IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	**) MOTION FOR ENLARGEMENT**
	) OF TIME (FIRST)
Appellee,	)
	) Before Panel No. 1
v.	)
	) ACM 40281
	)
Senior Airman (E-4)	) Filed on: 9 July 2022
DYLAN D. O'HARA,	**)**
USAF,	**)**
	)
Appellant.	)

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

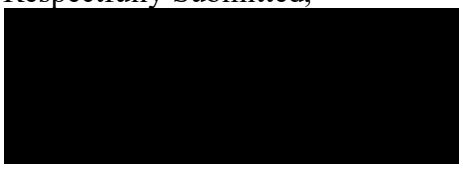
Pursuant to Rules 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant SrA Dylan D. O'Hara hereby moves for the first enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 17, 2022. SrA O'Hara's brief is currently due on July 16, 2022. SrA O'Hara requests an enlargement for a period of 60 days, which will end on September 14, 2022. On the date requested, 120 days will have elapsed from the date of docketing. 53 days have elapsed from the date the record of trial was received to the present day. SrA O'Hara is currently confined.

On August 3, 2021, SrA O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120(b), Uniform Code of Military Justice. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,



MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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 July 9, 2022.

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

11 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLAN D. O'HARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40281 Panel No. 1

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.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	**) MOTION FOR ENLARGEMENT**
	) OF TIME (SECOND)
Appellee,	)
	) Before Panel No. 1
v.	)
	) ACM 40281
	)
Senior Airman (E-4)	) Filed on: 7 September 2022
DYLAN D. O'HARA,	**)**
USAF,	**)**
	)
Appellant.	)

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SrA Dylan D. O'Hara hereby moves for the second enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 17, 2022. SrA O'Hara's brief is currently due on September 14, 2022. SrA O'Hara requests an enlargement for a period of 30 days, which will end on October 14, 2022. On the date requested, 150 days will have elapsed from the date of docketing. 113 days have elapsed from the date the record of trial was received to the present day. SrA O'Hara is currently confined.

On August 3, 2021, SrA O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120(b), Uniform Code of Military Justice. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript is 170 pages long. There are four prosecution exhibits, eight defense exhibits, 17 appellate exhibits, and one court exhibit. No motions were filed at trial.

Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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 September 7, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

9 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLAN D. O'HARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40281 Panel No. 1

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.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

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 9 September 2022.

[redacted]

THOMAS J. ALFORD, Lt Col, USAFR
Appellate Government Counsel, Government
Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*, v. Senior Airman (E-4) **DYLAN D. O'HARA,** USAF, *Appellant*.	**) MOTION FOR ENLARGEMENT** **) OF TIME (THIRD)**)) Before Panel No. 1)) ACM 40281)) Filed on: 7 October 2022 **)** **)** **)**)

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SrA Dylan D. O'Hara hereby moves for the third enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 17, 2022. SrA O'Hara's brief is currently due on October 14, 2022. SrA O'Hara requests an enlargement for a period of 30 days, which will end on November 13, 2022. On the date requested, 180 days will have elapsed from the date of docketing. 143 days have elapsed from the date the record of trial was received to the present day. SrA O'Hara is currently confined.

On August 3, 2021, SrA O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120(b), Uniform Code of Military Justice. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

The transcript is 170 pages long. There are four prosecution exhibits, eight defense exhibits, 17 appellate exhibits, and one court exhibit. No motions were filed at trial.

Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,

[redacted]

MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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 October 7, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

11 October 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLAN D. O'HARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40281 Panel No. 1

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.

[redacted]

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

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 11 October 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	**) MOTION FOR ENLARGEMENT**
	) OF TIME (FOURTH) (OUT OF TIME)
Appellee,	)
	) Before Panel No. 1
v.	)
	) ACM 40281
	)
Senior Airman (E-4)	) Filed on: 7 November 2022
DYLAN D. O'HARA,	**)**
USAF,	**)**
	)
Appellant.	)

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SrA Dylan D. O'Hara hereby moves for the fourth enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 17, 2022. SrA O'Hara's brief is currently due on November 13, 2022. SrA O'Hara requests an enlargement for a period of 30 days, which will end on December 13, 2022. On the date requested, 210 days will have elapsed from the date of docketing. 174 days have elapsed from the date the record of trial was received to the present day. SrA O'Hara is currently confined.

On August 3, 2021, SrA O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120(b), Uniform Code of Military Justice. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

Good cause exists to grant this motion and to do so out of time. Undersigned counsel mis-calendared—by one day—the date SSgt O'Hara's motion for a fourth enlargement of time was due. This motion is filed less than seven hours late. To prevent this occurrence in the future, counsel has now set double calendar reminders for all future filings—one before the due date and one on the due date. To ensure effective representation in furtherance of Article 70, UCMJ, by Appellant's defense counsel, appellate defense counsel requests that this Court grant the additional time needed for counsel to fully brief this case.

Of counsel's three cases currently before this Court, this case is second in priority. Counsel has one case in which the Court of Appeals for the Armed Forces recently granted review; that brief is due in 13 days and is currently taking up a significant amount of undersigned counsel's time and will continue to do so for the next several weeks. Counsel also has one case pending a grant of review before the Court of Appeals for the Armed Forces. In her civilian capacity, the undersigned is lead counsel in 14 cases before the United States Court of Appeals for Veterans Claims and the Federal Circuit.

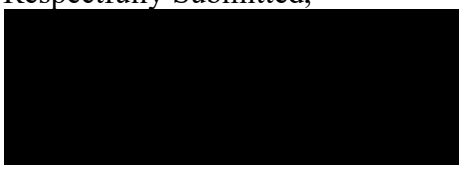
Counsel has thoroughly reviewed the record and has consulted with her client. Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case. Counsel will make every effort to ensure SrA O'Hara's brief is filed on the date requested.

The transcript is 170 pages long. There are four prosecution exhibits, eight defense exhibits, 17 appellate exhibits, and one court exhibit. No motions were filed at trial.

Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case.

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

Respectfully Submitted,



MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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 November 7, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

9 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLAN D. O'HARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME – OUT OF TIME ACM 40281 Panel No. 1

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, Out 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.

[redacted]

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

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 9 November 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	**) MOTION FOR ENLARGEMENT**
	) OF TIME (FIFTH)
Appellee,	)
	) Before Panel No. 1
v.	)
	) ACM 40281
	)
Senior Airman (E-4)	) Filed on: 6 December 2022
DYLAN D. O'HARA,	**)**
USAF,	**)**
	)
Appellant.	)

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

Pursuant to Rules 23.3(m)(1) and (3) of this Honorable Court's Rules of Practice and Procedure, Appellant SrA Dylan D. O'Hara hereby moves for the fifth enlargement of time to file an Assignment of Errors in this case, which was docketed with the Court on May 17, 2022. SrA O'Hara's brief is currently due on December 13, 2022. SrA O'Hara requests an enlargement for a period of 30 days, which will end on January 12, 2022. On the date requested, 240 days will have elapsed from the date of docketing. 203 days have elapsed from the date the record of trial was received to the present day. SrA O'Hara is currently confined.

On August 3, 2021, SrA O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120(b), Uniform Code of Military Justice. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded.

Of counsel's three cases currently before this Court, this case is second in priority. Counsel has one case pending the government's brief at the Court of Appeals for the Armed Forces. Counsel also has one case pending a grant of review before the Court of Appeals for the Armed Forces. In her civilian capacity, the undersigned is lead counsel in 17 cases before the United States Court of Appeals for Veterans Claims and the Federal Circuit.

Counsel has thoroughly reviewed the record and has consulted with her client. Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case. Counsel will make every effort to ensure SrA O'Hara's brief is filed on the date requested.

The transcript is 170 pages long. There are four prosecution exhibits, eight defense exhibits, 17 appellate exhibits, and one court exhibit. No motions were filed at trial.

Through no fault of SrA O'Hara, his assigned defense counsel has been working on other matters and has been unable to complete the brief in this case. SrA O'Hara is aware of this motion and consents to the relief it requests. He has been advised of his speedy trial rights.

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

Respectfully Submitted,

[redacted]
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force
[redacted]

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 December 7, 2022.

[redacted]

Respectfully Submitted,
MEGAN E. HOFFMAN, Major, USAF
Appellate Defense Counsel
United States Air Force

[redacted]

6 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DYLAN D. O'HARA, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40281 Panel No. 1

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.

[redacted]

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

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 December 2022.

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40281**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dylan D. O'HARA	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 6 December 2022, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth), requesting "an enlargement period of 30 days, which will end on 12 January 2022." Additionally, Appellant states that "[o]n the date requested, 240 days will have elapsed from the date of docketing." The Government opposes the motion.

This court previously granted Appellant's Motion for Enlargement of Time (Fourth) on 9 November 2022, which set the deadline for Appellant's brief to 13 December 2022. This court understands Appellant to be requesting 30 additional days from the current due date, which would set a new deadline of 12 January 2023 and not "12 January 2022."

Accordingly, it is by the court on this 7th day of December, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant's brief will be due **12 January 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 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

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	**) BRIEF ON BEHALF OF APPELLANT**
	)
Appellee,	**)**
	) Before Panel No. 1
v.	**)**
	) ACM 40281
	)
Senior Airman (E-4)	**)** Filed on: 12 January 2022
DYLAN D. O'HARA,	**)**
USAF,	**)**
	)
Appellant.	)

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

Assignment of Error[1] [2]

---

[1] SrA O'Hara notes that the Convening Authority took no action on the sentence in this case. Because SrA O'Hara was convicted of offenses occurring before 1 January 2019, the Convening Authority's failure to act on the sentence was an error. However, in accordance with the most recent C.A.A.F. decision in *United States v. Brubaker-Escobar,* 81 M.J. 471 (C.A.A.F. 2021), an appellant must demonstrate "material prejudice" from the error to be entitled to relief. *Id.* at 474-75. SrA O'Hara did not ask for the Convening Authority to reduce his sentence; he asked only that the adjudged reduction in rank and automatic forfeitures be deferred until entry of judgment, and that all automatic forfeitures be waived for a period of six months to benefit his dependents. Record of Trial (ROT) Vol. 4, Clemency Submission. The Convening Authority granted these requests. Accordingly, despite the Convening Authority's error in failing to take action on the sentence, SrA O'Hara is confident that he was not materially prejudiced by the error and does not present that issue as an Assignment of Error in this brief.

[2] SrA O'Hara raises a separate issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). *See* Appendix A.

WHETHER SRA O'HARA'S SENTENCE IS INAPPROPRIATELY SEVERE.

Statement of the Case

On 3 August 2021, Senior Airman (SrA) Dylan O'Hara was tried by a military judge sitting alone at a general court-martial at Eglin Air Force Base, Florida. In accordance with his pleas, SrA O'Hara was convicted of one Charge and nine Specifications of sexual abuse of a child in violation of Article 120b, Uniform Code of Military Justice (UCMJ). Vol. 1, Statement of Trial Results. He was sentenced to be reduced to the grade of E-1, to be confined for 26 months, to be discharged from the Service with a dishonorable discharge, and to be reprimanded. Vol. 1, Entry of Judgment.

THE SENTENCE IS INAPPROPRIATELY SEVERE.

Statement of Facts

All offenses of which SrA O'Hara was convicted involve online chats with minors. SrA O'Hara was convicted of lewd acts via indecent language and, in one instance, sending pictures of his genitalia to these individuals. Vol. 1., Statement of Trial Results. None of the offenses involved any physical contact or in-person activity.

SrA O'Hara's mother raised him after she divorced his father. (R. at 129.) SrA O'Hara is the oldest of seven children across two blended families. (R. at 131.)

He is the product of a close family that supports him. SrA O'Hara is a loving father. Def. Exs. E, F. He is also a loving brother and son. Def. Exs. C, D.

Since his arrest, SrA O'Hara has voluntarily completed inpatient treatment for alcohol dependency in an attempt to better himself. (R. 139-40.)

In addition, SrA O'Hara's convictions relate entirely to non-contact offenses—he never met up with, or even attempted to meet up with, any of the individuals he was contacting online. During sentencing, the Defense submitted a statement from Dr. J.T., a forensic psychologist. Def. Ex. B. Dr. J.T. opined that people like SrA O'Hara re-offend at extremely low rates of between five and 10 percent. Def. Ex. B, page 2. Dr. J.T. also stated that a "wakeup call" involving a short period of confinement would generally prevent an individual like SrA O'Hara from relapsing into criminal behavior, "especially if it is combined with a plea of guilty and an openness to therapy." *Id.*

At trial, the only derogatory evidence from SrA O'Hara's personnel records was a nearly five-year-old administrative demotion related to an incident of driving under the influence from 2016. Prosecution Exhibit (Pros. Ex.) 4.

Standard of Review

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

Law

Under Article 66(d), UCMJ (*2019 Manual for Courts-Martial (MCM)*), 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, 10 U.S.C. § 866(d)(1) (*2019 MCM*). "Article 66(c)'s sentence appropriateness provision is a sweeping Congressional mandate to ensure a fair and just punishment for every accused."[3] *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 United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted).

Analysis

[3] Prior versions of Article 66(c), UCMJ, have included the same or substantially similar language about sentence appropriateness, such that case law interpreting these provisions should be honored, even for cases referred after 1 January 2019. *See* Executive Order 13,825.

A dishonorable discharge and 26 months confinement is inappropriately severe because of SrA O'Hara's proven rehabilitative potential and the facts and circumstances of the convicted offenses.

While SrA O'Hara's offenses were serious, they are on the lower end of the severity spectrum of Article 120b offenses because he did not ever attempt to see, meet, or touch another person in real life. His offenses were confined to the internet and individuals he found through applications like Snapchat. In addition, SrA O'Hara's actions were influenced by his addiction to alcohol, which impaired his judgment. (R. 139-40.) He has taken responsibility for his actions, completed alcohol treatment, and committed to attending community-based sex offender therapy programs when he is released, in addition to any programs he is offered while in confinement. (R. 136.)

While this Court may not grant clemency, it must consider the entire record, including the nature of the crimes the accused was convicted of and all the mitigating evidence in deciding whether an adjudged punishment is appropriate. Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (*2019 MCM*). It should do so in this case, where the offenses involved no physical contact, the potential for rehabilitation is high, and the appellant has shown a willingness to better himself through substance abuse and psychological treatment programs.

SrA O'Hara is not arguing that he deserves no punishment, just that the lifelong stigma of a dishonorable discharge on top of 26 months of confinement is inappropriately severe.

WHEREFORE, SrA O'Hara requests this Court exercise its authority under Article 66 to modify his sentence and reduce his term of confinement.

Respectfully Submitted,

MEGAN E. HOFFMAN, Major,
U.S.A.F.
Appellate Defense Counsel
United States Air Force
[redacted]

Certificate of Filing and Service

I certify that on January 12, 2023, the foregoing was electronically filed with the Court and delivered to the Government Appellate Division.

[redacted]

MEGAN E. HOFFMAN, Major,
U.S.A.F.
Appellate Defense Counsel
United States Air Force
[redacted]

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982), SrA Dylan O'Hara, through appellate defense counsel, personally requests that this Court consider the following matter:

WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE WHERE HE REPEATEDLY CHARACTERIZED APPELLANT'S OFFENSES AS "HEINOUS" DURING HIS SENTENCING ARGUMENT.

Additional Facts

During argument, trial defense counsel began his argument with the following:

> Now, the government's presentation of the evidence here is compelling, it's emotional. Hell, it makes me mad. I think it makes Major (indiscernible) mad. It made his mom mad. It made everyone in this room mad. We should be mad. What he did was wrong. What he did was illegal. That's why he's going to jail. We know that he's going to jail today, but we don't sentence purely based on our emotions. They are all heinous, and they appear in text message form.

R. 157.

A few minutes later, while discussing the impact (or lack thereof) of the offenses on the victims, he said:

> I want to be clear. I'm not trying to create some kind of oh, this isn't so bad or anything like that, but when we're thinking about what is the true impact or the heinousness of the offense, which

> is a proper sentencing consideration, just consider what evidence was provided to you and the lack thereof.

R. 163.

Standard of Review

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021).

Law

"To prevail on an ineffective assistance claim, the appellant bears the burden of proving that the performance of defense counsel was deficient and that the appellant was prejudiced by the error." *United States v. Captain*, 75 M.J. 99, 103 (C.A.A.F. 2016) (citing *Strickland v. Washingto*n, 466 U.S. 668, 698 (1984)).

An appellant established prejudice by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. Appellant must show "'a reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different.'" *Captain,* 75 M.J. at 103 (citing *Strickland*, 466 U.S. at 694).

Analysis

Trial defense counsel's decision to characterize SrA O'Hara's offenses as "heinous" not once but several times was bizarre and prejudicial to SrA O'Hara. It

served no purpose other than injecting trial defense counsel's own thoughts and feelings about the charged offenses into the sentencing proceedings.

Similarly, his statements that he was "mad" at SrA O'Hara –as he said SrA O'Hara's mother, the judge, and other people sitting in the courtroom also probably were—was another instance of trial defense counsel unnecessarily characterizing SrA O'Hara's offenses as repugnant and worthy of severe punishment.

This argument prejudiced SrA O'Hara. As noted in the main body of this brief, SrA O'Hara was sentenced to 26 months in jail for offenses that involved no physical contact with victims whatsoever, and where the government's sentencing case involved a single, 5-year-old administrative demotion. It is apparent that trial defense counsel's emphasis on the "heinous" nature of the offenses played a part in the judge's decision to sentence SrA O'Hara to over two years in prison.

WHEREFORE, SrA O'Hara requests this Court exercise its authority to reduce his term of confinement.

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	ANSWER TO ASSIGNMENTS OF ERRORS
v.	)	Before Panel No. 1
Senior Airman (E-4) **DYLAN D. O'HARA** United States Air Force *Appellant.*	)	No. ACM 40281 13 February 2023

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

ISSUES PRESENTED

I.

WHETHER SRA O'HARA'S SENTENCE IS INAPPROPRIATELY SEVERE.

II.

WHETHER TRIAL DEFENSE COUNSEL WAS INEFFECTIVE WHERE HE REPEATEDLY CHARACTERIZED APPELLANT'S OFFENSES AS "HEINOUS" DURING HIS SENTENCING ARGUMENT[1].

STATEMENT OF CASE

The United States generally agrees with Appellant's statement of the case.

STATEMENT OF FACTS

While Appellant was stationed at Eglin Air Force Base in Florida, his wife found several social media accounts that she believed Appellant was using to communicate with underage individuals. (R. at 27.) After initially denying any communication, Appellant eventually

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

admitted to his wife, "I do have an attraction to teenage girls." Appellant also admitted to messaging underage individuals. Id. OSI corroborated Appellant's attraction to, and messages with, teenage girls through its investigation, including discovering that Appellant admitted to a friend that he was "attracted to teenagers." Id. After discovering the messages with underage girls, Appellant and his wife began marriage counseling. Id. During a counseling session, Appellant's wife described the messages Appellant had sent to underage individuals to the marriage counselor. Id. The marriage counselor, as a mandated reporter, reported Appellant's conduct to the local police department. Id.

The police searched Appellant's person, lodging, and vehicle. (R. at 28.) OSI discovered four mobile phones, a laptop, iPad, and hard drive. (R. at 28.) The day after Appellant's wife confronted him, he told her that he had deleted his Snapchat application on his phone, which was one of the messaging applications Appellant used to communicate with underage girls. Id. In the five months between March and August of 2019, Appellant contacted at least 311 Snapchat users from 4 different usernames with 46 of the individuals identifying themselves as being younger than 16 years old. (R. at 28-29, 142.) Appellant lied about his age to these underage individuals– pretending to be 16, 17, or 19 years old – but frequently shared his actual age: 23 years old. (R. at 29.) When initiating contact, Appellant generally asked for another user's age and what they looked like. (R. at 28.) In 22 conversations, Appellant "asked the user if they were 'cool' with the age difference before continuing" messaging. (R. at 29.) In about 20 conversations, Appellant asked the user if they wanted to play 'truth or dare' with him. Id. If the user chose 'truth,' Appellant asked questions about what the user was wearing, "if they were a virgin, whether they masturbate, or the size of their bra." Id. If the user chose 'dare,' Appellant would dare them to send "a full body pic," "a booty pic," or photos of their breasts to him. Id.

To four different users, Appellant messaged them that they were "jailbait" and to a blocked-out username, he stated, "I'm kinda into teens." Id. Appellant would also occasionally send photos of himself in his Air Force uniform and tell users that he was in the Air Force. Id.

To nine victims ranging from 12 to 15 years old, Appellant sent photos of his genitalia or communicated indecent language including asking a 13-year-old to "finger" herself and send him the audio file (R. at 44), telling a 14-year-old victim that she was "sexy" and asking if she wanted to see his "cock" (R. at 35), requesting a 12-year-old to "help him cum" because " I don't want porn I want real sexy girls like you" and asking if she masturbates. (R. at 41.) Further, Appellant asked for explicit pictures from all nine of the named victims, calling the 15-year-old victim "jailbait," (R. at 42), and trying to video call several victims multiple times (R. at 41.)

After learning that he lived 3 hours away from a 14-year-old victim, Appellant messaged her "[to be honest] I was gonna [sic] see if you wanted to meet up sometime after we got to know each other." (R. at 37.) Additionally, Appellant told the 12-year-old, "I'll let you watch me cum" and "I wish I could come to your house lol." (R. at 41.) To a username who never stated her age, the Appellant stated, "Im [sic] feeling a little guilty about what we're doing . . . [b]ecause you're so young and I'm so much older . . . [a]nd I feel like I'm taking advantage" and "you're going to find somebody closer to your age you are still so young you have a lot of life left even just in high school. If I ever find myself in Washington i [sic] will hit you up and we can have our [in real life] night together." (R. at 44.)

Pursuant to a plea agreement, Appellant was convicted of one Charge and nine Specifications of sexual abuse of a child, in violation of Article 120b, Uniform Code of Military Justice (UCMJ). (Vol. 1, Statement of Trial Results.) The sentencing parameters included a range of confinement between 12 to 36 months for each specification with time to be served

concurrently and either a bad conduct or dishonorable discharge. (R. at 105.) In accordance with Appellant's pleas, the military judge sentenced Appellant to a reduction to E-1, confinement for 26 months, a dishonorable discharge, and a reprimand. (Vol. 1, Entry of Judgment; R. at 170.)

ARGUMENT

I.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Baier, 60 M.J. 382, 383-384 (C.A.A.F. 2005). 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.

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. 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 channels by Congress, CCAs are entrusted with the task of determining sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. 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.). "Absent evidence to the contrary, accused's own sentence proposal is a reasonable indication of its probable fairness to him." United States v. Hendon, 6 M.J. 171, 175 (C.M.A. 1979) (citing United States v. Johnson, 41 C.M.R. 49, 50 (U.S.C.M.A. 1969)).

Analysis

Appellant argues that his sentence of 26 months of confinement and dishonorable discharge are inappropriately severe for two reasons. First, Appellant contends his offenses were "on the lower end of the severity spectrum." (App. Br. at 5.) And second, Appellant contends he has "proven rehabilitative potential" stemming from his willingness to attend treatment programs and agreement to plead guilty. (App. Br. at 5.)

First, Appellant argues that his conduct was on "the lower end of the severity spectrum of Article 120b offenses because he did not ever attempt to see, meet, or touch another person in real life." (App. Br. at 2.) But Appellant *did* attempt to meet at least two of the victims. (R. at 37.) He stated to 13-year-old victim H.J., "[To be honest] I was gonna see if you wanted to meet up sometime after we got to know each other." (R. at 37.) After the child told the Appellant her parents did not let her hang out with "boys or men on her own," the Appellant responded, "You could've told them you were going out with friends lol. . . . I could've picked you up somewhere." (R. at 37.) Not only did the Appellant not respect H.J.'s boundaries, but he encouraged her to lie to her parents to hang out with a 23-year-old man who should have known better.

In a similar fashion, Appellant told the 12-year-old victim T.P., "I wish I could come to your house lol." (R. at 41.) Finally, to a user that never stated their age, Appellant messaged, "You're going to find somebody closer to your age you are still so young you have a lot of life left even just in high school. If I ever find myself in Washington i [sic] will hit you up and we can have our [in real life] night together." (R. at 44.) Appellant unmistakably tried to take his online lascivious interactions with these children offline into "real life." (App. Br. at 2.)

Further, Appellant faced a maximum of 135 years of confinement based on the charges alone. (R. at 99.) This potential penalty is so severe because "[t]he demand for child pornography harms children in part because it drives production, which involves child abuse." Paroline v. United States, 572 U.S. 434, 439-40 (2014). Asking a child to produce visual depictions of herself engaged in sexually explicit conduct that is sent via the internet can have long-lasting implications for that child. "Child pornography is a continuing crime: it is 'a permanent record of the depicted child's abuse, and the harm to the child is exacerbated by [its] circulation.'" United States v. Barker, 77 M.J. 377, 381 (C.A.A.F. 2018) (citing Paroline, 572 U.S. at 439-40 (alteration in original) (citation omitted)). Even those "who 'merely' or 'passively' receive or possess child pornography directly contribute to [the child's] continuing victimization." United States v. Goff, 501 F.3d 250, 259 (3d Cir. 2007). Appellant's argument that his conduct was on the "lower end of the severity spectrum" because he did not "attempt to see, meet, or touch another person in real life" is not compelling because he did try to meet some of the victims. (App. Br. at 2.) Moreover, his contention does not account for the impact of his misconduct on the victims.

Second, Appellant argues that his sentence is inappropriately severe because of his potential for rehabilitation, agreement to plea, and willingness to attend treatment; however,

none of these factors are dispositive. (App. Br. at 3.) At trial, Appellant submitted an affidavit from a forensic psychologist, Dr. Jeff Temple, generally indicating that recidivism rates for "non-contact" offenses like Appellant's are low. (Def. Ex. B at 2.) But such statistics are not individualized. The forensic psychologist who prepared the affidavit did not speak to "anything specific as it relates to what he's witnessed of [Appellant]. [H]e gives . . . some . . . general guideposts to . . . consider." (R. at 161.) Therefore, the information Dr. Temple provided in the affidavit simply informed the military judge about general recidivism statistics of similar offenders and did not consider the details of Appellant's individual background and offenses. Id. Because 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," Anderson, 67 M.J. at 705 (emphasis added), Appellant's rehabilitative potential, guilty plea, and willingness to attend treatment are mitigating factors for this Court to consider. However, these factors should not be overshadowed by the Appellant's lewd online conversations with, and explicit photo requests of, the nine complaining witnesses ranging from 12 to 15 years old and the lasting impact on them.

Appellant also received 10 months less than the maximum length of imprisonment available to the judge under the plea agreement, which was 36 months. (R. at 105.) Further, Appellant agreed to the conditions of the plea agreement and received the benefits of it. (R. at 110.) A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." Perez, 2021 CCA LEXIS 501, at *7 (unpub. op.). Here, Appellant's "own sentence proposal" to the convening authority "is a reasonable indication of its probable fairness to him." Hendon, 6 M.J. at 175 (additional citation omitted). The benefits Appellant received from his proposed plea agreement included a maximum confinement

reduction from 135 years to a range of 12 to 36 months to be served concurrently. (R. at 105, 154.) Also, the convening authority agreed to dismiss Specification 3 of The Charge. (R. at 115.) When an accused pleads guilty to some specifications and secures a plea agreement that dismisses other specifications, he receives a "benefit." *See* United States v. Matichuk, No. ACM S32611, 2020 CCA LEXIS 278, at *6-7 (A.F. Ct. Crim. App. 19 August 2020) (unpub. op.). A Therefore, Appellant's benefits under the plea agreement not only included a drastic reduction in confinement, but also dismissal of a specification.

A dishonorable discharge is also an appropriate sentence for Appellant's lewd conduct that led to his convictions. (R. at 170.) A dishonorable discharge "should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment." R.C.M. 1003(a)(8)(B). Moreover, "[a] bad-conduct discharge is . . . designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature." Id. Appellant's various actions toward at least nine victims including ranging from 12 to 15 years old included Appellant asking a 13-year-old to "finger" herself and send him the audio file of her masturbating (R. at 44), telling a 14-year-old victim that she was "sexy" and asking if she wanted to see his "cock" (R. at 35), requesting a 12-year-old to "help him cum" because " I don't want porn I want real sexy girls like you" and asking if she masturbates. (R. at 41.) Such repeated lascivious misconduct against children should not be considered merely "bad-conduct" but "serious offenses." RCM 1003(a)(8)(B). Thus, the Appellant's sentence of 26 months confinement and a dishonorable discharge was entirely appropriate, and Appellant is not entitled to relief. This Court should deny this assignment of error.

II.

TRIAL DEFENSE COUNSEL WAS NOT INFFECTIVE WHEN HE CHARACTERIZED APPELLANT'S OFFENSES AS "HEINOUS" DURING HIS SENTENCING ARGUMENT.

Additional Facts

During argument, trial defense counsel began his sentencing argument acknowledging the emotional aspects of Appellant's crimes:

> Now, the government's presentation of the evidence here is compelling, it's emotional. Hell, it makes me mad. I think it makes Major (indiscernible) mad. It made his mom mad. It made everyone in this room mad. We should be mad. What he did was wrong. What he did was illegal. That's why he's going to jail. We know that he's going to jail today, but we don't sentence purely based on our emotions. They are all heinous, and they appear in text message form.

(R. at 157.)

A few minutes later, while discussing the impact of the offenses on the victims, he said:

> I want to be clear. I'm not trying to create some kind of oh, this isn't so bad or anything like that, but when we're thinking about what is the true impact or the heinousness of the offense, which is a proper sentencing consideration, just consider what evidence was provided to you and the lack thereof.

(R. at 163.)

Standard of Review

Claims of ineffective assistance of counsel are reviewed *de novo*. United States v. Datavs, 71 M.J. 420, 424 (C.A.A.F. 2012) (citing United States v. Gutierrez, 66 M.J. 329, 330-31 (C.A.A.F. 2008)).

Law

The Sixth Amendment guarantees an accused the right to effective assistance of counsel. 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, courts apply the standard from Strickland v. Washington, 466 U.S. 668, 687 (1984), and begin with the presumption of competence announced in United States v. Cronic, 466 U.S. 648, 658 (1984).

"In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing Strickland, 466 U.S. at 698). The Strickland standard is "stringent." United States v. Rose, 71 M.J. 138, 144 (C.A.A.F. 2012).

The Court can decide an ineffective assistance claim on either of these two elements without consideration of the other. Strickland, 466 U.S. at 697. Accordingly, this Court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the [appellant] as a result of the alleged deficiencies." Id.

Military courts apply the following three-part test in assessing 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 were ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result? United States v. Gooch, 69 M.J. 353, 362 (C.A.A.F. 2011) (alteration and omission in original) (quoting United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991)). The burden is on Appellant to demonstrate both deficient performance and prejudice. Datavs, 71 M.J. at 424.

To establish the element of deficiency, the appellant must first overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional

assistance." Strickland, 466 U.S. at 689. In cases involving attacks on defense counsel's trial tactics, an appellant must show specific defects in counsel's performance that were "unreasonable under prevailing professional norms." United States v. Mazza, 67 M.J. 470, 475 (C.A.A.F. 2009)).

"Disaffected clients seeking to assign blame for their predicament often blame their lawyers for their predicament rather than themselves. For this reason, the law presumes that counsel is effective, and places upon an appellant the burden of establishing ineffectiveness." United States v. Thompson, No. ACM 32630, 1998 CCA LEXIS 163, at *7 (A.F. Ct. Crim. App. 5 February 1998) (unpub. op.).

In order to show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 698; Loving v. United States, 68 M.J. 1, 6-7 (C.A.A.F. 2008). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In the guilty plea context, the prejudice question is whether "there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Rose, 71 M.J. at 143 (additional citations omitted).

An appellant who claims ineffective assistance of counsel "must surmount a very high hurdle." United States v. Alves, 53 M.J. 286, 289 (C.A.A.F. 2000) (citations and quotation marks omitted). Judicial scrutiny of a defense counsel's performance must be "highly deferential and should not be colored by the distorting effects of hindsight." Id. (citing Strickland, 466 U.S. at 689). Moreover, this Court does "not look at the success of a criminal defense attorney's trial

theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, unpub. op. at *7-8.

"If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice…that course should be followed." United States v. Wiley, 47 M.J. 158, 160 (C.A.A.F. 1997) (quoting Strickland, 466 U.S. at 697). "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." United States v. Dewrell, 55 M.J. 131, 133 (C.A.A.F. 2001) (quoting Strickland, 466 U.S. at 690).

Analysis

Appellant argues his counsel were constitutionally ineffective for characterizing his convictions as "heinous" and for arguing that individuals were "mad" at Appellant for his convictions. (App. Br., Appendix at 10.) But Appellant's convictions stem from numerous sexual conversations with nine children ranging from 12 to 15 years old spanning five months. (R. at 157, 163.) With the strong presumption of competency in mind, trial defense counsel's word choice was not "unreasonable under prevailing professional norms." Mazza, 67 M.J. at 475.

Arguing to a military judge alone, trial defense counsel acknowledged the seriousness of Appellant's crimes, to which he pleaded guilty, as a trial strategy to garner credibility with the sentencing authority. The concept of sexual crimes against children usually elicits a strong negative reaction from most people. To that end, trial defense counsel acknowledged the emotional nature of Appellant's convictions and then reminded the military judge, "but we don't sentence purely based on our emotions." (R. at 157.) Defense counsel even then clarified that he was not trying to downplay the Appellant's crimes when speaking on the single victim impact

statement provided but merely request a "proper sentencing consideration" as "the true impact" of Appellant's conduct. (R. at 163.)

Further, this Court does "not look at the success of a criminal defense attorney's trial theory, but rather whether counsel made an objectively reasonable choice in strategy from the alternatives available at the time." Thompson, unpub. op. at *7-8. It was an objectively reasonable choice in strategy to acknowledge the seriousness of Appellant's crimes upfront and then focus the rest of the sentencing argument on Appellant's mitigation. Thus, Appellant's counsel's characterization of Appellant's lewd conversations with children as "heinous" does not establish that counsel's performance was "deficient" under Strickland. 466 U.S. at 698.

In order to show prejudice, Appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id.; Loving, 68 M.J. at 6-7. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. In the guilty plea context, the prejudice question is whether "there is a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial." Rose, 71 M.J. at 143 (additional citations omitted). Here, trial defense counsel used the word "heinous" only three times in his sentencing argument at the end of the proceedings. (R. at 157, 163).

Next, Appellant argues that it was ineffective to state that certain people in the courtroom were "mad." (App. Br. at 11.) However, most people would agree with the categorization of Appellant's actions of sexual conversations with at least nine minors as heinous or that it makes people "mad," which is why trial defense counsel said it – to build credibility with the military judge. Further, the prejudicial effect of the limited use of the word "heinous" on the proceedings

was nonexistent. Appellant has presented no evidence that if his trial defense counsel did not say "heinous" or characterize certain people in the room as "mad" there would have been a different result in the trial.

Even if trial defense counsel's sentencing argument exceeded the bounds of what was permissible, such characterization of Appellant's conduct did not materially prejudice a substantial right of Appellant. This was a judge alone trial. (R. at 11-12.) Appellant has presented no evidence that the sentencing authority was impermissibly swayed by defense counsel's use of the word "heinous." (R. at 157, 163). As part of the presumption that military judges know and follow the law absent clear evidence to the contrary, this Court must "presume that the military judge is able to distinguish between proper and improper sentencing arguments." United States v. Hill, No. ACM 38979, 2017 CCA LEXIS 477, at *19-20 (A.F. Ct. Crim. App. July 12, 2017) (unpub. op.) (quoting United States v. Erickson, 65 M.J. 221, 225 (C.A.A.F. 2007)). This is true regardless of whether the military judge states on the record what portion of the argument is improper and will not be considered. Erickson, 65 M.J. at 225. Therefore, even if the argument was error, the military judge is presumed to have filtered out any inappropriate choice of word to characterize Appellant or his conduct.

Appellant cannot meet his burden with speculation that the result of the proceeding would have been different had trial counsel not used the word "heinous" three times in his sentencing argument. There is nothing in the record to suggest the military judge sentenced Appellant on anything except the evidence alone. After all, "argument by counsel is not evidence." United States v. Bodoh, 78 M.J. 231, 236 (C.A.A.F. 2019). The military judge was not unduly swayed by trial defense counsel's word choice as evidenced by the fact that he did not sentence Appellant to anywhere near the maximum possible confinement allowed under the Plea

Agreement: the maximum possible was 36 months and Appellant received 26 months. (R at 105, 170.) With no performance deficiency and thus no prejudice suffered, the Appellant cannot support a claim of ineffective assistance of counsel. This Court should deny this assignment of error.

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.

[redacted]
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[2] In accordance with Rule 9.1 of this Court's Rules of Practice and Procedure, Ms. Wooldridge was at all times supervised by attorneys of AF/JAJG during her participation in the writing of this brief.

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 13 February 2023.

[redacted]
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