IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 Case No. ACM 40273 Filed on: 31 May 2022

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

Pursuant to Rule 23.3(m)(1) and (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 23 August 2022. The record was docketed with this Court on 25 April 2022. On the date requested, 120 days will have elapsed from the date this case was docketed.

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

Respectfully Submitted,

//signedASK31May22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

GRANTED
3 JUN 2022

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 31 May 2022.

//signedASK31May22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

2 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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 2 June 2022.

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, 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) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SECOND)** Before Panel No. 2 Case No. ACM 40273 Filed on: 31 July 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 a second enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 22 September 2022. The record of trial was received by this division on 25 April 2022. From the date of docketing to this present date, 97 days have elapsed. On the date requested, 150 days will have elapsed from the date this case was received by the division.

The appellant was sentenced to 209 days confinement, a bad conduct discharge, and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article 117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined. Undersigned counsel is a reservist and due to the demands of his civilian job has been unable to complete a review of Appellant's case. Accordingly, an

GRANTED
2 Aug 2022

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,

//signedASK31Jul22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 31 July 2022.

//signedASK31Jul22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

1 August 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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 1 August 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) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (THIRD)** Before Panel No. 2 Case No. ACM 40273 Filed on: 11 September 2022

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

Pursuant to Rule 23.3(m)(3) and (4) 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. Undersigned counsel respectfully requests to withdraw the previously filed Motion for Enlargement of Time (Third), filed 31 August 2022, in order to edit the number of days that will have elapsed from the date the case was received by this division to the date requested that was incorrect in that filing. Appellant requests an enlargement for a period of 30 days, which will end on 22 October 2022. The record of trial was received by this division on 25 April 2022. From the date of docketing to this present date, 139 days have elapsed. On the date requested, 180 days will have elapsed from the date this case was received by the division.

e appellant was sentenced to 209 days confinement, a bad conduct , and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article

GRANTED
14 SEP 2022

117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined. Undersigned counsel is a reservist and due to the demands of his civilian job has been unable to complete a review of Appellant's 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,

//signedASK11Sep22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 11 September 2022.

//signedASK11Sep22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

13 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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 13 September 2022.

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, 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) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 Case No. ACM 40273 Filed on: 14 October 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 21 November 2022. The record of trial was received by this division on 25 April 2022. From the date of docketing to this present date, 172 days have elapsed. On the date requested, 210 days will have elapsed from the date this case was received by the division.

The appellant was sentenced to 209 days confinement, a bad conduct discharge, and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article 117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined.

GRANTED
17 Oct 2022

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has so far completed the initial review of the appellant's ROT. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of Indiana. Counsel is currently assigned approximately 40 cases as a federal prosecutor and has 2 other cases that are pending initial AOEs before this Court. None of the other pending AOEs take priority over this case but six civilian matters take priority.

1. *United States v. Roland*, Case Number 22-1799 – This is a pending appeal before the 7th Circuit Court of Appeals for a federal criminal case. Undersigned counsel is required to submit a response brief by 16 November 2022.

2. *United States v. Wall*, Cause Number 1:20-cr-39 – This is a federal criminal case set for sentencing on 21 October 2022.

3. *United States v. Brown*, Cause Number 1:20-cr-242 – This is a federal criminal case in the Southern District of Indiana that is set for sentencing on 26 October 2022.

4. *United States v. Johnson*, Cause Number 1:21-cr-251 – This is a federal criminal case in the Southern District of Indiana that is set for sentencing on 1 November 2022.

5. *United States v. Robinson*, Cause Number 1:22-cr-93 – This is a federal criminal case in the Southern District of Indiana set for sentencing on 2 November 2022.

6. *United States v. Williams*, Cause Number 1:19-cr-189 - This is a federal criminal case in the Southern District of Indiana set for sentencing on 3 November 2022.

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,

//signedASK14Oct22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 14 October 2022.

//signedASK14Oct22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

14 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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 14 October 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) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 2 Case No. ACM 40273 Filed on: 6 November 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on 21 December 2022. The record of trial was received by this division on 25 April 2022. From the date of docketing to this present date, 195 days have elapsed. On the date requested, 240 days will have elapsed from the date this case was received by the division.

The appellant was sentenced to 209 days confinement, a bad conduct discharge, and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article 117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters. Undersigned counsel has conducted a thorough review of the ROT but needs additional time to draft the brief. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United States Attorney in the Southern District of Indiana. Counsel is currently assigned approximately 40 cases as a federal prosecutor and has 4 other cases that are pending initial AOEs before this Court. None of the other pending AOEs take priority over this case but four civilian matters take priority.

1. *United States v. Robinson*, Cause Number 1:22-cr-93 – This is a federal criminal case in the Southern District of Indiana that is set for sentencing on 9 November 2022.

2. *United States v. Wall*, Cause Number 1:20-cr-39 – This is a federal criminal case in the Southern District of Indiana that is set for sentencing on 21 November 2022.

3. *United States v. Johnson*, Cause Number 1:21-cr-251 – This is a federal criminal case in the Southern District of Indiana that is set for sentencing on 21 November 2022.

4. *United States v. Pineda-Hernandez*, Cause Number 1:22-cv-1765 – This is a federal criminal case in the Southern District of Indiana that is undergoing litigation pursuant to Title 28 United States Code Section 2255. Undersigned counsel was ordered by the court to respond to a filing from the defendant on this matter by 12 December 2022.

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,

//signedASK6Nov22//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 6 November 2022.

//signedASK6Nov22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

8 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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 November 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 40273**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mori N. ESEMOTO	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 6 November 2022, 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 9th day of November, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **21 December 2022**.

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 his 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

ANTHONY F. ROCK, Maj, USAF
Acting Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* *v.* Airman Basic (E-1) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 Case No. ACM 40273 Filed on: 14 December 2022

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 30 days, which will end on **20 January 2023**. The record was docketed with this Court on 25 April 2022. From the date of docketing to this present date, 233 days have elapsed. On the date requested, 270 days will have elapsed from the date this case was received by the division.

The appellant was sentenced to 209 days confinement, a bad conduct discharge, and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article 117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to finish the brief. Undersigned counsel has conducted a thorough review of the ROT and identified potential issues to raise but needs additional time to complete a brief. Undersigned counsel is a reservist that works a full-time civilian job as an Assistant United

GRANTED
16 DEC 2022

States Attorney in the Southern District of Indiana. As a result, undersigned counsel can only attend to this matter while on military status which has been limited this past month. Appellant has been advised on undersigned counsel's civilian job and understands the limitations it places on how quickly he can complete the initial AOE. Appellant has further been advised on his right to a speedy appeal and consents to this EOT. Currently, undersigned counsel currently handles a civilian case load of 30 assigned cases and military case load of four other cases pending initial AOEs before this court. None of the other four cases pending AOEs or civilian matters currently take priority over this case. However, undersigned counsel submitted a brief in response to issues specified by the court in *United States v. Cole* (ACM 40189) on 6 December 2022 and was actively utilizing his limited time on military duty to work on that matter since the last request for an EOT in this case. Undersigned counsel is on military orders up until the date requested in this EOT and anticipates making significant progress on this case during that time.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete the brief.

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

Respectfully Submitted,

//signedASK14Dec22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 14 December 2022.

//signedASK14Dec22//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

15 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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 15 December 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) **MORI N. ESEMOTO,** United States Air Force, *Appellant.*	**MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 Case No. ACM 40273 Filed on: 12 January 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time to file an Assignment of Errors. Appellant requests an enlargement for a period of 14 days, which will end on **3 February 2023**. The record was docketed with this Court on 25 April 2022. From the date of docketing to this present date, 262 days have elapsed. On the date requested, 284 days will have elapsed from the date this case was received by the division.

The appellant was sentenced to 209 days confinement, a bad conduct discharge, and a reprimand for one charge and two specifications of violations of Article 112a of the UCMJ and one charge and one specification for violation of Article 117a of the UCMJ. The record of trial consists of 3 prosecution exhibits, no defense exhibits, and 4 appellate exhibits; the transcript is 95 pages. Appellant is not currently confined. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not been able to finish the brief. Undersigned counsel is actively working on the brief b[illegible] additional two weeks to complete it. No further extensions of time are anticip[illegible]one. Undersigned counsel is a reservist that works a full-time civilian job as

GRANTED
18 JAN 2023

an Assistant United States Attorney in the Southern District of Indiana. As a result, undersigned counsel can only attend to this matter while on military status. Appellant has been advised on undersigned counsel's civilian job and understands the limitations it places on how quickly he can complete the initial AOE. Appellant has further been advised on his right to a speedy appeal and consents to this EOT. Currently, undersigned counsel currently handles a civilian case load of 30 assigned cases and military case load of five other cases pending initial AOEs before this court. None of the other cases pending AOEs or civilian matters currently take priority over this case.

Accordingly, an enlargement of time is necessary to allow undersigned counsel to complete the brief.

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

Respectfully Submitted,

//signedASK12Jan23//

ABHISHEK S. KAMBLI
Major, USAFR
Appellate 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 12 January 2023.

//signedASK12Jan23//
ABHISHEK S. KAMBLI
Major, USAFR
Appellate Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

17 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman Basic (E-1) MORI N. ESEMOTO, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40273 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 17 January 2023.

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	)	**MERITS BRIEF**
Appellee,	)	
	)	Before Panel No. 2
v.	)	
	)	No. ACM 40273
Airman Basic (E-1)	)	
MORI N. ESEMOTO	)	2 February 2023
United States Air Force,	)	
Appellant	)	

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

Submission of Case Without Specific Assignments of Error

Undersigned appellate defense counsel attests he has, on behalf of AB Esemoto, carefully examined the record of trial in this case. Neither undersigned counsel nor AB Esemoto concede that the findings and sentence are correct in law and fact, but submit this case to the Honorable Court on its merits with no attorney raised assignments of error. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant raises two issues for this Honorable Court's consideration

Respectfully Submitted,

ABHISHEK S. KAMBLI, Maj, USAF
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 2 February 2023.

Respectfully submitted,

ABHISHEK S. KAMBLI, Maj, USAF
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), Appellant, through appellate defense counsel, personally requests that this Court consider the following matters:

I.

WHETHER AB ESEMOTO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PRESUMED WAIVER OF ARTICLE 13 MOTIONS IN HIS PLEA AGREEMENT?

II.

WHETHER AB ESEMOTO'S SENTENCE FOR TWO WRONGFUL USES OF A CONTROLLED SUBSTANCE OFFENSES AND ONE COUNT OF ARTICLE 117a IS UNDULY SEVERE?

Statement of the Case

On 2 February 2022, Airman Basic (AB) Mori N. Esemoto was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. In accordance with his pleas, the military judge found him guilty of one charge and two specifications of wrongful use of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice (UCMJ) and one charge and one specification of wrongful broadcast of a sexually explicit image, in violation of Article 117a, UCMJ. Record (R.) at 65. The military judge sentenced AB Esemoto to time served (209 days confinement), a reprimand, and a bad conduct discharge (BCD). R. at 94. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT) Vol. 1, Convening Authority Action.

Statement of Facts

AB Esemoto immigrated to this country from Cameroon at a young age and was raised by a single mother for much of that time. R. at 72. The area he grew up was a dangerous one where he witnessed a classmate shot while in high school. R. at 77. Despite those obstacles he still obtained a 3.61 grade point average in high school. R. at 73. Unfortunately, despite AB Esemoto's aptitude, college was out of reach financially. *Id.* When that realization hit, AB Esemoto decided to serve his country by joining the Air Force. R. at 74. He entered active duty on 27 October 2020 and was assigned to the 49th Wing at Holloman AFB, New Mexico. Prosecution Exhibit (Pros. Ex. 2).

AB Esemoto's tenure in the Air Force came with its challenges since he found out his father had cancer and felt himself isolated at a remote base. R. at 75.

Unfortunately, AB Esemoto turned to drugs to deal with these stressors and wrongfully broadcast a video of him engaging in a sexual act with another Airman. R. at 76-78. The wrongful broadcast of a sexually explicit image involved AB Esemoto sharing a video of himself in a consensual sexual encounter with a female Airman. R. at 78. The video disappeared after he shared it and there is no evidence that more than one Airman saw it. Pros. Ex. 1.

On 8 July 2021, as a result of his drug use and breaking COVID-19 isolation protocol, AB Esemoto was placed in pretrial confinement. Record of Trial (ROT) Vol. 2, Probable Cause Determination. Over the period of 209 days of pretrial confinement, AB Esemoto was moved four times. Pros. Ex. 2. After one of the transfers, there was a 56-day period where AB Esemoto did not receive his psychiatric medication because the confinement officers did not bring it. R. at 77. There is no record of AB Esemoto's trial defense counsel requesting his release from pretrial confinement after a military judge was assigned. There is also no record of AB Esemoto's trial defense counsel requesting a speedy trial in his case. The original trial date was for on 10 January 2022, but the government was not ready to proceed due to the victim unavailability on that date. Appellate Exhibit (App. Ex.) III. Trial defense counsel did not request an earlier date to address the issue and instead agreed to delay the trial until 31 January 2022. *Id.*

AB Esemoto was ready to plead guilty early in his case, and his trial defense counsel submitted a signed plea agreement to the government on 19 November 2021. App. Ex. II. However, the convening authority did not sign the plea agreement until

9 January 2022. *Id.* The plea agreement capped confinement at 9 months and did not allow for a dishonorable discharge as punishment. *Id.* It contained a general provision to waive all waivable motions but was silent as to Article 13 motions. *Id.*

On 2 February 2022, 209 days after he entered pretrial confinement, AB Esemoto pled guilty to the charges. R. at 11. The prosecution introduced (1) a stipulation of fact, (2) AB Esemoto's personal data sheet, and (3) AB Esemoto's disciplinary record. Pros. Ex. 1-3. AB Esemoto's trial defense counsel presented no evidence outside of a verbal unsworn statement. The victim presented a written and verbal impact statement. Court Ex. A. During the guilty plea inquiry, AB Esemoto's counsel stated that AB Esemoto was waiving his right to present an Article 13 motion for illegal pretrial punishment. R. at 55. The military judge sentenced AB Esemoto to time served (209 days confinement), a reprimand, and a bad conduct discharge. R. at 94.

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

I.

AB ESEMOTO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Standard of Review

Whether an appellant has received ineffective assistance of counsel at trial is a legal issue that this Court reviews de novo. *United States v. Scott*, 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend VI. The Supreme Court has held that this "right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). An attorney can "deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance." *Id.* To prevail on a claim of ineffective assistance of counsel, an appellant must show two things: (1) that the performance of defense counsel was deficient and (2) the error prejudiced the appellant. *Id.* at 687.

To establish deficient performance, an accused must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688 ("The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.* at 690. Reviewing courts must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance, and thus, an accused must overcome a presumption that the challenged action, "might be considered sound trial strategy." *Id.* at 689.

To establish prejudice, an accused must demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability

sufficient to undermine confidence in the outcome."). Critical here, "[p]rejudice may occur at the sentencing phase, even when trial defense counsel presents several character witnesses, if there is a reasonable probability that there would have been a different result if all available mitigating evidence had been exploited by the defense." *Scott*, 81 M.J. at 84–85 (internal citation omitted).

Analysis

Trial defense counsel presumed that they were required to waive AB Esemoto's right to file an Article 13 motion despite the fact that it was not an explicit term of the plea agreement. In addition, they failed to exercise due diligence in moving the case toward a speedy resolution. Because of these deficiencies, trial defense counsel placed AB Esemoto in a situation where he served more time in confinement that he otherwise would have been sentenced to.

A. Trial defense counsel were deficient for presuming an Article 13 waiver when it was not explicitly stated in the plea agreement and not moving AB Esemoto's case expeditiously.

AB Esemoto's trial defense counsel presumed an Article 13 waiver within the plea agreement when it simply contained a general provision to waive all waivable motions. By conceding waiver in a situation where AB Esemoto was not required to, trial defense counsel sacrificed his right to make a motion alleging illegal pretrial punishment. Article 13 waivers are a permissible term of a plea agreement. *See United States v. Felder*, 59 M.J. 444, 445-46 (C.A.A.F. 2004). Although they are permissible, CAAF has taken caution in how they view such waivers and past cases indicate those should be an explicit term of a plea agreement. *See generally id.* and

United States v. McFadyen, 51 M.J. 289 (C.A.A.F. 1999). This indicates it should not be a term that is generally included in the standard waive all waivable motions provision in a plea agreement. This view makes sense since Article 13 waivers can be ripe for abuse.

Trial defense counsel's presumptive waiver of an Article 13 motion was amplified by their lack of movement on the case while AB Esemoto was languishing in pretrial confinement. As an example, even though trial defense counsel believed that the government dragged its feet in getting the case to trial, they never filed a request for a speedy trial. In fact, during the docketing conference, trial defense counsel agreed to a delay of three weeks (due to the government's inability to proceed) despite AB Esemoto being in pretrial confinement. App. Ex. III. They could have asked for an earlier date, especially given that they submitted a signed plea a couple weeks after the docketing conference and presumably knew AB Esemoto intended to plead guilty. In addition, after the case was referred to a general court-martial, they had the opportunity to request AB Esemoto be released from pretrial confinement but never did. Finally, despite AB Esemoto being ready to plead guilty three months prior to his sentencing date, no effort was made to move up the trial date.

The combination of errors from trial defense counsel made it so that AB Esemoto was put in a position where he received a much longer sentence than he should have. That was deficient performance that was not based on any reasonable trial strategy.

B. Trial defense counsel's unnecessary Article 13 waiver and failure to move the case expeditiously prejudiced AB Esemoto.

Had trial defense counsel not unnecessarily waived AB Esemoto's Article 13 motion, there is a reasonable probability that he would have had success. First, the circumstances of his pretrial confinement were tenuous at best. He was placed into pretrial confinement for drug use and not following a COVID restriction (some of which were offenses he was not ultimately charged with). ROT Volume 2, Probable Cause Determination. The record indicates that it was not necessary for him to be in pretrial confinement to begin with. Then to aggravate matters, AB Esemoto was moved to four different confinement facilities over a period of 209 days and did not receive his medication for 56 days of his time in pretrial confinement. Pros. Ex. 2 and R. at 77. If such a motion was made, it would have certainly had a reasonable probability of success and could have resulted in a lower sentence. However, because trial defense counsel unnecessarily waived that motion he did not receive that benefit.

In addition, he would have certainly received a lower sentence had trial defense counsel moved the case expeditiously. Instead they did the following: (1) made no request for a speedy trial despite the government dragging its feet, (2) agreed to weeks long delay in the trial while AB Esemoto was in pretrial confinement, (3) did not file a motion for the military judge to release AB Esemoto from pretrial confinement and (4) made no effort to move up the trial date despite knowing that AB Esemoto was ready to plead guilty almost three months prior. It is highly likely the military judge would have given a lower sentence than what AB Esemoto received

had the trial occurred sooner than it did. Unfortunately, AB Esemoto sat in pretrial confinement because no effort was made to speed up the trial date.

Given these facts, AB Esemoto was prejudiced by trial defense counsel's failures. Since AB Esemoto already served his confinement, the only aspect of the sentence he is eligible for relief on is the bad conduct discharge. Under these circumstances, it is appropriate for the court to set aside that portion of the sentence.

WHEREFORE, AB Esemoto respectfully requests this Honorable Court disapprove the bad conduct discharge portion of his sentence.

II.

AB ESEMOTO'S SENTENCE WAS UNDULY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo* pursuant to its Article 66, UCMJ authority. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006).

Law

"Congress has vested responsibility for determining sentence appropriateness in the Courts of Criminal Appeals. The power to review a case for sentence appropriateness, which reflects the unique history and attributes of the military justice system, includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Durant*, 55 M.J. 258, 260 (C.A.A.F. 2001) (internal citations omitted). As the Court of Appeals for the Armed Forces has made clear, "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) (citations and internal quotations omitted). This provision "requires that the members of [the Courts of Criminal Appeals independently determine, in every case within [their] limited Article 66, U.C.M.J., jurisdiction, the sentence appropriateness of each case [they] affirm." *Id*. at 384-85 (alterations in original) (citations and internal quotations omitted).

In determining sentence appropriateness, this Court considers "the particular 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. Anderson*, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009). Further, Courts of Criminal Appeals have the discretion to consider and compare other court-martial sentences when that court is reviewing a case for sentence appropriateness and relative uniformity. *See United States v. Wacha*, 55 M.J. 266, 268 (C.A.A.F. 2001).

Analysis

AB Esemoto's sentence to 209 days of confinement, a reprimand and a bad conduct discharge is unduly severe when considering the nature and seriousness of the offense, his personal characteristics, and his record of service. *See Anderson*, 67 M.J. at 705.

Starting with the nature and seriousness of the offense, AB Esemoto pled guilty to one charge and two specifications of unlawful use of a controlled substance in violation of Article 112a, UCMJ along with one charge and one specification of wrongful broadcast of a sexually explicit image in violation of Article 117a, UCMJ. R. at 11. The drug use was certainly unlawful, but it was ultimately a case of using

marijuana and cocaine on one night. There was no evidence of distribution, manufacturing, or introducing it into a military installation. It was purely a use offense during a time when AB Esemoto was going through personal difficulties.

With the Article 117a offense, it was certainly wrong for AB Esemoto to post the image on Snapchat without the consent of the victim. However, the sentence he received overstates the seriousness of that offense. First, the sexual act and the recording of it was purely consensual as even the victim notes. Court Ex. A. Second, the broadcast was over Snapchat where the message disappeared shortly after it was posted and was only visible to individuals on his "friends" list. Pros Ex. 1. The evidence indicates that only one other person saw that image. *Id.* This was not a case where it was posted on a website where there was access to the public over an extended period.

Next, the personal characteristics of AB Esemoto make the sentence even more unduly severe. AB Esemoto clearly has strong personal characteristics as evidenced by his military test scores that were above 90 in every category outside of mechanical. Pros. Ex. 2. In addition, he received a 3.61 GPA when he was in high school. R. at 73. He achieved all this despite being the child of an immigrant single mother who grew up in an environment where violence was a regular occurrence. R. at 72. AB Esemoto certainly has the potential to rehabilitate and become a productive member of society. Finally, it should be noted that AB Esemoto not only pled guilty but wanted to do so at the earliest possible moment. He signed his plea agreement three months before the actual sentencing of his case (and was willing to even earlier) but due to factors beyond his control, his court-martial was not convened until later..

It should also be noted that the primary reason AB Esemoto received a 209 days' time served sentence is because the government failed to expeditiously move the case forward while AB Esemoto sat in pretrial confinement. AB Esemoto waived his speedy trial motion to pursue a plea agreement but the time it took for the case to get to trial is a factor that should be considered when determining whether his sentence was unduly severe (especially when the sentence was time served). AB Esemoto entered pretrial confinement on 8 July 2021. Pros. Ex. 2. However, charges were not even preferred against him until 26 August 2021. ROT Volume 1, Charge Sheet. After that, it took until 14 October 2021 to refer charges. *Id.* Within a month of referral, AB Esemoto submitted a signed plea agreement to the convening authority. App. Ex. II. However, the convening authority did not sign it until 9 January 2022. *Id.* The government, through its inaction, effectively created a situation where AB Esemoto served more time in confinement than he would have if they moved the case expeditiously. It was ultimately the government's choice to put AB Esemoto in pretrial confinement. They should have taken every step possible to move the case along expeditiously, but they did not. And AB Esemoto suffered as a result.

Given the whole context of the nature and seriousness of the offense, the record of trial, and AB Esemoto's personal characteristics, his sentence was unduly severe. *Anderson*, 67 M.J. at 705. The only reason that AB Esemoto received the sentence that he did was because he sat in pretrial confinement for a long period of time until he was given the opportunity to plead guilty. Unfortunately, the consequence of that was AB Esemoto receiving a time served sentence of 209 days. The crimes he pled

guilty to did not warrant anywhere near that amount of time in confinement. The only relief he can receive from this court is on the bad conduct discharge. Setting it aside would be appropriate in light of the excessive amount of jail time, AB Esemoto received.

WHEREFORE, AB Esemoto respectfully requests that this Honorable Court disapprove the bad conduct discharge portion of his sentence.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Airman Basic (E-1) **MORI N. ESEMOTO**, United States Air Force *Appellant*	)	No. ACM 40273
	)	21 February 2023

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests that it be given 14 days after this Court's receipt of a declaration or affidavit from both trial defense counsel to submit its answer so that it may incorporate statements provided by Appellant's trial defense counsel in response to the specified ineffective assistance of counsel issues.[1] Appellant filed his brief with this Court on 2 February 2023. This is the United States' first request for an enlargement of time. As of the date of this request, 302 days have elapsed since docketing.

There is good cause for the enlargement of time in this case. Appellant has raised, *inter alia*, one area in which he claims his trial defense counsel were ineffective. The United States cannot prepare its answer to the allegations of ineffective assistance of counsel without statements from trial defense counsel. An enlargement of time is necessary to ensure trial defense counsel have time to review the allegations before they draft and submit their statements to the Court, and to give the United States sufficient time to incorporate trial defense counsels' statements into its answer. Moreover, additional time is needed for drafting and supervisory

[1] The United States is filing a motion to compel a declaration or affidavit from Appellant's trial defense counsel contemporaneously with this motion.

review before the United States files it answer. Fourteen days is a reasonable request, given the nature of the allegation and the need to coordinate with two separate defense counsel to receive responsive declarations.

This is undersigned counsel's first priority case and the only case to which undersigned counsel is currently assigned. Undersigned counsel has begun to review the record of trial.

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

DEEPA M. PATEL, Maj, USAF
Appellate Government Counsel, Government Trial
and Appellate Operations Division
Military Justice and Discipline
United States Air Force

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 Appellate Defense Division on 21 February 2023.

DEEPA M. PATEL, Maj, USAF
Appellate Government Counsel, 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*	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS OR AFFIDAVITS**
v.	)	Before Panel No. 2
Airman Basic (E-1) **MORI N. ESEMOTO**, United States Air Force *Appellant*	)	No. ACM 40273
	)	21 February 2023

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

Pursuant to Rule 23.3(e) of this Honorable Court's Rules of Practice and Procedure, the United States hereby requests this Court to compel Appellant's trial defense counsel, Capt Kerry Mawn and then-Capt Nan Chen, to provide affidavits or declarations in response to Appellant's allegation of ineffective assistance (IAC) of counsel. Pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), in his assignments of error, Appellant claims he received ineffective assistance of counsel when his trial defense counsel presumed waiver of Article 13, UCMJ, motions during the course of his plea agreement. (App. Br. at 3.) Capt Mawn and Mr. Chen responded to undersigned counsel stating that they would only provide an affidavit or declaration by order by this Court. The government is requesting this court compel declarations from all three trial defense counsel.

To prepare an answer under the test set out in United States v. Polk,[1] 32 M.J. 150, 153 (C.M.A. 1991), the United States requests that this Court compel trial defense counsel to provide

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

a declaration or affidavit. A statement from each attorney is necessary because the record is insufficient to answer Appellant's IAC allegation as the record provides no information about trial defense counsels' strategic decisions as they relate to the failure to file an Article 13, UCMJ, motion. The record also contains no evidence as to what information was known to trial defense counsel that informed their decision not to file a motion. Thus, the United States requires statements from trial defense counsel to adequately respond to Appellant's brief. See United States v. Rose, 68 M.J. 236, 236 (C.A.A.F. 2009); United States v. Melson, 66 M.J. 346, 347 (C.A.A.F. 2008). In fact, this Court cannot grant Appellant's ineffective assistance of counsel claim without first obtaining statements from trial defense counsel. See Rose, 68 M.J. at 237; Melson, 66 M.J. at 347.

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

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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 21 February 2023.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40273**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mori N. ESEMOTO	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 2 February 2023, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, through appellate counsel, personally requested we consider whether Appellant's trial defense counsel were ineffective in that they presumed waiver of motions related to Article 13, Uniform Code of Military Justice, 10 U.S.C. § 813, as part of Appellant's plea agreement.

On 21 February 2023, the Government filed a Motion to Compel Declarations or Affidavits and contemporaneously filed a Motion for Enlargement of Time. The Government requests this court compel Appellant's trial defense counsel, Captain Kerry Mawn and then-Captain Nan Chen,* to provide affidavits or declarations in response to the claimed ineffective assistance of counsel. According to the Government, Appellant's trial defense counsel indicated they would only provide an affidavit or declaration upon order by this court. In the motion for enlargement of time, the Government requests 14 days after the court's receipt of declarations or affidavits to submit its answer. Appellant did not file a response to the motions.

The court has examined the claimed deficiencies and does not find good cause to compel affidavits or declarations in response to the claim. However, in light of the timing of the court's order, we find granting an enlargement of time appropriate.

Accordingly, after considering the Government's motions and the deficiencies alleged by Appellant, it is by the court on this 3d day of March, 2023,

ORDERED:

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* Captain Chen has separated from active duty service.

The Government's Motion to Compel Declarations or Affidavits is **DENIED**.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED IN PART**. The Government's answer to Appellant's assignments of error brief will be filed not later than **17 March 2023**.

FOR THE COURT

ANTHONY F. ROCK, Maj, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERROR
v.	)	Before Panel No. 2
Airman Basic (E-1) **MORI N. ESEMOTO** United States Air Force *Appellant.*	)	No. ACM 40273 17 March 2023

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

ISSUES PRESENTED

I.

WHETHER [APPELLANT] RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY PRESUMED WAIVER OF ARTICLE 13 MOTIONS IN HIS PLEA AGREEMENT?[1]

II.

WHETHER [APPELLANT]'S SENTENCE FOR TWO WRONGFUL USES OF A CONTROLLED SUBSTANCE OFFENSES AND ONE COUNT OF ARTICLE 117a IS UNDULY SEVERE?[2]

STATEMENT OF CASE

Appellant was charged with one charge and two specifications of possession of marijuana and cocaine, respectively, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, and one charge and one specification of broadcasting a sexually explicit visual

[1] Appellant has raised this issue in accordance with United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

[2] Appellant has raised this issue in accordance with Grostefon, 12 M.J. at 431.

image of SB, in violation of Article 117a, UCMJ, 10 U.S.C. § 917a. (Charge Sheet, dated 27 October 2020, Record of Trial (ROT) Vol. I). Pursuant to a plea agreement, Appellant pled guilty to all charges and specifications. (Entry of Judgment, dated 7 April 2022, ROT Vol. I). In so doing, Appellant agreed to "waive all motions which may be waived under the Rules for Court Martial." (App. Ex. II at 2.)

Appellant was sentenced to 209 days of confinement for each charge and specification, which was to run concurrently, but the military judge granted Appellant 209 days of confinement credit.[3] (R. at 94.) The military judge also sentenced Appellant to a bad conduct discharge and a reprimand. (Id.) The total maximum punishment that could be adjudged for all charges and specifications was 14 years of confinement, total forfeitures of pay and allowances, and a dishonorable discharge. (R. at 45.) In accordance with the plea agreement, however, Appellant could receive confinement for no less than time served and no more than nine months for each charge and specification, which was to run concurrently. (App. Ex. II at 2.) Appellant could also not receive a dishonorable discharge. (Id.)

STATEMENT OF FACTS

During the inquiry regarding Appellant's plea agreement, the military judge specifically asked about the waiver of a motions provision. (R. at 54.) The judge's exchange with trial defense counsel and Appellant transpired as follows:

> MJ: The next term of the plea agreement states in subparagraph d that you waive all motions which may be waived under the Rules for Court Martial. So this next question will be for your defense counsel. Defense Counsel, what motions are you not making pursuant to this provision of the plea agreement?
>
> DC: Your Honor, it would be an Article 10 and Article 13 motions.

[3] Appellant entered pretrial confinement on 8 July 2021 and pled guilty on 2 February 2022.

MJ: So Airman Esemoto, your plea agreement states that you waive, or give up, the right to make motions regarding any requests for relief on the bases of Article 10 or Article 13 of the UCMJ. And so those relate to, essentially, speedy trial interests or illegal pretrial punishment concerns. I advise you that certain motions are waived, or given up, if your defense counsel does not make the motion prior to entering your plea. Some motions, however, such as motions to dismiss for lack of jurisdiction, for example, can never be given up. Do you understand that by having this term in your plea agreement you give up the right to make any motion which by law you give up when you plead guilty?

ACC: Yes, Your Honor.

MJ: In particular, do you understand that this term of your plea agreement may not preclude this court or any appellate court from having the opportunity to determine if you are entitled to any relief based upon these motions?

ACC: Yes, Your Honor.

MJ: When you elected to give up the right to litigate these motions, did your defense counsel explain this term of your agreement and the consequences to you?

ACC: Yes, Your Honor.

MJ: Did anyone force you to enter into this term of your agreement?

ACC: No, Your Honor.

MJ: Defense Counsel, which side originated the waiver of motions provision?

ACC: Your Honor, the defense.

MJ: Airman Esemoto, did you freely and voluntarily agree to this term of your agreement in order to receive what you believe to be a beneficial agreement?

ACC: Yes, Your Honor.

MJ: Defense counsel, what do you believe to be the factual basis of any motion covered by this term of the plea agreement?

. . .

> DC: Your Honor, very briefly, sir, for the Article 10 motion. It would be based on the fact that the government did not do its due diligence in terms of moving this case to trial with the proper due diligence. The Article 13 is for pretrial confinement credit for deprivation of medication for a period of time while he was in confinement.
>
> . . .
>
> MJ: Okay. Airman Esemoto, do you understand that if these motions had been made, and if they had been granted, a possible ruling could have been a dismissal of the charges against you or the award of additional confinement credit?
>
> ACC: Yes, Your Honor.
>
> MJ: Knowing what your defense counsel and I have told you, do you still want to give up making these motions in order to get the benefit of your plea agreement?
>
> ACC: Yes, Your Honor.
>
> MJ: Do you have any questions about this provision of your plea agreement?
>
> ACC: No, Your Honor.

(R. at 54-56.)

On 21 February 2023, undersigned counsel filed with this Court a Motion to Compel Declarations from Appellant's trial defense counsel. On 3 March 2023, this Court denied counsel's motion and ordered the Government to file a response brief by 17 March 2023. (Order, dated 3 Mar 23.)

ARGUMENT

I.

APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.[4]

[4] Appellant has raised this issue in accordance with Grostefon, 12 M.J. at 431.

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. United States v. Scott, 81 M.J. 79, 84 (C.A.A.F. 2021).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. *See* U.S. CONST. amend. VI; United States v. Gilley, 56 M.J. 113, 124 (C.A.A.F. 2001). In assessing the effectiveness of counsel, this Court applies the U.S. Supreme Court's standard in Strickland v. Washington, 446 U.S. 668, 687 (1984), and begins with the presumption of competence announced in United States v. Chronic, 466 U.S. 648, 658 (1984). Courts will also not second-guess reasonable strategic or tactical decisions by trial defense counsel. *See* United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009) (citation omitted).

This Court uses the following three-part test to determine whether the presumption of competence has been overcome: (1) are appellant's allegations true, and if so, "is there a reasonable explanation for counsel's actions;" (2) if the allegations are true, did defense counsel's level of advocacy "fall measurably below the performance … [ordinarily expected] of fallible lawyers;" and (3) if defense counsel was ineffective, is there "a reasonable probability that, absent the errors," there would have been a different result? Gooch, 39 M.J. at 362 (alteration in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)).

The burden is on the appellant to demonstrate both deficient performance and prejudice. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citation omitted). "[C]ourts 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. (quoting Strickland, 466 U.S. at 689). With respect to prejudice, a

"reasonable probability" of a different result is "a probability sufficient to undermine confidence in the outcome" of the trial. Id. (quoting Strickland, 466 U.S. at 694).

"Waiver must be established by *affirmative* action of the accused's counsel, and not by a mere failure to object to erroneous instructions or to request proper instructions." United States v. Smith, 50 M.J. 451, 455-56 (C.A.A.F. 1999) (emphasis in original) (citations and internal quotation marks omitted). "[W]here a military judge is faced with a pretrial agreement that contains an Article 13 waiver, the judge should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." United States v. McFadyen, 51 M.J. 289, 291 (C.A.A.F. 1999). "While there are no 'magic words' dictating when a party has sufficiently raised an error to preserve it for appeal, of critical importance is the specificity with which counsel makes the basis for his position known to the military judge." United States v. Killion, 75 M.J. 209, 214 (C.A.A.F. 2016) (citation omitted) (quoting Smith, 50 M.J. at 456).

Analysis

a. Trial defense counsel were not deficient for waiving motions under Article 13, UCMJ.

Appellant claims that his trial defense counsel were ineffective because (1) they "presumed that they were required to waive [Appellant's] right to file an Article 13 motion despite the fact that it was not an explicit term of the plea agreement," and (2) "they failed to exercise due diligence in moving the case toward a speedy resolution." (App. Br. at 8.) Appellant argues that because of these two deficiencies, he "served more time in confinement that he otherwise would have been sentenced to." (Id.) Appellant's allegations are untrue, and his counsel's conduct did not fall measurably below the standard ordinarily expected of fallible lawyers.

At the outset, this Court denied the Government's motion to compel trial counsel affidavits in this case. The Court's denial is dispositive to the ineffective assistance of counsel analysis here since if this Court "finds that allegations of ineffective assistance and the record contain evidence which, if unrebutted, would overcome the presumption of competence and there is no affidavit from defense counsel in the record addressing those allegations, [the court] is required to obtain a response from trial defense counsel in order to properly evaluate the allegations." United States v. Melson, 66 M.J. 346, 350 (C.A.A.F. 2008). This Court's denial reasonably indicates that the record and Appellant's allegation did not contain evidence that would overcome the presumption that trial defense counsel were competent.

Second, Appellant's trial defense counsel voiced the motions they were forgoing pursuant to the plea agreement on the record to demonstrate Appellant's choices and decision-making process prior to voluntarily pleading guilty. There is simply no evidence that Appellant's counsel "presumed" an Article 13, UCMJ waiver—they merely listed those motions that Appellant was waiving pursuant to the waiver of motions provision, which can and did include an Article 13, UCMJ, motion. *See, e.g.*, United States v. McFadyen, 51 M.J. 289, 291 (C.A.A.F. 1999) (motions brought under Article 13, UCMJ, may be waived as part of a pretrial agreement); United States v. White, No. ACM 39600, 2020 CCA LEXIS 235, at *13 (A.F. Ct. Crim. App. 15 July 2020) (unpub. op.) (same). Trial defense counsel's exchange with the military judge regarding the motion also demonstrates that they properly understood that a waiver of motions was necessary so that Appellant could receive the benefit of the plea offer.

Third, trial defense counsel's level of advocacy did not—at all—fall below the performance ordinarily expected of fallible lawyers. Trial defense counsel (1) ensured that Appellant's concerns about the Article 13, UCMJ motion were put on the record, (2) helped

Appellant later incorporate those concerns into his unsworn statement as a mitigating factor (a more than reasonable alternative to filing a motion in a plea agreement case), and (3) ultimately worked to minimize Appellant's overall punitive exposure while still ensuring that the case was not delayed any further. These are all actions that a competent and indeed an effective attorney would be expected to take.

Last, there was no reasonable probability that Appellant's Article 13, UCMJ, motion would have been meritorious. When an appellant claims ineffective assistance of counsel because of a failure to raise a motion, the appellant must also show a "reasonable probability that such a motion would have been meritorious." United States v. Harpole, 77 M.J. 231, 236 (C.A.A.F. 2018). A "reasonable probability" is one "sufficient to undermine confidence in the outcome." United States v. Spurling, 74 M.J. 261 (C.A.A.F. 2015). Here, Appellant has not met his burden to show that he would have prevailed on an Article 13, UCMJ, motion. Moreover, had trial defense counsel filed a motion, a reasonable outcome would have been confinement credit for the time he had already served, which was exactly what Appellant received anyway pursuant to the plea agreement.

Appellant's allegations here are untrue, and his counsel's conduct did not fall measurably below the standard expected of ordinarily fallible attorneys. Nor was his motion remotely likely to provide him any relief. His counsel, therefore, acted reasonably and provided effective assistance of counsel.

b. Appellant properly and adequately waived his right to file an Article 13, UCMJ, motion.

Appellant properly waived the Article 13, UCMJ, motion in his plea agreement and colloquy with the military judge. Other than merely citing to CAAF's holding in United States v.

McFadyen, 51 M.J. 289 (C.A.A.F. 1999), Appellant does not meet his burden to demonstrate that this waiver was improper.

In McFadyen, CAAF indeed discussed Article 13, UCMJ, motions in the context of a "waive all waivable" motions provision in a pretrial agreement. The Court held in that case that "R.C.M. 705(c)(1)(B) [did] not specifically prohibit an accused from waiving his right to make a motion for sentencing credit because of unlawful pretrial punishment" and that "an accused may offer to waive several significant rights as part of a pretrial agreement." Id. at 290. Where a waiver of an Article 13, UCMJ, motion exists, the Court reasoned that a judge "should inquire into the circumstances of the pretrial confinement and the voluntariness of the waiver, and ensure that the accused understands the remedy to which he would be entitled if he made a successful motion." Id. at 291.

Here, the military judge did just that by inquiring into the circumstances of Appellant's pretrial confinement. The judge asked trial defense counsel what they believed "to be the factual basis of any motion covered" by the plea agreement. (R. at 56.) In response, trial defense counsel stated two bases: (1) that the government did not move this case to trial "with the proper due diligence," and (2) that Appellant was deprived of his medication for "a period of time" during his confinement. (Id.) Based on this inquiry and response, the military judge next informed Appellant of the remedies would be available to him because of these motions including "a dismissal of the charges against you or the award of additional confinement credit." (Id.) Appellant responded, "Yes, Your Honor." (Id.) The military judge also asked Appellant whether, knowing that these remedies were available to him, he still desired to waive the motion in order to receive the benefits of the plea agreement. Again, Appellant responded, "yes." (Id.) Based on these facts, the military

judge complied with McFadyen, and Appellant thus properly waived his right to file a motion under Article 13.

Additionally, at no point during pre-trial negotiations, the guilty plea inquiry, or the remainder of the proceedings did Appellant raise doubts about waiving an Article 13, UCMJ, motion. Rather, Appellant's discussion with the military judge on the issue reflects that Appellant was well aware that he could file an Article 13 motion but that he was waiving said motion pursuant to the plea agreement. Appellant agreed expressly that he understood the purpose and function of such a motion, and he knowingly waived it to receive the benefit of the plea offer. (*See* R. at 56.)

c. Appellant was not prejudiced by the waiver of an Article 13, UCMJ, motion or the time it took for this case to go to trial.

Appellant argues that, had trial defense counsel not waived his Article 13, UCMJ motion, "there was a reasonable probability that he would have had success." (App. Br. at 10.) Specifically, Appellant claims that "the circumstances of his pretrial confinement were tenuous at best" and that "it was not necessary for him to be in pretrial confinement to begin with." (Id.) But, the Pretrial Confinement Review Officer (PCRO) conducted a proper review of Appellant's confinement and found that it met the criteria for continued confinement; namely, there existed a reasonable belief that: (1) an offense triable by court-martial was committed, (2) Appellant committed the offense, (3) confinement was necessary because it was foreseeable that Appellant would not appear at a court proceeding or would engage in serious misconduct, and (4) less severe forms of restraint were inadequate. (PCRO Memorandum, ROT Vol. II.) The PCRO found that Appellant tested positive for marijuana and cocaine on 16 June 2021, 29 June 2021, and 8 July 2021, pursuant to random urinalyses. Further, Appellant was placed on restriction of movement and violated that order twice, indicating that he would not remain in quarters as directed (and was thus a flight risk). (Id.) Appellant's confinement was predicated on his meeting all these criteria.

Appellant claims that he was moved to four different facilities over a period of 209 days. Yet, Appellant points to no evidence to support the notion that moving to four different facilities was prejudicial. Additionally, Appellant was sentenced to time served. So, even had he filed and litigated an Article 13, UCMJ, motion, it was impossible for him to have received any additional confinement credit.

Appellant also asserts that he did not receive his medication for 56 days while in confinement. However, Appellant was able to avail himself of other non-judicial remedies to address this issue, including filing a complaint with the commander. Appellant also discussed this issue during his unsworn statement, but, again, the military judge was limited in his sentencing to the terms of the plea agreement, which Appellant freely and voluntarily agreed to.

Moreover, Appellant maintains that he would have received a lower sentence at trial if trial defense counsel had requested a speedy trial, opposed a delay, filed a motion to release him from pre-trial confinement, or tried to "move up" his court date. (App. Br. at 10.) However, a period of 209 days, or approximately seven months, is a reasonable time to begin and end a military case, even when an Appellant is in pre-trial confinement. This was especially true in 2021 and 2022 during the COVID-19 pandemic. Further, Appellant points to nothing in the record to demonstrate a reasonable probability that his trial date would have changed or he would have been released from pre-trial confinement had his trial defense counsel filed a speedy trial motion.

The military judge sentenced Appellant pursuant to the exact terms of the plea agreement. Appellant knew those terms going into sentencing. The plea offer accounted for the number of days that Appellant had already served in confinement by making "time served" an option. Appellant cannot realistically posit that the terms of his confinement would have been reduced based on a delay that was already factored into the sentence he did receive.

What Appellant likely hopes to achieve through this argument is for his adjudged bad conduct discharge to be set aside since he has already served his confinement terms. However, this backdoor method of challenging his bad conduct discharge is not supported by anything in the record, and Appellant has not offered any additional factors to show that he is entitled to have the bad conduct discharge set aside as relief for his pretrial confinement.

II.

APPELLANT'S SENTENCE WAS NOT INAPPROPRIATELY SEVERE?[5]

Additional Facts

In the Stipulation of Fact, Appellant admitted and agreed that on 5 June 2021, another Airman witnessed a video posted on Appellant's Instagram "stories" that "showed him holding a bottle of Jack Daniel's Black Jack Cola, an alcoholic beverage, as well as a table containing what appeared to be cocaine in the form of a white powdery substance that had been cut into five lines." (Pros. Ex. 1 at 1.) That Airman eventually forwarded the video and, ultimately, the Air Force Office of Special Investigations (AFOSI) was notified. (Pros. Ex. 1 at 1-2.) Based upon the Instagram video, AFOSI determined that it possessed probable cause to obtain a urine sample from Appellant. (Pros. Ex. 1 at 2.) Accordingly, Appellant provided a urine sample, which was sent to a laboratory for testing. Separately, another Airman reported that on 9 June 2021, four days after the Instagram story, he witnessed Appellant smoking a vape pen device that he believed contained marijuana. (Id.)

On 16 June 2021, the results of Appellant's urinalysis returned from the laboratory as positive for both marijuana and cocaine. (Id.) Several days after the positive result, Appellant told

[5] Appellant has raised this issue in accordance with Grostefon, 12 M.J. at 431.

three paralegals at the base legal office, "That's a lot of fucking cocaine…I only did it once. It made me feel better." (Pros. Ex. 1 at 2-3.)

On 21 July 2021, an Airman reported to two others that he saw a video on Appellant's Snapchat of another Airman performing oral sex on Appellant. (Pros. Ex. 1 at 3.) All three Airmen recognized the female as SB, the named victim in this case. (Id.) Appellant admitted the following:

> [SB] met Amn Esemoto between on or about 9 June 2021 and on or about 16 June 2021, and she and Amn Esemoto had a consensual sexual relationship. The particular sexual encounter wherein Amn Esemoto filmed her providing oral sex occurred in late June or early July 2021. On this occasion, Amn Esemoto came over to [SB]'s apartment. [SB] began performing oral sex on Amn Esemoto. Amn Esemoto began recording [SB] with his phone using the phone's flashlight as a light source in the otherwise dark room. [SB] was over the age of 18 at this time and consented to the recording. She was not, however, aware that Amn Esemoto posted the video on SnapChat, nor did she give her consent to distribute the video. She only became aware the video was shared when OSI called her in to interview her as part of their investigation into A1C Smith's initial report of the video.

(Pros. Ex. 1 at 3-4.)

Appellant admitted that he "knew [SB] had a reasonable expectation of privacy as to the act that was being recorded. Amn Esemoto knew sending out an image like this was likely to cause harm or emotional distress to [SB] in respect to her mental health, career, reputation and personal relationships." (Pros Ex. 1 at 4.) Further, Appellant admitted that he "also knew that sharing such images with other active duty members at Holloman AFB would have direct and palpable connections with the military environment in which both he and [SB] worked." (Id.)

Standard of Review

This Court reviews sentence appropriateness de novo. United States v. Sauk, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (citation omitted). The Court may only

affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1).

Law

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the 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). Although this Court has great discretion to determine whether a sentence is appropriate, the Court has no authority to grant mercy. *See* United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeal are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. *See* United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988). A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.).

Analysis

Appellant posits that his sentence of "209 days of confinement, a reprimand, and a bad conduct discharge is unduly severe considering the nature and seriousness of the offense, his personal characteristics, and his record of service." (App. Br. at 12.) He argues that he has strong personal characteristics and rehabilitative potential, and points to his experience as a child of a single immigrant mother who grew up around violence. (App. Br. at 13.) Appellant's argument rings hollow.

First, the military judge sentenced Appellant pursuant to a plea agreement, and as this court has found before, a plea agreement gives "some indication of fairness and appropriateness" of Appellant's sentence. Perez, 2021 CCA LEXIS 501 at *7. Here, the military judge gave Appellant the lowest possible sentence permitted by the plea agreement. And Appellant himself previously agreed that confinement up to nine months was appropriate for the offenses, yet his adjudged sentence was well below that number.

Second, as Appellant himself admits, a sentence appropriateness determination hinges on the nature and seriousness of the charges, Appellant's record of service, and all matters in the record of trial. Anderson, 67 M.J. at 705. For example, Appellant claims that the nature of his drug offense was use, rather than possession, distribution, or introduction onto a military installation. But, he is not charged with those offenses. He is charged with use of controlled substances, which the government demonstrated through three failed urinalyses. Use of illegal drugs—on its own—is a serious offense that should not be minimized because of how it can impact a person's ability to function and perform his daily tasks, including his job.

Here, Appellant tested positive for marijuana and cocaine on three separate occasions: 16 June 2021, 29 June 2021, and 8 July 2021. Appellant posted a video on his Instagram profile which showed him holding a bottle of alcohol and sitting at a table with what looked like cocaine "cut into five lines." (Pros. Ex. 1 at 1.) Other Airmen saw this video and reported it to law enforcement. (Id.) A different Airman also witnessed Appellant smoking marijuana from a vape pen. (Pros. Ex. 1 at 2.) Based on the social media video, Appellant was ordered to give a urine sample, which was positive for cocaine and marijuana. (Pros. Ex. 1 at 1.) Appellant later admitted to three members of the 49th Wing legal office, "That's a lot of fucking cocaine…I only did it once. It made me feel better." (Pros. Ex. 1 at 3.) Given these facts and the accompanying

aggravating evidence, Appellant's sentence was more than proper. And, no amount of personal difficulty mitigates his blatant and flagrant use of illegal drugs in this case.

Regarding the wrongful broadcast violation, Appellant argues that the sentence overstates the seriousness of this offense because the sexual act that he posted and the recording of it were both consensual. (App. Br. at 13.) But Appellant disregards the actual offense: that he publicly broadcasted a private video—without the victim's consent—of her engaging in sex with Appellant. Appellant also completely disregards the shame that the victim experienced because of his actions—that is, posting the video on Snapchat. (R. at 70.) As she told the military judge during her victim impact statement, "I placed my trust in the accused and believed he would respect me and my decision not to publicly share what I had permitted him to record." (Id.)

It does not matter whether the video was posted for mere seconds or an extended period; Appellant did not have permission to post the video onto social media—a platform where at least one other Airman witnessed the video, and where others who saw the video recognized the victim. Moreover, the victim only became aware that the video had been posted when OSI notified her that others had reported it. (Pros. Ex. 1 at 3-4.) In addition, Appellant admitted to recording the video in a way that made the victim easily recognizable. He also admitted that he did not have her consent to post the video, and that he knew it could have caused harm to the victim's mental health, reputation, and personal relationships. (Pros. Ex. 1 at 4.) Yet he posted it anyway. Considering these egregious facts and Appellant's disregard of the victim's personal autonomy, reputation, and mental health, it is abundantly clear that Appellant's sentence was appropriate.

CONCLUSION

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 17 March 2023.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40273**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Mori N. ESEMOTO	)	
Airman Basic (E-1)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 23d day of March, 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:

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge
GOODWIN, JAMES A., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal