opinions and facts not in evidence.").

Second, trial counsel's argument was erroneous because counsel's argument against SrA Harden's rehabilitative potential was based principally on the nature and severity of SrA Harden's offenses, in violation of R.C.M. 1001(b)(5)(C), rather than SrA Harden's personal circumstances. Opinion testimony concerning an accused's rehabilitative potential "must be based upon relevant information and knowledge possessed by the witness or deponent, and must relate to the accused's personal circumstances." R.C.M. 1001(b)(5)(C). "Relevant information and knowledge" includes, but is not limited to, "information and knowledge about the accused's character, performance of duty, moral fiber, determination to be rehabilitated, and nature and severity of the offense or offenses." R.C.M. 1001(b)(5)(A). However, "the severity or nature of the accused's offense or offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." R.C.M. 1001(b)(5)(C).

Trial counsel's argument concerning SrA Harden's rehabilitative potential was based solely on facts relating to the offenses themselves. Trial counsel argued SrA Harden's untruthfulness during the investigation of the offenses meant he had low rehabilitative potential, and thus needed a long period of confinement. R. at 122-23. More troubling, trial counsel argued against SrA Harden's rehabilitative potential because he committed offenses on multiple occasions. R. at 122. All these arguments related to the nature of SrA Harden's offense, in direct contravention of R.C.M. 1001(b)(5)(C). Notably, trial counsel did not cite to other information such as SrA Harden's character, performance of duty, or his moral fiber in support of his argument concerning rehabilitative potential. Rather, trial counsel's argument focused solely on facts relating to the actual charged offenses. Thus, trial counsel's improper argument constituted clear error.

Finally, trial counsel's improper presentencing argument resulted in material prejudice to

SrA Harden. In analyzing the *Fletcher* factors, the severity of trial counsel's improper argument was strong. Trial counsel repeatedly emphasized SrA Harden's rehabilitative potential in argument even though trial counsel had not presented any evidence on that matter. Trial counsel's presentencing argument was brief. R. at 119-24. As a result, the improper argument about SrA Harden's rehabilitative potential accounted for a significant potion of the overall argument. R. at 122-23. But most prejudicial to SrA Harden was that trial counsel's argument against his rehabilitative potential was limited to facts arising from the charged offenses—in contravention of R.C.M. 1001(b)(5).

The military judge did not address this misconduct with a curative instruction because no objection was made. Thus, although military judges are presumed to follow the law, the record leaves a presumption that the military judge considered this improper argument. Notably, the miliary judge sentenced SrA Harden to a total of 16 months confinement and a dishonorable discharge after the defense had asked for confinement of seven months, so the record strongly suggests that this improper argument could have affected the military judge's overall sentencing determination. This Court should address and rectify both trial counsel's clearly erroneous argument and the prejudicial effect that this improper argument had on SrA Harden's sentencing.

WHEREFORE, SrA Harden requests this Honorable Court reassess the sentence and set aside his dishonorable discharge.

II.

SENIOR AIRMAN HARDEN'S SENTENCE IS INAPPROPRIATELY SEVERE.

Additional Facts

The military judge sentenced SrA Harden to a reduction in pay grade to E-1, confinement for 16 months—given that all individual terms of confinement were directed to be served

concurrently—and a dishonorable discharge. R. at 132.

During SrA Harden's presentencing case, the defense presented numerous character letters from family, friends, and people who worked with him and knew him best to show the full picture of his character. For example, the defense presented a character letter from SrA Harden's mother, who explained that she had raised her son singlehandedly since he was three months old. Defense Exhibit (Def. Ex.) D. She also explained that while SrA Harden had made a mistake and accepted responsibility, he was a hard-working person and a loving father to his children. *Id*. SrA Harden's aunt provided another letter that noted that, despite the odds stacked against him as a child, he avoided the trouble that many youths in his situation become entangled with, and he went on to be a loving provider for his wife and children. Def. Ex. E. The defense also presented a character letter from Master Sergeant (MSgt) T.C., who met SrA Harden in a men's Bible Study group during a deployment. Def. Ex. G. MSgt T.C. explained that he got to know SrA Harden well. *Id*. He noted that although SrA Harden did not have a relationship with his own father, SrA Harden was a loving father to his children. *Id*. Finally, MSgt T.C. stated that despite SrA Harden's mistakes, he was a loving father and that his legal troubles had strengthened his faith. *Id*.

Standard of Review

The standard of review for sentence appropriateness is *de novo*. *United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023).

Law and Analysis

Appellate courts have "not only the power but also the independent duty to consider the appropriatenes" of adjudged sentences. *See United States v. Baker*, 28 M.J. 121, 123 (C.M.A. 1989). Under Article 66(d), UCMJ, this Court may only approve "the sentence or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of

the entire record, should be approved." Article 66(d)(1), UCMJ. "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (internal quotations and citations omitted). This Court's broad power to ensure a just sentence is distinct from the convening authority's clemency power to grant mercy. *See*, *e.g. United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). 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. *See United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

SrA Harden's sentence, in particular the dishonorable discharge, is inappropriately severe. SrA Harden admitted that his conduct relating to the charged offenses was unacceptable, stating that there "are no excuses for my actions, and I take full responsibility for them." Def. Ex. P at 2. SrA Harden pleaded guilty, admitted his wrongdoing, and apologized. R. at 17, 81, 114. His guilty plea should have been weighed in his favor in determining an appropriate sentence for him. Instead, the military judge imposed a dishonorable discharge, which was "greater than necessary" to promote justice under the unique circumstances of this case. Article 56(c), UCMJ.

Moreover, the character letters and other evidence presented by the defense demonstrated that SrA Harden was a committed Airman who served with distinction and had a history of volunteering to serve both in the Air Force and in community activities. Def. Ex. P. His character letters also detailed that SrA Harden faced obstacles during his childhood without a father and he disclosed in his unsworn statement that he even experienced a sexual assault. Def. Exs. D-H, R.

at 115. Despite these challenges, SrA Harden developed into loving father who cared for his children.

Accordingly, a punitive discharge is inappropriate here where it will unfairly characterize an otherwise successful service record. More importantly, SrA Harden's adjudged sentence will continue to burden him with the stigma of a punitive discharge in a manner that is greater than necessary, and which will remain a continuing obstacle as he tries to advance in his civilian life and to continue to provide for his young children. Given the matters presented in mitigation and extenuation, SrA Harden's adjudged sentence is inappropriately severe.

WHEREFORE, SrA Harden respectfully requests that this Honorable Court exercise its authority under Article 66, UCMJ, to modify his sentence, and at minimum, disapprove the imposition of a dishonorable discharge.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**UNITED STATES' MOTION FOR**
Appellee	)	**ENLARGEMENT OF TIME**
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40329
DEVONTAYE T. HARDEN	)	
United States Air Force	)	5 July 2023
Appellant	)	

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

Pursuant to Rule 23.3(m)(5)-(6) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time of 7 days, until 19 July 2023, to provide its answer to Appellant's Assignments of Error.

This case was docketed with the Court on 13 September 2022. Since docketing, Appellant has requested and been granted 6 enlargements of time. Appellant filed his Assignments of Error with this Court on 12 June 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 295 days have elapsed. As of the new requested filing date, 309 days will have elapsed.

There is good cause for an enlargement of time in this case. At this time, JAJG intends to assign this case to a JAJG Reservist, Maj Josh Austin, who will perform his annual tour beginning on 10 July 2023 2023. Due to PCS season, JAJG currently only have three active duty attorneys available to write briefs, two of which will be PCSing by the end of July. Each attorney is assigned at least one brief with higher priority than this brief. Maj Austin has no other pending briefs at this time, and this brief will be his first priority. Maj Austin has not

begun work on this case and will not be able to begin work until 10 July 2023 when he begins his annual tour.

For these reasons, the United States respectfully requests until 19 July 2023 to file its answer brief. In the event that the answer is completed before 19 July 2023, the United States will file promptly with this Court. The United States requests this Honorable Court grant this Motion for Enlargement of Time.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 July 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	ANSWER TO *Appellee,*
	)	ASSIGNMENTS OF ERROR
	)	
v.	)	Before Panel No. 2
	)	
Senior Airman (E-4)	)	No. ACM 40329
DEVONTAYE T. HARDEN	)	
United States Air Force	)	17 July 2023
Appellant.	)	

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

ISSUES PRESENTED

I.

WHETHER TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT DURING PRESENTENCING ARGUMENTS BY CLAIMING SENIOR AIRMAN HARDEN HAD LOW REHABILITATIVE POTENTIAL WHERE NO EVIDENCE OF THE LACK OF REHABILITATIVE POTENTIAL WAS PRESENTENTED AND BY IMPROPERLY LINKING SENIOR AIRMAN HARDEN'S REHABILITATIVE POTENTIAL SOLELY TO THE SEVERITY AND NATURE OF THE OFFENSES IN VIOLATION OF R.C.M. 1101(B)(5)(C)?[1]

II.

WHETHER SENIOR AIRMAN HARDEN'S SENTENCE IS INAPPROPRIATELY SEVERE?[2]

STATEMENT OF CASE

Senior Airman Devontaye Harden, Appellant, entered into a plea agreement wherein Appellant agreed to plead guilty to four specifications of abusive sexual contact under Charge I

[1] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).
[2] This issue is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

and to one specification of abusive sexual contact under the Additional Charge. (App. Ex. I.) The plea agreement provided a minimum term of confinement of 80 days and a maximum term of confinement of thirty months with confinement running concurrently, and no other limitations on sentence. (Id.) Appellant was convicted, in accordance with his pleas, of the charges and five specifications of abusive sexual contact. (*Entry of Judgment*, ROT, Vol. 1.) The military judge sentenced Appellant to a reduction to the grade of E-1, no forfeitures of pay and allowances with a waiver of automatic forfeitures for six months so those pay and allowances could be directed to the spouse and two dependent children of Appellant, a reprimand, 16 months confinement with 83 days of pretrial confinement credit, and a dishonorable discharge. (Id.) The convening authority took no action on the findings and approved the sentence, deferring the reduction in grade until the date of decision on action and deferring automatic forfeitures until the date of decision on action. (*Convening Authority Decision on Action*, ROT, Vol. 1.)

STATEMENT OF FACTS

Abusive Sexual Contact of J.O. – June 2021

Appellant entered active duty on 30 August 2016 and was assigned to the 92d Maintenance Squadron, Fairchild Air Force Base, Washington. (Pros. Ex. 2 at 1.) Appellant, while on paternity leave, unlawfully touched the buttocks of J.O. with his hand while inside a Walmart located in Poulsbo, WA on 9 June 2021. (Id.) Appellant walked the aisles of this Walmart while waiting for his vehicle to be serviced when he came upon J.O. (Id. at 2.). Appellant then walked past J.O. and slapped her buttocks with his hand. (Id.) Appellant admitted to slapping her buttocks with the intent to gratify his own sexual desires and after slapping J.O.'s buttocks, he turned around and gave J.O. a thumbs up stating, "you have a nice bottom," or words to that effect. (Id.) Appellant had never met or spoken to J.O. before this

incident and touched her buttocks without her permission or consent. (Id.) J.O. reported this incident to an employee in the Walmart who contacted the Poulsbo Police Department. (Id.) A police officer arrived at the Walmart, reviewed the surveillance footage, and then contacted Appellant by phone informing him that he would need to return to the Walmart to explain the incident. Appellant made a voluntary statement to the police and stated to the police officer, "I've never done anything like this before, it's never going to happen again." (Id.)

Abusive Sexual Contact of J.M. – September 2021

Appellant went to the Bowl and Pitcher Park hiking trail in Spokane, Washington on 24 September 2021. (Id). At some point on the trail Appellant saw J.M. (Id.) J.M. was hiking alone and isolated on the trail without anyone else in sight. (Id. at 3.) Appellant caught up to J.O and stated, "Ohh you are older than I thought. I find you attractive. If I guess your age within five years, then I get to give you a kiss." (Id.) J.M. declined Appellant's request and continued her hike. (Id.) Appellant continued to walk alongside J.M. for between a quarter and a half mile and then stated, "I've been walking a lot more than I wanted." (Id.) Appellant then turned and smacked J.M. on the buttocks with his hand and ran off. (Id.) Appellant had never met or spoken to J.M. prior to this incident and did not have her permission or consent to touch her buttocks. (Id.) Appellant smacked J.M.'s buttocks with the intent to gratify his own sexual desire. (Id.)

Abusive Sexual Contact of S.C. – December 2021

On 2 December 2021, Appellant went jogging on Fairchild Air Force Base and at some point, observed S.C., a military dependent, who was also jogging. (Id.) Appellant approached S.C. from behind as she was jogging on the sidewalk toward a neighborhood. (Id.) S.C. moved to the left to allow Appellant to pass. (Id.) As Appellant began to pass S.C., he reached out and

moved his hand across S.C.'s buttocks and then slapped her right buttocks and continued jogging. Appellant had never met or spoken to S.C. (Id.) Appellant touched S.C.'s buttocks without her permission or consent. (Id.) Appellant touched the buttocks of S.C. with the intent to gratify his own sexual desire. (Id.)

Abusive Sexual Contact of E.B. – January 2022

Appellant went jogging near Manito Park in Spokane, WA on 20 January 2022. (Id. at 4.) At some point while jogging, Appellant saw E.B., who was also jogging. (Id.) Appellant was wearing a hoodie and ran behind E.B. and as he went to pass, he grabbed E.B.'s buttocks. (Id.) Appellant grabbed E.B.'s buttocks with the intent to gratify his own sexual desire and had never met or spoken to her prior to this incident. (Id.) Appellant touched E.B.'s buttocks without her permission or consent. (Id.) After Appellant grabbed E.B.'s buttocks, he turned and said to her, "I'm sorry," to which she replied, "no you are not."

Abusive Sexual Contact of J.S – January 2022

On 20 January 2022, Appellant also observed 15-year-old J.S., who was walking to her high school near Manito Park where Appellant had gone to jog. (Id.) Appellant ran up, approaching J.S. from behind, and J.S. stepped to the side of the sidewalk to let Appellant pass. (Id.) While passing J.S., Appellant touched her buttocks and continued jogging. (Id.) J.S. told Spokane Police that Appellant had reached under her long jacket and backpack to grab her buttocks. (Id.) Appellant had never met or spoken to J.S. prior to this incident and did not know here age at the time of the incident. (Id.) Appellant touched the buttocks of J.S. without her permission or consent and did so to gratify his own sexual desire. (Id.)

Plea Colloquy

On 14 April 2022, the plea agreement that Appellant and his counsel signed on 8 April 2022 was approved. (App. Ex. I.) During the trial, the military judge conducted an in-depth inquiry on the record with Appellant to ensure Appellant understood the provisions of the plea agreement and had entered into the agreement voluntarily with the benefit of advice from counsel and with the belief that doing so was in his best interest. (R. at 59-81.) The military judge ultimately determined Appellant's plea was made voluntarily, with full knowledge of its meaning and effect. (Id. at 79.) The military judge also determined Appellant had knowingly, intelligently, and consciously waived the rights against self-incrimination. (Id.) Finally, the military judge advised Appellant that while he found his plea provident, Appellant could withdraw the guilty plea at any time before sentence was announced. (Id. at 71.) Appellant did not raise any objections to the terms of the plea agreement, including the confinement parameters, at trial. Appellant also never attempted to withdraw from the plea agreement.

The military judge closed the court and deliberated for nearly an hour before reopening the court and announcing the sentence. (R. at 131-132.) The maximum punishment for the offenses and specifications Appellant plead guilty to were a dishonorable discharge, a reduction to the rank of E-1, total forfeitures of pay and allowances, and 35 years confinement. (R. at. 55.) The military judge sentenced Appellant to be reprimanded, to be confined for 10 months for Specification 1 of Charge I, 12 months for Specification 2 of Charge I, 12 months for specification 3 of Charge 1, 12 months for Specification 4 of Charge I, and 16 months for the Specification of the Additional Charge (with confinement running concurrently), and to be dishonorably discharged from the service. (R. at 132.)

The trial judge indicated he would consider statements made by Appellant in the *Care*[3] inquiry when deciding a sentence. (R. at 92.) The trial judge also considered the unsworn statements of J.O., J.M., J.S., and Appellant along with the Prosecution, Defense, and Court Exhibits. (R. at 104-116.)

ARGUMENT

I.

NO ERROR OCCURRED WHEN THE GOVERNMENT TRIAL COUNSEL ARGUED APPELLANT NEEDED TIME TO REHABILITATE HIMSELF BASED ON THE FACTS SURROUNDING THE OFFENSES

Standard of Review

As trial defense counsel did not object to the complained-of comments, this Court reviews the issue for plain error. United States v. Marsh, 70 M.J. 101, 104 (C.A.A.F. 2011). To do so, an appellant "must prove the existence of error, that the error was plain or obvious, and that the error resulted in material prejudice to a substantial right." Id.

Law and Analysis

"As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." United States v. Bungert, 62 M.J. 346, 348 (C.A.A.F. 2006). To establish prejudice as it relates to allegations of improper argument, "we balance the severity of the improper argument, any measures by the military judge to cure the improper argument, and the evidence supporting the sentence." Marsh, 70 M.J. at 107. We do this to determine whether the "trial counsel's comments, taken as a whole, were so damaging that

[3] United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (C.M.A. 1969). The Care inquiry is the factual basis or the providence inquiry for the plea of guilt.

we cannot be confident that [the appellant] was sentenced on the basis of the evidence alone." Id. (alteration in original) (internal quotation marks omitted).

"When the issue of plain error involves a judge-alone trial, an appellant faces a particularly high hurdle." United States v. Robbins, 52 M.J. 455, 457 (C.A.A.F. 2000). This is because a "military judge is presumed to know the law and apply it correctly, [and] is presumed capable of filtering out inadmissible evidence . . . ." Id. Therefore, "plain error before a military judge sitting alone is rare indeed." Id.

In United States v. Lawrence, this Court found no plain or obvious error in the Prosecution's arguments concerning unit impact and rehabilitation potential. United States v. Lawrence, 2021 CCA LEXIS 459, *13-14 (A.F. Ct. Crim. App. 2021). The Court explained the law is clear that "counsel may argue evidence before the court and reasonable inferences from that evidence." Id. (Citing United States v. Spears, 32 M.J. 934, 935 (A.F.C.M.R. 1991). "A reasonable sentencing authority could infer from the evidence that (1) junior Airmen in Appellant's unit, including those he supervised, would have noticed Appellant's absences from work; (2) the reason Appellant missed work was related to his indulgence in drugs, e.g., 12 November 2019; and (3) Appellant's lack of apology to his commander or promise to his commander not to reoffend indicates low rehabilitative potential." Id. Unlike Lawrence, the trial counsel in this case, did request the trial judge to consider statements made by Appellant during the *Care* inquiry.

Appellant's assertion centers around a brief portion of trial counsel's argument:

> Finally, the rehabilitative potential of the accused. Now, a guilty plea may make it seem that the accused has taken full accountability for his actions, and he has and the government is grateful for that. But what is important to look at is what the history was before he took accountability. The accused lied to that first police officer that stopped to talk to him about the incident that happened at Walmart.

> He said it would never happen again and he understood the gravity of his actions and that he apologized to the victim. But then again he did it four more times.
>
> The accused also lied to the law enforcement officers when they pulled him over on 21 January 2022, asking him if he had been in Manito Park on the 20th, and the accused said, 'no, I wasn't there.' And then the accused lied again to AFOSI agents when they brought him in to ask him about the incidents that had been reported. Not until the accused realized after hours of questioning and saying that he was at other places, when he realized that the agents already knew that he was in those places, did he finally confess.
>
> This is a person who has lied, who is not afraid to lie, and whose actions speak louder than his words. He needs time. He needs time to rehabilitate so that this can never happen to another individual again. 30 months of confinement is sufficient.

(R. at 122-123.) Appellant erroneously argues that trial counsel can only argue rehabilitative potential in sentencing if opinion testimony is presented as to the rehabilitative potential of an accused during the presentencing proceedings. (App. Brief at 4-5.) Appellant cites Kirk and Horner, which provide that a witness' opinion evidence of rehabilitative potential may not be based solely on the severity of the offense and instead must be based upon relevant information and knowledge possessed by the witness of the accused's personal circumstances. United States v. Kirk, 31 M.J. 84, 88 (C.M.A. 1990); United States v. Horner, 22 M.J. 294 (C.M.A. 1986). These cases do not limit trial counsel's well settled ability to argue evidence before the court and reasonable inferences from that evidence. Spears, 32 M.J. 935. To do so would go against R.C.M. 1001(g) which provides that a court-martial may consider any evidence properly introduced on the merits before findings in sentencing including statements from the providence inquiry.

This Court implicitly recognized this distinction in Lawrence when it found no error in trial counsel's arguments surrounding rehabilitative potential that were based on

evidence presented before the findings and reasonable inferences from that evidence. Lawrence at 13-14. In this case, Appellant committed his first known abusive sexual contact on 9 June 2021. He informed a local civilian police officer that, "I've never done anything like this before, it's never going to happen again." (Pros. Ex. 1. at 2.) This statement shows Appellant knew his conduct was wrong, it shows his untruthfulness to the officer, and it shows his inability to not commit abuse sexual contact against women, since he engaged in this same conduct four more times over the next several months. It was more than reasonable for trial counsel to argue the repeated nature of Appellant's conduct showed a need for him to serve more confinement as he would need more time to rehabilitate. It is reasonable to infer that a person who knows something is wrong, but still yet continues to engage in that wrongful conduct will need more time to rehabilitate.

Appellant argues trial counsel did not cite to information of Appellant's "character" or his "moral fiber" and instead made rehabilitative potential arguments based solely on the facts relating to the charged offenses and argued against Appellant's rehabilitative potential because there were numerous offenses. (App. Br. at 8.) Appellant conflates a rule governing a witness's opinion as to rehabilitative potential and applies it to trial counsel's arguments on what amounts to an appropriate sentence. The Government acknowledges trial counsel could not try and bring in a witness's improper opinion of Appellant's rehabilitative potential through argument, but that is not what trial counsel did in this case. The trial counsel simply argued the evidence and reasonable inferences from the evidence. As explained in the previous paragraph, it was appropriate for trial counsel to argue the repeated nature of Appellant's conduct showed a need for him to serve more confinement as he would need more time to rehabilitate. Trial counsel

committed no error, plain or otherwise, by arguing the facts of the case and reasonable inferences based on the evidence.

Assuming, for purposes of argument, that this Court were to find trial counsel's argument to be in error and that this was clear error (which is not possible based upon the facts of this case and a review of the record), Appellant's claim would still fail as Appellant cannot prove a scintilla of prejudice – let alone establish any material prejudice to his substantial rights. Appellant claims the prejudice is that the trial judge heard trial counsel's inappropriate argument about Appellant's rehabilitation potential based on the evidence surrounding the offenses. (App. Br. at 9.) Material prejudice is present when a reviewing court determines that trial counsel's comments, taken as a whole, were so damaging that it could not be confident an appellant was sentenced based on the evidence alone. Appellant asserts the trial judge sentenced him based upon trial counsel's argument of rehabilitative potential from the evidence of the offenses. However, a military judge is presumed to filter out improper arguments and to base findings on the evidence, absent clear evidence to the contrary. United States v. Bousman, No. ACM 40174, 2023 CCA LEXIS 66, at *39 (A.F. Ct. Crim. App. Feb. 8, 2023). Appellant's argument is illogical – no prejudice, let alone material prejudice, could result from trial counsel arguing the evidence and reasonable inferences from that evidence. Appellant's claim of prosecutorial misconduct and improper arguments should be summarily denied.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE

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 Analysis

In determining whether a sentence is appropriate, the court examines the specific appellant, the nature and seriousness of the offenses, appellant's record of service, and all matters contained in the record of trial. United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009) (citing United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982)). Courts possess a great amount of discretion in evaluating whether a sentence is appropriate, however the court is not authorized to engage in exercises of clemency. United States v. Nerad, 69 M.J. 138, 148 (C.A.A.F. 2010).

While not dispositive on the issue of sentence appropriateness, "a pretrial agreement may be considered as part of the totality of circumstances surrounding a particular case." United States v. Harley, ACM 38896, 2017 CCA LEXIS 251, at *5 (A.F. Ct. Crim. App. 6 March 2017) (unpub. op.). United States v. Cron, 73 M.J. 718 (A.F. Ct. Crim. App. 2014), posed an analogous scenario to the current case, where the appellant had signed a pretrial agreement, was sentenced within the limitations of the pretrial agreement, and then on appeal asserted the adjudged sentence was inappropriately severe. In reaching its conclusion that relief was not warranted, this Court looked to the fact that the appellant did not raise any objection at trial and was represented by competent counsel. Id. at 729. Particularly important was that the military judge, after a lengthy inquiry with the appellant, found that appellant entered the agreement voluntarily and intelligently. Id. at 729-730. The Cron court also highlighted that the appellant

entered into the agreement to avoid the more severe authorized sentence than that bargained for in the agreement. Id. at 729.

Appellant's sentence in this case was not inappropriately severe due to the nature and seriousness of the offenses, the impact on the victims, and the fact the plea agreement the Appellant entered on the advice of counsel allowed for a more severe sentence than the sentence adjudged. Without the limitations of the plea agreement in the place, the maximum permissible punishment for Appellant's convictions was a reduction to E-1, total forfeitures, confinement for thirty-five years, and a dishonorable discharge. The sixteen months of confinement Appellant received is substantially less than the thirty-five years of confinement permitted as the maximum punishment under the law.

Sixteen months confinement and a dishonorable discharge is an appropriately severe punishment for Appellant given that he committed five separate abusive contacts within seven months. Appellant found isolated victims who he had never spoken to or met prior and touched their buttocks without their consent so he could gratify his sexual desires. One of his victims was a 15-year-old walking to school at 0730 with a backpack and a long jacket. J.O., J.M., J.S suffered significant harm due to Appellant's crimes as detailed in their victim impact statements – harm that will likely follow them their whole lives.

Appellant himself, acting under the advice of qualified counsel - the services of which he was satisfied with - decided it was in his best interest to bargain for and enter the plea with the adjudged sentence being a distinct possibility. The sixteen months of confinement and dishonorable discharge are far from being inappropriately severe.

Appellant argues that his sentence is inappropriately severe because Appellant pleaded guilty to the offenses, and a dishonorable discharge was greater than necessary to promote justice

in this case. (App. Br. at 11.) Appellant points to character letters presented on his behalf as defense exhibits during the presentencing proceeding. (Id.) It's important to note that these were matters in mitigation brought to the attention of the trial judge during sentencing. These character letters were considered in determining the sentence and weighed against the facts of the criminal offenses, the impact of the crimes had on the victims as well as other appropriate matters in aggravation. Appellant's arguments have already been judged and an appropriate sentence was crafted based on the whole of the case. Appellant asks this court to engage in an act of clemency, which is not permitted under the law. The sentence adjudged was not inappropriately severe.

CONCLUSION

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

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Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

MARY ELLEN PAYNE
Associate Chief
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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 17 J

Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Senior Airman (E-4) **DEVONTAYE T. HARDEN,** United States Air Force, *Appellant.*	**REPLY BRIEF** Before Panel No. 2 No. ACM 40329 Filed on: 24 July 2023

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

Appellant, Senior Airman (SrA) Devontaye T. Harden, by and through his undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this reply to the Appellee's answer of 17 July 2023 [hereinafter Gov. Ans.]. SrA Harden stands on the arguments in his initial brief, filed on 12 June 2023 [hereinafter App. Br.], but submits additional arguments for the issue listed below.

I.

TRIAL COUNSEL IMPROPERLY ARGUED THAT SENIOR AIRMAN HARDEN HAD LOW REHABILITATIVE POTENTIAL WHERE NO EVIDENCE OF THE LACK OF REHABILITATIVE POTENTIAL WAS PRESENTED AND BY IMPROPERLY LINKING SENIOR AIRMAN HARDEN'S REHABILITATIVE POTENTIAL SOLELY TO THE SEVERITY AND NATURE OF THE OFFENSES IN VIOLATION OF R.C.M. 1001(b)(5)(C)[1].

Trial counsel committed prosecutorial misconduct during argument. Specifically, trial counsel erred in arguing against SrA Harden's rehabilitative potential where (1) no evidence of

[1] This issue was raised personally by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), in Appellant's initial brief to this Court. Undersigned counsel is submitting this reply brief only on the basis of, and in support of, Appellant's *Grostefon* claim.

the lack of rehabilitative potential had been presented during presentencing[2] and (2) trial counsel improperly linked SrA Harden's rehabilitative potential to facts that related solely to the severity and nature of the offense, in violation of Rule for Courts-Martial (R.C.M.) 1001(b)(5)(C).

The Government's answer tries to deflect away from trial counsel's inappropriate argument, but these attempts fall flat. First, the Government asserts that no error occurred because R.C.M. 1001(g) permits a court-martial to consider any evidence properly introduced before findings, which included the providence inquiry. Gov. Ans. at 8. This argument misses the point. The uncontroverted fact that a court-martial may consider any evidence properly introduced on the merits at findings is a different issue from whether there was any evidence presented that was relevant to the issue of SrA Harden's rehabilitative potential that would support trial counsel's argument.

Notably, the only evidence the Government identifies to support trial counsel's arguments consists of facts that are derived directly from the charged offenses. The Government notes that when SrA Harden committed misconduct that led to his first charge of abusive sexual contact, he told the civilian police he had never done anything like that before and that he would never do it again. Gov. Ans. at 9. The Government then argues that because SrA Harden engaged in this conduct again and was charged for this conduct four more times, it was reasonable for trial counsel to argue against his rehabilitative potential. Gov. Ans. at 9. But the Government's argument cuts against its own position. These facts related directly to the circumstances of the charged offenses themselves. R.C.M. 1001(b)(5)(C) prohibits facts relating the nature of the offense, standing alone, to serve as the basis for an opinion relating to the accused's rehabilitative potential.

[2] Indeed, the only evidence the Government presented at presentencing was limited to four exhibits: (1) a stipulation of fact, (2) SrA Harden's personal data sheet, (3) his Enlisted Performance Reports, and (4) his personal information file. Record (R.) at 21, 25, 85-92.

The Government next argues that SrA Harden's position conflates a rule governing the limits of a witness's opinion as to rehabilitative potential (R.C.M. 1001(b)(5)(C)) with what trial counsel may argue "on what amounts to an appropriate sentence." Gov. Ans. at 9. But the Government fails to offer a principled reason why a witness would be prohibited from basing their opinion on an accused's rehabilitative potential solely on the nature and severity of the offense, while on the other hand, trial counsel would be permitted to make argument in presentencing against an accused's rehabilitative potential based solely on the nature and severity of the offense. Just as trial counsel did during presentencing arguments, the only evidence the Government identifies in the record relating to SrA Harden's rehabilitative potential consists of facts that relate solely to the nature and severity of his charged offense. Such evidence alone cannot form the basis for trial counsel to argue against an accused's rehabilitative potential, as trial counsel improperly did here. Otherwise, permitting such arguments would allow trial counsel to effectively make an end-run around the prohibitions of R.C.M. 1001(b)(5)(C).

Finally, in support of its position, the Government cites this Court's decision in *United States v. Lawrence*, No. ACM S32655, 2021 CCA LEXIS 459 (A.F. Ct. Crim. App. 14 Sept. 2021) (unpub. op), but that case is inapposite. In *Lawrence*, this Court held that there was a reasonable basis for trial counsel's argument that the accused lacked rehabilitative potential because the evidence in that case showed that the accused did not apologize to his commander or promise not to reoffend. *Id*. at *14-15. But unlike in SrA Harden's case, in *Lawrence*, the Government presented witness testimony in its presentencing case. *Id*. at *12. Specifically, in that case, the Government called the accused's squadron commander to testify about the accused's rehabilitative potential. *Id*.

Far from supporting the Government's position, *Lawrence* cuts against it. In *Lawrence*, the Government presented evidence on the accused's rehabilitative potential and trial counsel's argument that the accused in that case had low rehabilitative potential was based on evidence in the record that was not based principally on the severity and nature of the offense itself. In contrast here, the Government failed to present any specific evidence on SrA Harden's rehabilitative potential. Trial counsel's argument against SrA Harden's rehabilitative potential was based solely on the nature and severity of the charged conduct—namely, that SrA Harden committed, and was charged for, additional misconduct four times after he was first charged with abusive sexual contact. This argument was improper, constituted plain error, and requires SrA Harden's sentence to be reassessed.

WHEREFORE, SrA Harden requests this Honorable Court reassess the sentence and set aside his dishonorable discharge.

Respectfully submitted,

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

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 24 July 2023.

THOMAS R. GOVAN, JR., Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
United States Air Force

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40329**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Devontaye T. HARDEN	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 18th day of August, 2023,

ORDERED:

The Record of Trial in the above-styled matter is withdrawn from Panel 2 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MENDELSON, JAMIE L., Lieutenant Colonel, Appellate Military Judge
DOUGLAS, KRISTINE M., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal