IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force *Appellant*	)	No. ACM 40220 24 January 2022

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his first enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **2 March 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 53 days have elapsed. On the date requested, 120 days will have elapsed.

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

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 24 January 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

28 January 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	))))))))))	UNITED STATES' GENERAL OPPOSITION, OUT OF TIME, TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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. This response is being filed out of time due to an administrative oversight.

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, 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 28 January 2022.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40220**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark A. PETERSON	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 24 January 2022, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit an assignment of error brief, with a new requested deadline of **2 March 2022**. The record of trial was docketed with this court on 2 December 2021. From the date of docketing to the present date, 54 days have elapsed.

The motion incorrectly calculates the requested deadline date. First, an appellant has 60 days from date of docketing by this court to file a brief. *See* A.F. Ct. Crim. App. R. 17.3(d). Further, "[a]n appellant's first motion for enlargement may be granted for up to 60 calendar days and does not require a showing of good cause." A.F. Ct. Crim. App. R. 23.3(m)(2). Therefore, the deadline date for Appellant's first motion for an enlargement of time would be **25 March 2022** vice 2 March 2022.

Accordingly, it is by the court on this 31st day of January, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant's brief will be due **25 March 2022**.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (SECOND)**
	)	
v.	)	Before Panel No. 1
	)	
Master Sergeant (E-7)	)	No. ACM 40220
MARK A. PETERSON,	)	
United States Air Force	)	18 March 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 April 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 106 days have elapsed. On the date requested, 143 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The record of trial is four volumes consisting of 10 prosecution exhibits, four defense exhibits, and five appellate exhibits; the transcript is 109 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. 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 of time.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 18 March 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

22 March 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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]

JOHN P. PATERA, Maj, USAF
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 22 March [redacted]

[redacted]
JOHN P. PATERA, Maj, USAF
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**
Appellee	)	**TIME (THIRD)**
	)	
v.	)	Before Panel No. 1
	)	
Master Sergeant (E-7)	)	No. ACM 40220
MARK A. PETERSON,	)	
United States Air Force	)	15 April 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **24 May 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 134 days have elapsed. On the date requested, 173 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The record of trial is four volumes consisting of 10 prosecution exhibits, four defense exhibits, and five appellate exhibits; the transcript is 109 pages. Appellant is not currently confined.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. 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 of time.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 15 April 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

18 April 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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]

JOHN P. PATERA, Maj, USAF
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 18 April 2022.

[redacted]

JOHN P. PATERA, Maj, USAF
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**
Appellee	)	**TIME (FOURTH)**
	)	
v.	)	Before Panel No. 1
	)	
Master Sergeant (E-7)	)	No. ACM 40220
MARK A. PETERSON,	)	
United States Air Force	)	17 May 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 June 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 166 days have elapsed. On the date requested, 203 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The record of trial is four volumes consisting of 10 prosecution exhibits, four defense exhibits, and five appellate exhibits; the transcript is 109 pages. Appellant is not currently confined.

Counsel is currently assigned 17 cases; 7 cases are pending AOEs before this Court. Four cases have priority over the present case:

1. *United States v. Stafford*, ACM 40131 - The record of trial has 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Counsel has reviewed approximately half of the record of trial in this case.

2. *United States v. Roberts*, ACM 40139 – The record of trial has six volumes consisting of six prosecution exhibits, nine defense exhibits, 30 appellate exhibits, and one court exhibit; the transcript is 814 pages. Counsel has not yet begun her review in this case.

3. *United States v. McClenney*, ACM S32712 – The record of trial has five volumes and consists of nine prosecution exhibits and 21 appellate exhibits; the transcript is 176 pages. Counsel has not yet begun her review in this case.

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charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

4. *United States v. McWoodson*, ACM 40188 – The record of trial is five volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 91 pages. Counsel has not yet begun her review in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. Appellant was informed of his right to a timely appeal, was consulted with regard to an enlargement of time, and agrees with this enlargement of time. 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 of time.

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 17 May 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 May 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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]

JOHN P. PATERA, Maj, USAF
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 17 May 20[redacted]

[redacted]

JOHN P. PATERA, Maj, USAF
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**
Appellee	)	**TIME (FIFTH)**
	)	
v.	)	Before Panel No. 1
	)	
Master Sergeant (E-7)	)	No. ACM 40220
MARK A. PETERSON,	)	
United States Air Force	)	16 June 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **23 July 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 196 days have elapsed. On the date requested, 233 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The record of trial is four volumes consisting of 10 prosecution exhibits, four defense exhibits, and five appellate exhibits; the transcript is 109 pages. Appellant is not currently confined.

Counsel is currently assigned 17 cases; 8 cases are pending AOEs before this Court. Four cases have priority over the present case:

1. *United States v. Stafford*, ACM 40131 - The record of trial has 21 volumes consisting of 17 prosecution exhibits, 16 defense exhibits, five court exhibits, and 186 appellate exhibits; the transcript is 2282 pages. Undersigned counsel and civilian appellate defense counsel have finished their review of the record of trial and are finalizing the brief in this case.

2. *United States v. McClenney*, ACM S32712 – The record of trial has five volumes and consists of nine prosecution exhibits and 21 appellate exhibits; the transcript is 176 pages. Counsel has completed her review of the record and is drafting the brief in this case.

3. *United States v. Roberts*, ACM 40139 – The record of trial has six volumes consisting of six prosecution exhibits, nine defense exhibits, 30 appellate exhibits, and one court exhibit; the transcript is 814 pages. Undersigned counsel has reviewed approximately half of the record,

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charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

while civilian appellate defense counsel has reviewed approximately one-third of the transcript in this case.

4. *United States v. McWoodson*, ACM 40188 – The record of trial is five volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 91 pages. Counsel has not yet begun her review in this case.

Through no fault of Appellant, undersigned counsel has been unable to complete her review and prepare a brief for Appellant's case. Appellant was informed of his right to a timely appeal, was consulted with regard to an enlargement of time, and agrees with this enlargement of time. 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 of time.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 16 June 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

16 June 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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]

JOHN P. PATERA, Maj, USAF
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 16 June 2023.

[redacted]

JOHN P. PATERA, Maj, USAF
Appellate Government Counsel, Government Trial and Appellate Operations Division
Military Justice and Discipline
United States Air Force
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40220**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark A. PETERSON	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 16 June 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 17th day of June, 2022,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **23 July 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

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**MOTION FOR ENLARGEMENT OF TIME (SIXTH)**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force *Appellant*	)	No. ACM 40220 15 July 2022

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

Pursuant to Rule 23.3(m)(3) and 23.3(m)(6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **22 August 2022**. The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 225 days have elapsed. On the date requested, 263 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The record of trial is four volumes consisting of 10 prosecution exhibits, four defense exhibits, and five appellate exhibits; the transcript is 109 pages. Appellant is not currently confined. Undersigned counsel has completed her review of the record in this case but not yet drafted a brief.

Counsel is currently assigned 19 cases; 8 cases are pending AOEs before this Court. Three cases have priority over the present case:

1. *United States v. Roberts*, ACM 40139 – The record of trial has six volumes consisting of six prosecution exhibits, nine defense exhibits, 30 appellate exhibits, and one court exhibit; the transcript is 814 pages. Undersigned counsel and civilian appellate defense counsel have completed review of the record of trial and are drafting the brief.

2. *United States v. Witt*, ACM 36785 (reh)/ USCA Dkt. No. 22-0090 – One issue was granted and undersigned counsel is drafting Appellant's brief, which is due 6 August 2022.

3. *United States v. McWoodson*, ACM 40188 – The record of trial is five volumes consisting of four prosecution exhibits, seven defense exhibits, and five appellate exhibits; the transcript is 91 pages. Undersigned counsel has completed her review of the record in this case but not yet drafted a brief.

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charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

Through no fault of Appellant, undersigned counsel has been unable to prepare a brief for Appellant's case. Appellant was informed of his right to a timely appeal, was consulted with regard to an enlargement of time, and agrees with this enlargement of time. 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 of time.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Appellate Government Division on 15 July 2022.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

18 July 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40220 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]

MARY ELLEN PAYNE
Associate Chief, 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 18 July 2022.

[redacted]

MARY ELLEN PAYNE
Associate Chief, 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*	)	**MOTION TO ATTACH**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force *Appellant*	)	No. ACM 40220 19 August 2022

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

Pursuant to Rules 23 and 23.3(b) of this Honorable Court's Rules of Practice and Procedure, Appellant, Master Sergeant (MSgt) Mark A. Peterson, respectfully moves to attach the following document to the record of trial: the declaration of MSgt Peterson, dated 31 July 2022, 75 pages total. (Appendix A.) Attached to MSgt Peterson's declaration are medical and mental health records relevant to his claim of ineffective assistance of counsel.

This declaration is relevant and necessary for this Court's resolution of Appellant's claim of ineffective assistance of counsel. *See* Brief on Behalf of Appellant, dated 22 August 2022. Specifically in the claim, MSgt Peterson argues that trial defense counsel were ineffective for failing to request a sanity board under Rule for Courts-Martial 706, failing to adequately investigate his significant mental health issues and combat related injuries, failing to present mitigation evidence regarding his physical and mental health to the convening authority in plea negotiations and the court in sentencing, and advising MSgt Peterson to enter into a plea agreement with a mandatory dishonorable discharge.

This Court is permitted to receive this declaration and attach it to the record. *See United States v. Jessie*, 79 M.J. 437, 442 (C.A.A.F. 2020) (holding Courts of Criminal Appeals may consider affidavits when doing so is necessary for resolving issues raised by materials in the

record). Ineffective assistance of counsel is explicitly recognized in *Jessie* as an exception to the general rule prohibiting extra-judicial declarations on appeal. *Id*.

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

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 August 2022.

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force *Appellant*	)	No. ACM 40220 19 August 2022

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

Assignment of Error

I.

WHETHER MSGT PETERSON'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE?

II.

WHETHER MSGT PETERSON'S SENTENCE TO A DISHONORABLE DISCHARGE IS UNDULY SEVERE?

Statement of the Case

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base (AFB), New Mexico. R. at 9. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §912a; one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ, 10 U.S.C. §931b; and one charge with one specification of conspiracy to obstruct justice

in violation of Article 81, UCMJ, 10 U.S.C. §881.[1] R. at 81; Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge.[2] R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

Statement of Facts

MSgt Peterson entered Active Duty in the United States Air Force on 12 January 2002. Prosecution Exhibit (PE) 7. During his 19 years and eight months of service prior to his court-martial, MSgt Peterson served as a civil engineer troop both inside the continental United States and in multiple overseas assignments and deployments. *Id.* MSgt Peterson deployed to Afghanistan twice—first from September 2006 until March 2007, and again from July 2011 to July 2012. *Id.*

During his first Afghanistan deployment, MSgt Peterson was assigned to Army Special Forces. Defense Exhibit (DE) D. In November of 2006, while conducting a cordon and search in the Garmsir district in Helmand Province, then-Senior Airman (SrA) Peterson's small fire team came under attack from the enemy. DE C. While the team assisted two British platoons in

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

[2] Appellant's plea agreement required the military judge to adjudge a dishonorable discharge, and limited the maximum confinement for each specification to the credited pretrial confinement time, to run concurrently. Appellate Exhibit III.

returning enemy fire, a rocket detonated only 25 to 50 meters behind then SrA Peterson, throwing him to the ground. *Id.* SrA Peterson and his team continued to engage the enemy until the enemy fire stopped and all units could safely maneuver to the rally point. *Id.* Despite being thrown to the ground from the rocket detonation, SrA Peterson did not seek medical treatment when he returned to his forward operating base. DE D, *see also* Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. Years later, MSgt Peterson would be diagnosed with a traumatic brain injury (TBI) and bulging and impinged disks in his vertebrae from this incident. *Id.*

In the years that followed his deployments, MSgt Peterson began to experience mental and emotional distress, including depression, for which he began to receive mental health treatment. DE D. Despite spending two weeks in inpatient mental health treatment in April 2018, MSgt Peterson was still plagued by suicidal ideations. *Id.* He continued to receive mental health treatment, but his condition was exacerbated by stressors such as his divorce and child custody battle. *Id.*

In September 2019, MSgt Peterson was assigned to Holloman AFB. PE 1. Sometime between 8 July and 22 July 2020, MSgt Peterson purchased what he believed to be OxyContin pills from a woman off base. R. at 27. MSgt Peterson crushed the pills into powder and snorted the powder into his nose through a rolled dollar bill. *Id.* MSgt Peterson had no legal or medical justification to use the pills, but he did so to try to escape the mental and physical pain he was experiencing. *Id.* On 22 July 2020, MSgt Peterson was ordered by his squadron commander to provide a urine sample to the Drug Demand Reduction (DDR) office as part of a unit sweep. PE 1. His urine sample tested positive for d-Methamphetamine and Fentanyl. *Id.* Based on the

urinalysis result, MSgt Peterson believed that the pills he purchased were laced with Methamphetamine and Fentanyl. R. at 27, 33.

MSgt Peterson again purchased what he believed to be OxyContin pills from the same woman off base between 27 July and 10 August 2020. R. at 37. He ingested these pills in the same manner as before—by crushing them into a powder and snorting the powder through a rolled dollar bill. *Id.* On 10 August 2020, MSgt Peterson was ordered to provide another urine specimen to DDR in accordance with the 49th Wing Commander's *Bickel* policy. PE 1. This urine specimen tested positive for Fentanyl. R. at 38, PE 1. MSgt Peterson believes the pills he purchased contained Fentanyl. R. at 38.

In October 2020, MSgt Peterson's commander preferred one charge and three specifications on MSgt Peterson for wrongful drug use in violation of Article 112a, UCMJ. PE 1. Those charges were referred to trial by Special Court-Martial, docketed to begin on 19 January 2021. *Id.* While awaiting trial, MSgt Peterson went to a local off-base hospital for treatment, and his providers administered Fentanyl. R. at 43. MSgt Peterson authorized his mother to receive his medical records from the off-base hospital. *Id.* MSgt Peterson's mother brought him the medical records on a compact disc. *Id.* MSgt Peterson then used Adobe Acrobat Pro to modify his medical records to falsely show he had been administered Fentanyl on 21 July 2020 and 7 August 2020. *Id.* He explained to his mother that he was altering the records so he would not be convicted of the Fentanyl use at his court-martial. R. at 44. MSgt Peterson printed the records and asked his mother to deliver them to his defense counsel, which she did. *Id.* His defense counsel provided notice of these medical records to the Government, who subsequently withdrew and dismissed the specifications of wrongful use of Fentanyl. PE 1. Further investigation revealed that the records were falsified, leading to the charges in the present case. PE 1.

Charges in the present case were preferred on MSgt Peterson on 30 March 2021 and referred to trial by General Court-Martial on 13 May 2021. ROT Vol. 1, DD Form 458 – Charge Sheet. New military defense counsel were detailed to represent MSgt Peterson in this court-martial. R. at 4-5. While awaiting his court-martial, MSgt Peterson was admitted to inpatient mental health and substance abuse treatment, first from 17 May to 15 June 2021 and again in August of 2021. *See* Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. MSgt Peterson's trial defense counsel was aware that he had been admitted to inpatient mental health treatment but did not request a sanity board under Rule for Courts-Martial (R.C.M.) 706 to determine if MSgt Peterson had the capacity to stand trial. *Id.*

The maximum punishment authorized in MSgt Peterson's case was reduction to E-1, total forfeiture of all pay and allowances, confinement for 30 years, and a dishonorable discharge. R. at 59. MSgt Peterson's plea agreement required the military judge to sentence MSgt Peterson to a dishonorable discharge. Appellate Exhibit III, ¶4a. When asked by the military judge which party initiated the mandatory dishonorable discharge term in the plea agreement, MSgt Peterson's trial defense counsel responded "Defense did, Your Honor." R. at 68. MSgt Peterson's trial defense counsel informed him that the plea agreement requiring a dishonorable discharge was the best he could get, and if he declined the plea agreement and went to trial, his sentence would be worse. Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022

Argument

I.

MSGT PETERSON'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

Standard of Review

This Court reviews claims of ineffective assistance of counsel 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) that the appellant was prejudiced by the error. *Id*. at 698–99.

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.

However, "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Wiggins v. Smith*, 539 U.S. 510, 533 (2003) (citing *Strickland*, 466 U.S. at 690–91). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (citation omitted). The Supreme Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citing *Hill v. Lockhart*, 474 U.S. 52, 57 (1985)). "At the sentencing phase, ineffective assistance may occur if trial defense counsel either 'fails to investigate adequately the possibility of evidence that would be of value to the accused in presenting a case in extenuation and mitigation or, having discovered such evidence, neglects to introduce that evidence before the court-martial.'" *Scott*, 81 M.J. at 84 (citing *United States v. Boone*, 49 M.J. 187, 196 (C.A.A.F. 1998)).

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."). "Prejudice 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).

"In the guilty plea context, the first part of the *Strickland* test remains the same—whether counsel's performance fell below a standard of objective reasonableness expected of all attorneys." *United States v. Bradley*, 71 M.J. 13, 16 (C.A.A.F. 2012) (citing *Hill v. Lockhart*, 474 U.S. 52, 56-

58 (1985). The second prong—prejudice—"is modified to focus on whether the 'ineffective performance affected the outcome of the plea process." *Id.*

R.C.M. 706(a) states that "If it appears to any commander who considers the disposition of charges, or to any preliminary hearing officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused . . . lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused." R.C.M. 909 provides that "No person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable . . . to conduct or cooperate intelligently in the defense of the case."

Analysis

MSgt Peterson's trial defense counsel were ineffective for at least three reasons: (1) they failed to request a sanity board under R.C.M. 706, (2) they failed to adequately investigate evidence of MSgt Peterson's combat related injuries and mental health issues for use in plea negotiations and as evidence in mitigation, and (3) they advised MSgt Peterson to enter into a plea agreement with a mandatory dishonorable discharge. While each of trial defense counsel's deficiencies individually denied MSgt Peterson effective assistance of counsel, the cumulative effect of these errors deprived MSgt Peterson of a fair trial and merits setting aside his sentence.

1. Trial defense counsel failed to request a sanity board under R.C.M. 706 in order to determine whether MSgt Peterson had capacity to stand trial.

Trial defense counsel were ineffective by failing to request a sanity board in order to determine whether MSgt Peterson had the mental capacity to stand trial. MSgt Peterson was obviously suffering from severe mental and emotional distress, as evidenced by his admission into inpatient treatment on two separate occasions prior to his court-martial. *See* Motion to Attach,

Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. MSgt Peterson's defense counsel were aware of his mental health condition because he informed them. *See* Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022.

Moreover, MSgt Peterson's actions of falsifying medical records and misleading his own defense team prior to his original court-martial demonstrate that the stress of his military justice proceedings were potentially too arduous for him to handle, raising obvious questions about his capability to stand trial. MSgt Peterson's trial defense counsel were aware of this behavior as it formed the basis for some of the charges in this case.

With that knowledge, trial defense counsel had an obligation to request a sanity board under R.C.M. 706(a), as they had "reason to believe" that MSgt Peterson lacked capacity to stand trial. An accused must be mentally competent to cooperate intelligently in the defense of their case. R.C.M. 909. An accused resorting to fabricating evidence and lying to their attorneys is engaging in self-sabotaging behavior and arguably unable to competently assist in the defense of their case. A reasonable defense counsel would be concerned about their client's ability to assist in their defense if their client had twice been admitted to inpatient treatment while awaiting trial, and if their client had misled their previous defense team. Under these circumstances, a reasonable defense counsel would also be concerned about their client's ability to enter into a plea agreement, especially when that plea agreement mandates the imposition of a dishonorable discharge after a career that spanned 19 years and eight months with multiple combat deployments. Additionally, any diagnoses reached by the sanity board could have been used by trial defense counsel to negotiate a more favorable plea agreement, or presented to the military judge as mitigating evidence. At a minimum, trial defense counsel had an obligation to further investigate whether

MSgt Peterson was competent to stand trial, and the appropriate vehicle for that investigation was a sanity board under R.C.M. 706.

2. Trial defense counsel failed to adequately investigate MSgt Peterson's combat related injuries and mental health issues for use in plea negotiations and as evidence in mitigation.

Trial defense counsel provided ineffective assistance of counsel by failing to adequately investigate and present readily available evidence regarding MSgt Peterson's combat related injuries and mental health difficulties during plea negotiations and as evidence in mitigation in MSgt Peterson's sentencing case. Trial defense counsel was aware of MSgt Peterson's mental health struggles, as discussed *supra*. Trial defense counsel was also aware of MSgt Peterson's combat related injuries, evidenced by the fact that MSgt Peterson referenced his injuries in his unsworn statement. DE D. However, trial defense counsel made no effort to present any documentary or testimonial evidence of MSgt Peterson's mental health issues and combat related injuries to the convening authority or the military judge. While trial defense counsel did present evidence that MSgt Peterson experienced a rocket detonation during his 2006 deployment, they did not present any evidence of his resultant injuries. *See* DE C. The only account of these mitigating circumstances came from MSgt Peterson's unsworn statement.

Trial defense counsel had a duty to investigate whether MSgt Peterson's combat related injuries and mental health difficulties mitigated the charged offenses. One reasonable step to conduct such an investigation would have been to ask MSgt Peterson for copies of his medical and mental health records. MSgt Peterson would have easily been able to obtain them, as evidenced by the fact he retrieved such records for his appeal. There is no reasonable explanation why trial defense counsel could not have performed this simple investigative step.

This lack of investigation prejudiced MSgt Peterson. Investigation into MSgt Peterson's combat related injuries would have shown that he was suffering both physically and mentally from these injuries and attempting to self-medicate by purchasing OxyContin, mitigating his conduct as charged in the Article 112a offenses. Had this mitigating evidence been presented to the convening authority during the negotiation of the plea agreement, MSgt Peterson may have avoided a plea agreement with a mandatory dishonorable discharge. Had the plea agreement not required the military judge to adjudge a dishonorable discharge, and had the military judge been presented with this compelling mitigating evidence, the military judge may not have sentenced MSgt Peterson to a punitive discharge, or at least not a dishonorable discharge.

There is a reasonable probability that had this information been investigated and presented to the convening authority and the military judge, MSgt Peterson may have received a lower sentence. Because trial defense counsel did not exploit this mitigating evidence, MSgt Peterson suffered prejudice.

3. Trial defense counsel advised MSgt Peterson to enter into a plea agreement with a mandatory dishonorable discharge.

MSgt Peterson's trial defense counsel initiated a mandatory dishonorable discharge term in his plea agreement, and informed MSgt Peterson that if he did not accept the plea agreement and took his case to trial, it would result in a worse sentence. R. at 68; Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. MSgt Peterson's trial defense counsel grossly overestimated the likelihood that he would receive a dishonorable discharge—likely because trial defense counsel failed to fully investigate the mitigating circumstances present in this case, as discussed above. Even considering the charges and specifications which were dismissed as part of the plea agreement, when compared with his record of service and the significant mitigation surrounding his offenses, there was a low likelihood that MSgt Peterson would receive

a punitive discharge in this case, much less a dishonorable discharge. The Manual for Courts-Martial provides that convictions for certain offenses are subject to a mandatory dishonorable discharge, including rape and sexual assault. *Manual for Courts-Martial, United States*, (2019 ed.) (*MCM)* pt. IV, ¶ 60d(1)-(2). The only other instance in which a dishonorable discharge is a mandatory punishment is when a service member is sentenced to death. R.C.M. 1004(d). MSgt Peterson's convictions are far less severe than convictions for rape, sexual assault, and situations where an accused is sentenced to death, even without taking into account the substantial mitigation at play in his case.

Trial defense counsel's advice that MSgt Peterson would be subject to a more severe punishment without the plea agreement was without a basis in law or fact, as a dishonorable discharge is the most severe punishment a court-martial can adjudge besides the death penalty, which was not available in this case. This advice fell below the standard of reasonableness expected of attorneys, especially in a case with an accused who was four months from being retirement eligible, and who desperately needed the benefits available from his service, such as healthcare, due to the injuries incurred during his service. This imprudent advice prejudiced MSgt Peterson because it affected the outcome of the plea process—he agreed to a mandatory dishonorable discharge provision in his plea agreement when he otherwise would not have.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his sentence.

II.

MSGT PETERSON'S SENTENCE TO A DISHONORABLE DISCHARGE IS 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).

Like death, a dishonorable discharge "is different" from other punishments, such as confinement, both in terms of severity and permanence. *United States v. Mitchell*, 58 M.J. 446, 448 (C.A.A.F. 2003) (citing *United States v. Rosendahl*, 53 M.J. 344, 348 (C.A.A.F. 2000), and *United States v. Josey*, 58 M.J. 105, 108 (C.A.A.F. 2003)). Confinement is temporary, but a dishonorable discharge is forever. *Mitchell*, 58 M.J. at 448 (finding that a sentence of six years of confinement and a dishonorable discharge was more severe than a sentence of ten years of confinement and a bad conduct-discharge).

Analysis

MSgt Peterson's sentence to a dishonorable discharge is unduly severe when considered in light of 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, MSgt Peterson pleaded guilty to three specifications of wrongful use of controlled substances, two specifications of obstruction of justice, and one specification of conspiracy to obstruct justice. R. at 11. The circumstances of these offenses are substantially mitigating. First, MSgt Peterson wrongfully used controlled substances in an attempt to escape the mental and physical pain he was suffering. R. at 27, 34. This pain stemmed from combat related injuries and the mental and emotional scars left from his multiple combat deployment and years of military service. DE D, *see also* Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. Like so many veterans, MSgt Peterson's physical and mental pain led him to abuse prescription painkillers, and he found himself a victim of the opioid crisis. MSgt Peterson's drug use did not harm anyone besides

MSgt Peterson himself. As for the obstruction of justice and conspiracy to obstruct justice, this Court should consider that the conduct underlying MSgt Peterson's convictions for obstruction of justice and conspiracy to obstruct justice were part of one continuous criminal act, which decreases the severity of the offenses. Additionally, MSgt Peterson was under a tremendous amount of stress regarding his pending court-martial. He was facing the likely end of a long career of Air Force service, and the likely loss of all the benefits he accrued because of his service and sacrifice. R. at 93. MSgt Peterson was also still dealing with significant mental health issues, as demonstrated by his multiple rounds of inpatient mental health treatment while awaiting his court-martial. MSgt Peterson admitted to the military judge that none of these circumstances excuse his offenses, but they certainly mitigate them. R. at 27, 37, 93.

Furthermore, MSgt Peterson pleaded guilty. R. at 11. Pleading guilty represents the first step towards an individual's rehabilitation and should be considered as mitigating evidence by this Court when evaluating the particular appellant and the need for rehabilitation. *See* R.C.M. 1001(g)(1). MSgt Peterson's ownership of his actions and accountability for his mistakes significantly offsets the relatively minimal harm that resulted from his conduct.

MSgt Peterson's record of service and personal characteristics as an Airman further demonstrate that a dishonorable discharge is unduly severe. At the time of his court-martial, MSgt Peterson had served in the military for 19 years and eight months. PE 7. His service included multiple combat deployments and overseas assignments. DE B; DE D. Throughout his career he earned a Joint Service Commendation Medal, three Air Force Commendation Medals, an Army Commendation Medal, two Air Force Achievement Medals, an Army Achievement Medal, and an Air Force Combat Action Medal, among other awards and decorations. DE A; DE B. He suffered physical injuries during his deployments, including traumatic brain injury, spinal

stenosis, and spondylosis at the C5-6 and C6-7 vertebrae. *See* Motion to Attach, Declaration of MSgt Mark A. Peterson, dated 31 Jul. 2022. He also suffered moral injuries during his deployments, for example when he recovered remains from a vehicle born improvised explosive device at the Bagram Air Base gate. DE D at 3. MSgt Peterson also endured the loss of comrades, both in combat and to suicide—an outcome he came to envy. DE D at 4. Like many service members, he did not seek treatment for his physical and mental health until they began to negatively impact his life in a significant way. This is demonstrated by his enlisted performance reports, which show consistently exceptional performance until 2019 when his mental health struggles escalated to suicidal ideations requiring inpatient treatment. PE 8; DE D. As discussed above, the physical and mental wounds MSgt Peterson bore through his almost 20 years of service contributed to the crimes he pleaded guilty to at his court-martial.

Given the whole context of the nature and seriousness of the offenses, the record of trial, and MSgt Peterson's personal characteristics and record of service, his sentence was unduly severe. *Anderson*, 67 M.J. at 705. Short of the death penalty, a dishonorable discharge is the most severe punishment a court-martial can adjudge. "[A]n executed punitive discharge terminates military status as completely as an executed death penalty ends mortal life." *United States v. Prow*, 13 C.M.R. 63, 64 (1962). A dishonorable discharge deprives MSgt Peterson of his opportunity to retain certain benefits associated with honorable military service, including education, housing, and medical assistance, not to mention the retirement benefits from which he was four months shy of eligibility. Just based on the evidence adduced at trial, a dishonorable discharge for an individual who dedicated almost 20 years of their life in service to their country, and sustained physical and mental wounds along the way, is unduly severe. More importantly, had the full context of mitigating evidence been adequately investigated and presented to the convening

authority, the record demonstrates that MSgt Peterson's plea agreement would not have required the imposition of a dishonorable discharge. Without the mandatory dishonorable discharge provision in the plea agreement, it is unlikely the military judge would have adjudged this punitive discharge given the nature and seriousness of the offenses and the considerable mitigation from MSgt Peterson's personal characteristics and record of exemplary service.

WHEREFORE, MSgt Peterson respectfully requests that this Honorable Court disapprove the dishonorable discharge portion of his sentence.

Respectfully submitted,

[redacted]

Appellate Defense Counsel
Air Force Appellate Defense Division

[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 August 2022.

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force, *Appellant*.	)	No. ACM 40220 7 September 2022

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

Pursuant to Rule 23.3(m)(5)-(6) of this Honorable Court's Rules of Practice and Procedure, the United States respectfully requests that it be allotted 15 additional days to submit its Answer from the date trial defense counsel's declarations or affidavits are provided to this Court.[1] The Court docketed this case on 1 December 2021. Since docketing, Appellant has been granted six enlargements of time. Appellant filed his brief with this Court on 19 August 2022, and the United States' Answer is currently due on 18 September 2022. This is the United States' first request for an enlargement of time and, as of the date of this request, 280 days have elapsed.

There is good cause for the enlargement of time in this case. First, the United States cannot prepare its Answer to the allegations of ineffective assistance of counsel without statements from Appellant's trial defense counsel. Appellant alleges his trial defense counsel were ineffective for three reasons, none of which were raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). An enlargement of time is therefore necessary to ensure trial defense counsel have sufficient time to review the allegations before they draft and submit their respective statements to this Court.

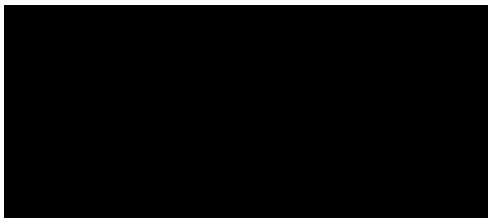
[1] In response to Appellant's claims of ineffective assistance of counsel, the United States is filing a concurrent Motion to Compel Declarations or Affidavits on 7 September 2022.

Second, an enlargement is necessary to ensure assigned Government appellate counsel, Captain Olivia Hoff,[2] has sufficient time to review trial defense counsel's affidavits or declarations, incorporate that information into the Government's Answer, and allow adequate time for supervisory review before filing with the Court. As mentioned above, Appellant raised three allegations that his trial defense counsel provided ineffective assistance. In total, Appellant raises two assignments of error in his brief, and the record includes four volumes consisting of 10 prosecution exhibits, 4 defense exhibits, 5 appellate exhibits, and a 109-page transcript.

Third, at the time of Appellant filed his brief in this case, assigned counsel, Captain Hoff, was in transition from Al Udeid Air Base, Qatar to Joint Base Andrews, 316th Wing Office of the Staff Judge Advocate. On 19 August 2022, U.S. Air Force JAG Corps' leadership diverted Captain Hoff to an assignment as an appellate counsel at the Government Trial and Appellate Operations Division at Joint Base Andrews. She arrived at her new assignment on 29 August 2022. Captain Hoff has already reviewed the record and reached out to each trial defense counsel regarding Appellant's claims of ineffective assistance of counsel. As of the date of this motion, this case is her top priority.

For these reasons, the United States respectfully requests an enlargement of time to ensure a proper and responsive brief is filed with this Court. Should this Court grant the United States' Motion to Compel Declarations or Affidavits, the United States requests 30 days for trial defense counsel to provide declarations or affidavits, and an additional 15 days for the United States to file its Answer. This would result in a filing deadline that is 45 days from the date of this Court's order.

[2] Because Captain Hoff is not yet admitted to the Air Force Court of Criminal Appeals, undersigned counsel is filing this motion, as well as the Government's Motion to Compel Affidavits or Declarations, on her behalf.



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 the original and copies of the forgoing was delivered to the Court and the Air Force Appellate Defense Division on 7 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*,	)	**UNITED STATES' MOTION TO COMPEL DECLARATIONS OR AFFIDAVITS**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON**, United States Air Force, *Appellant*.	)	No. ACM 40220
	)	7 September 2022

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 that this Court compel Appellant's trial defense counsel, Captain Dainec Stefan and Major Ryan Farrell, to provide affidavits or declarations in response to Appellant's allegations of ineffective assistance of counsel (IAC).

In his assignments of error, dated 19 August 2022, Appellant claims he received IAC when trial defense counsel (1) failed to request a sanity board under Rule for Courts-Martial (R.C.M.) 706 to determine whether Appellant had the capacity to stand trial; (2) failed to adequately investigate Appellant's combat-related injuries and mental health issues for use in plea negotiations and as evidence in mitigation; and (3) advised Appellant to enter into a plea agreement with a mandatory dishonorable discharge. (App. Br. at 8-10.) None of these allegations is raised pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

On 1 September 2022, both trial defense counsel responded to Captain Olivia Hoff, the Government appellate counsel assigned to this case (but not yet admitted to the Air Force Court of Criminal Appeals),[1] that they would only provide affidavits or declarations by order of this

[1] Because Captain Hoff is not yet admitted to this Court, undersigned counsel is filing this pleading on her behalf.

Court. To prepare an adequate brief that follows the IAC standard set out in United States v. Polk, 32 M.J. 150 (C.M.A. 1991),[2] the United States requests that this Court compel trial defense counsel to each provide a declaration or affidavit within 30 days of this Court's order.

The facts of Appellant's case and the nature of his claims render it appropriate for this Court to compel the production of declarations or affidavits. Appellant's allegations of IAC specifically pertain to strategic decisions that likely involve privileged communications between Appellant and his trial defense team. Without a declaration from Appellant's trial defense counsel, there is no way to know the contents of those strategic discussions or decisions, and it is accordingly impossible to answer Appellant's allegations from the mere contents of the record. Therefore, the United States requires a statement from the trial defense team to adequately respond to Appellant's claims of ineffectiveness. *See, e.g.*, United States v. Rose, 68 M.J. 236, 238 (C.A.A.F. 2009) (remand to the Court of Criminal Appeals to obtain an affidavit from military defense counsel in response to an ineffective assistance of counsel claim).

At this stage of the appellate process, such an order will ensure prompt disposition of the issues while also avoiding any undue delay. Moreover, this Court cannot grant Appellant's IAC claim without first obtaining a statement from trial defense counsel. *See* United States v. Melson, 66 M.J. 346, 350-51 (C.A.A.F. 2008) ("where the Court of Criminal Appeals 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, that court is required to obtain a response from trial defense counsel").

[2] The first question of the Polk test being, "[a]re the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?" Polk, 32 M.J. at 153 (citations omitted).

Accordingly, the United States requests that this Court order each trial defense counsel to provide a declaration or affidavit—each containing specific and factual responses to Appellant's allegations of IAC—within 30 days of this Court's order.

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 the original and copies of the forgoing was delivered to the Court and the Air Force Appellate Defense Division on 7 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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40220**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mark A. PETERSON	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 1**

On 19 August 2022, Appellant filed an assignments of error brief alleging that his trial defense counsel, Capt Dainec Stefan and Maj Ryan Farrell, were ineffective when they (1) failed to request a sanity board under [Rule for Courts-Martial (R.C.M.)] 706 in order to determine whether [Appellant] had capacity to stand trial;" (2) "failed to adequately investigate [Appellant]'s combat related injuries and mental health issues for use in plea negotiations and as evidence in mitigation;" and (3) "advised [Appellant] to enter into a plea agreement with a mandatory dishonorable discharge."

On 7 September 2022, the Government filed a Motion to Compel Declarations or Affidavits and a separate Motion for Enlargement of Time. The Government requests this court compel an affidavit or declaration from Appellant's trial defense counsel to respond to the claimed ineffective assistance of counsel. The Government asserts declarations or affidavits are necessary to address Appellant's claims of ineffective assistance of counsel, and further states that trial defense counsel declined to provide an affidavit or declaration without an order from this court.

In its Motion for Enlargement of Time, the Government requests an enlargement of time of 15 days after the affidavits or declarations are received to incorporate the responses into its brief. This is the Government's first request for an enlargement of time.

Appellant did not oppose either of the Government's motions.

After considering the Government's motions and applicable case law, it is by the court on this 16th day of September 2022,

ORDERED:

The Government's Motion to Compel Declarations or Affidavits is **GRANTED**. Capt Dainec Stefan and Maj Ryan Farrell are each ordered, individually, to provide an affidavit or declaration to the court that is responsive

to Appellant's claims that trial defense counsel were ineffective in the aforementioned allegations. Such affidavits or declarations need not go outside the scope of the above claims. The affidavits or declarations will be provided to the court not later than **16 October 2022**.

It is further ordered:

The Government's Motion for Enlargement of Time is **GRANTED**. Given the allegations of ineffective assistance of counsel, the Government's answer to Appellant's AOE brief is due to the court **not later than 31 October 2022**.

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*,	)	UNITED STATES' MOTION TO ATTACH DOCUMENTS
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON**, United States Air Force *Appellant.*	)	No. ACM 40220 14 October 2022

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

Pursuant to Rule 23.3(b) of this Court's Rules of Practice and Procedure, the United States moves the Court to attach the following documents to this motion:

- Appendix A - Declaration of Maj RF, dated 8 October 2022 (5 pages for the declaration with one attachment for a total of 6 pages)
- Appendix B - Declaration of Capt DS, dated 14 October 2022, (9 pages total)

The attached declarations are responsive to this Court's order directing Maj FR and Capt DS to provide declarations responsive to Appellant's Assignments of Error concerning whether he received ineffective assistance of counsel. (Court Order, dated 16 September 2022.)

Our Superior Court has held matters outside the record may be considered "when doing so is necessary for resolving issues raised by materials in the record." United States v. Jessie, 79 M.J. 437, 444 (C.A.A.F. 2020). The Court has also concluded that "based on experience . . . 'extra-record fact determinations' may be 'necessary predicates to resolving appellate questions.'" Id. at 442 (quoting United States v. Parker, 36 M.J. 269, 272 (C.M.A. 1993)). Accordingly, the attached documents are relevant and necessary to address this Court's order and Appellant's Assignments of Error.

WHEREFORE, the United States respectfully requests this Court grant this Motion to Attach the Documents.

[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]

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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 Appellate Defense Division on 14 October 2022.

[redacted]

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, *Appellee*,	)	UNITED STATES' ANSWER TO ASSIGNMENT OF ERROR
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON**, United States Air Force *Appellant.*	)	No. ACM 40220 31 October 2022

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

ISSUES PRESENTED

I.

WHETHER MSGT PETERSON'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE?

II.

WHETHER MSGT PETERSON'S SENTENCE TO A DISHONORABLE DISCHARGE IS UNDULY SEVERE?

STATEMENT OF THE CASE

On 4 October 2021, a military judge sitting alone at a general court-martial at Holloman Air Force Base, New Mexico, convicted Appellant, pursuant to his pleas, of Charge IV with three specifications in violation of Article 112a, Uniform Code of Military Justice (UCMJ); Charge V with two specifications in violation of Article 131b, UCMJ; and Charge VI with one specification in violation of Article 81, UCMJ. (*Entry of Judgment*, 1 November 2021, ROT, Vol. 1). The military judge sentence Appellant to a dishonorable discharge, confinement not to exceed his pretrial confinement credit (six days), and reduction in grade to E-1. (Id.)

STATEMENT OF FACTS

As a result of Appellant's drug abuse, his urinalysis conducted on Appellant on 22 July 2020, returned positive for d-methamphetamine, fentanyl, and NFENT (Norfentanyl, the major metabolite of Fentanyl). (Pros. Ex. 1). A subsequent test on 10 August 2020, reflected a positive result for NFENT. On 20 October 2020, Appellant's commander charged him with one charge and three specifications in violation of Article 112a, UCMJ, for using d-methamphetamine and fentanyl. (Id.) The legal office docketed a special court-martial for 5 January 2021; however, on 4 January 2021, Appellant went to the hospital to receive emergency medical treatment where they administered him fentanyl. (Id.) Appellant's mother reached out to Appellant's original trial defense counsel (not Maj RF and Capt DS) letting them know she was gathering his medical records to provide them for his defense while he was in the hospital. (Id.)

Approximately a week later, Appellant's mother watched Appellant falsify the medical records he had received to erroneously reflect he had undergone emergency medical treatment on 21 July 2020 and on 7 August 2020, during which he was administered fentanyl. (Id.) Appellant asked his mother to deliver the falsified records in a sealed envelope to his original trial defense counsel team. Appellant's original trial defense counsel provided notice in accordance with Military Rule of Evidence (M.R.E.) 902(11) that Appellant would be properly introducing the records at trial. In response, the Government withdrew and dismissed the two specifications for fentanyl use. (Id.)

On 19 January 2021, additional research conducted by the medical review officer into Appellant's medical records uncovered that the medical records offered by Appellant's original trial defense counsel did not exist. After the special court-martial adjourned on 19 January 2021, due to the military judge granting a continuance, Appellant returned to his home and destroyed

the laptop he used to falsify the records by smashing it with a sledgehammer, dipping it in acid, covering it in wood glue, then hiding it underneath a container outside. A digital forensic expert was unable to extract any data from the device as a result. (Id.)

Due to Appellant's actions, Maj RF and Capt DS replaced his original trial defense team for future proceedings. (Appendix A and B).

On 13 May 2021, the convening authority initially referred six charges against Appellant.

- Charge I, one specification in violation of Article 86, UCMJ, absence without leave
- Charge II, two specifications in violation of Article 92, UCMJ, failure to obey a lawful general order
- Charge III, one specification in violation of Article 107, UCMJ, false official statement
- Charge IV, three specifications in violation of Article 112a, UCMJ, drug abuse (one use of methamphetamine and two separate uses of fentanyl)
- Charge V, two specifications in violation of Article 131b, UCMJ, obstruction of justice
- Charge VI, one specification in violation of Article 81, UCMJ, conspiracy to obstruct justice

In May to June 2021, Capt DS and Maj RF attempted to negotiate a plea agreement on behalf of Appellant that did not include a punitive discharge. (Appendix A and B). However, the convening authority's position was to reject any offer that did not include a punitive discharge. (Id.) The convening authority was only willing to accept a plea agreement for a bad conduct discharge and a range of confinement between eighteen to twenty-four months. (Id.)

In July 2021, Appellant's First Sergeant drafted a memorandum stating Appellant disclosed to Alcohol and Drug Abuse Prevention and Treatment (ADAPT) the that he had used five illicit drugs and had done so up until at least two weeks prior to his ADAPT initial assessment on 5 May 2021. (Appendix A),

Trial defense counsel and the convening authority did not come to an agreement prior to Appellant being ordered into pretrial confinement on 6 August 2021. (Id.) He was ordered into

confinement because he tested positive for cocaine on a urinalysis he took as part of an outpatient treatment program. Appellant then had to be removed from pretrial confinement in order to receive inpatient treatment for drug withdrawal symptoms. (Id.) After he returned to pretrial confinement, he was removed for behavioral health concerns. The inpatient clinic then filed a petition for Appellant's court-ordered evaluation and potential civil commitment. (Appendix B). As a part of that process, the civilian court appointed Appellant a mental health defender. (Id.) On 25 August 2021, pursuant to Appellant's agreement, the civilian court mandated Appellant receive court-ordered treatment for one year, either inpatient or outpatient. Id.

The court-appointed mental defender assured trial defense counsel there were no concerns regarding Appellant's competency. (Id.) Had there been concerns over competency, "[Appellant] would never have been permitted… to voluntarily stipulate to court-ordered mental health treatment" by the civilian court judge and the mental health defender. (Id.) Trial defense counsel then followed up with his defense leadership and a senior policy advisor at the Trial Defense Division to check his rationale in not requesting a sanity board. (Id.)

During his representation of Appellant, Capt DS reviewed Appellant's combat history records and over 1000 pages of medical documentation. (Id.) He used Appellant's combat and medical history to argue for a better plea agreement from the convening authority. (Id.)

On 16 August 2021, after Appellant spent time in pretrial confinement, he informed his trial defense counsel he wanted a "guarantee no future confinement and that this was his top priority." (Id.) Trial defense counsel reopened plea negotiations and pursued Appellant's goal. Capt DS initiated the mandatory term for a dishonorable discharge after being informed the NAF legal office would not support a mandatory bad conduct discharge for time served. (Id.)_ Trial

defense counsel continually engaged Appellant in follow-up conversations regarding his plea agreement both telephonically and in person. (Id.)

Appellant submitted a plea agreement to the convening authority to plead guilty to charges IV, V, and VI and not guilty to the three other charges referred against him. (App. Ex. III). Appellant faced a maximum allowed sentence prior to the plea agreement of a dishonorable discharge, confinement for forty years, total forfeitures, reduction to E-1, and a reprimand. Appellant agreed to plead guilty to Charges IV, V, and VI in exchange for the military judge entering a judgement as follows: *a mandatory dishonorable discharge for the offenses Appellant plead guilty to and a maximum term of confinement equal to the number of days of credited pre-trial confinement time running concurrently for each specification*. (App. Ex. III (emphasis added)). Appellant asserted in the plea agreement that he was in fact guilty of the offense to which he was pleading guilty, he was satisfied with his trial defense counsel, and considered them competent to represent him. (Id.) The convening authority accepted Appellant's offer of plea agreement and signed the agreement. (Id.)

On 3 October 2021, trial defense counsel informed Appellant again of the consequences of his agreement and his ability to withdraw from the agreement. (Id.)Appellant declined to withdraw from the plea agreement. When the general court-martial convened on 4 October 2021, Maj RF and Capt DS represented Appellant. (R. at 4).

ARGUMENT

I.

MSGT PETERSON'S TRIAL DEFENSE COUNSEL WERE NOT INEEFECTIVE.

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. Guitierrez, 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. Chronic, 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 resulting 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).

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 the 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, 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 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, 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.

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 quotations 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). 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, 1998 CCA LEXIS at *7-8. The Strickland two-part test applies to guilty pleas and sentencing hearings. Alves, 53 M.J. at 289. The prejudice prong under Strickland requires Appellant to show "specifically that there is a reasonable probability, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. (*citing* Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

"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).

Under R.C.M. 909, no person may be brought to trial by court-martial if that person is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he is unable to understand the nature of the proceedings against him or to conduct or cooperate intelligently in the defense of the case. R.C.M. 909(a). A person is presumed to have the capacity to stand trial unless the contrary is established. R.C.M. 909(b). If it appears to any trial defense counsel that there is reason to believe that the accused lacked the mental responsibility for any offense charged or lacked mental capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. R.C.M. 706.

R.C.M. 705(a) allows for an appellant and convening authority to enter into a plea agreement in accordance with this rule, subject to the limitations prescribed by the service's secretary. Case law favors the "ability of an [appellant] to waive his rights as part of a pretrial agreement, absent some affirmative indication the accused entered the agreement unknowingly

and involuntarily." *See* United States v. Edwards, 2001 LEXIS 302, *7 (A.F. Ct. Crim. App. 29 Nov 2001) (unpub. op.) (*citing* United States v. Mezzanatto, 513 U.S. 196, 130 L. Ed. 2d 697, 115 S. Ct. 797 (1995)).

Analysis

Trial defense counsel effectively represented Appellant when they decided not to request a sanity board under R.C.M. 706, adequately investigated and strategically used Appellant's medical records, and counseled Appellant on his decision to enter into a plea agreement with a mandatory dishonorable discharge. Appellant's claim of ineffective assistance of counsel fails because trial defense counsel's performance was not deficient, and Appellant did not experience any prejudice as a result of their performance. *See* United States v. Green, 68 M.J. 360, 361 (C.A.A.F. 2020) (*citing* Strickland, 466 U.S. at 698). Furthermore, their strategic decisions are presumed effective unless Appellant meets his burden of showing deficiency and prejudice. Chronic, 466 U.S. 648, 658 (1984).

1. Trial Defense Counsel had No Duty to Request a Sanity Board Under R.C.M. 706.

Trial defense counsel did not request a sanity board under R.C.M 706, because they were not under a duty to do so. Under the first part of the three-part test articulated in Gooch, it is true trial defense counsel did not request a sanity board under R.C.M. 796, but trial defense counsel offered a reasonable explanation for their actions and why they were *not* under a duty to do so. Second, their level of advocacy did not "fall measurably below the performance…[ordinarily expected] of fallible lawyers." Third, if this Court deems trial defense counsel were ineffective, there is not a reasonable probability the outcome would have been different. 69 M.J. 353, 362 (C.A.A.F. 2011).

To the first and second prong, trial defense counsel offered reasonable explanations for their actions and are firm in their assessment that there was no reason to believe that Appellant lacked mental responsibility for any offense charged nor lacked capacity to stand trial. (Appendix A and B). This assessment was reasonable under all the facts of the case and counsel's interactions with Appellant. Furthermore, they consulted with other practitioners, and a civilian court legal assessment informed their decision. Under R.C.M. 706, they did not have a duty to transmit any concerns nor apply for a mental examination, because they did not have reason to believe Appellant met the criteria of the rule. R.C.M. 706(a). Trial defense counsel came to that assessment after thoroughly communicating with Appellant and observing him actively participate in his defense at all stages before and after his inpatient treatment. (Appendix B). From their interactions they determined Appellant was mentally competent to cooperate intelligently in his defense. To trial defense counsel, Appellant was able to admit why he committed the crimes he did and that he knew his actions were wrong. Maj RF stated in his declaration, "Despite careful probing, nothing indicated that [Appellant] was confused about what he did, that he felt an irresistible mental compulsion to do it, or that he somehow felt he was justified in doing it." (Appendix A).

Trial defense counsel's interactions with other practitioners informed their assessment – their own supervision, a subject matter expert within the defense community, and a civilian court determined Appellant competent to make decision on his own behalf. (Appendix A and B). Trial defense counsel realized at the time of their representation that if they had reason to believe that a sanity board was required, then they had a duty to pursue one. (Appendix B). However, they determined based on their extensive interactions with Appellant there was no basis for a sanity board. Trial defense counsel made the appropriate decision not to seek a futile sanity

board. Trial defense counsel enjoy a presumption of competency, which is supported by trial defense counsel's declarations attached to this record. Therefore, trial defense counsel offered a reasonable explanation for their actions, and their level of advocacy fell within the range of reasonable professional assistance.

For the third prong, Appellant has failed to show his trial defense counsel were ineffective. However, if he had, Appellant still has not shown there is a reasonable probability the outcome would have been different or, but for counsel's failure to request a sanity board, he would not have pleaded guilty. Trial defense counsel's declarations show that Appellant knew his actions were criminal both throughout the trial phases and when he committed the criminal acts. (Appendix A and B). He went through a lengthy providence inquiry with the military judge who did not raise any concerns over Appellant's ability to stand trial. (R. at 11-60, Plea Inquiry; R. at 60-78, Plea Agreement Inquiry). Appellant knowingly entered into agreements, investigated his defense, and interacted with trial defense counsel to advocate his defense case. (Appendix A and B). It is purely speculative, and highly unlikely given the facts of this case, that a sanity board would have ruled Appellant did not have the capacity to stand trial. The law presumes Appellant was competent to stand trial, R.C.M. 909(b), a presumption that Appellant has not overcome. The record indicates, and trial defense counsel declare, that Appellant understood the nature of the proceedings against him and cooperated intelligently in his defense. Trial defense counsel fully considered and assessed in accordance with the Rules for Courts-Martial, all the reasons Appellant raises in his brief as basis his trial defense counsel should have raised to request a sanity board. (Appendix A and B).

Appellant has failed to overcome the strong presumption of competency afforded to trial defense counsel, failed to show his trial defense counsel erred in not requesting a sanity board, and failed to establish he suffered prejudice.

2. Trial Defense Counsel Adequately Investigated Appellant's Combat Related Injuries and Mental Health Issues for Use in Plea Negotiations and as Evidence in Mitigation.

Under the first prong of the Gooch test, Appellant's assertion that trial defense counsel failed to adequately investigate Appellant's combat related injuries and mental health issues for use in plea negotiations and as evidence in mitigation is incorrect. Trial defense counsel reviewed forty pages of medical records directly related to Appellant's combat experience and over 1000 additional pages of his medical records from the years 2011-2021. (Appendix B). Trial defense counsel ultimately used Appellant's combat history and injuries in oral plea negotiations and cited to them in written materials in support of plea negotiations, despite obvious issues trial defense counsel found in the records.[1] (Appendix A and B). Trial defense counsel noted the defense investigated Appellant's records thoroughly, and in-depth enough, to pinpoint discrepancies in the records. (Appendix B).

Trial defense counsel made the strategic decision not to enter Appellant's medical records as evidence in mitigation due to the discrepancies they found in those records after a more than adequate investigation of the records. (Appendix B). Instead, trial defense counsel relied on Appellant's unrebutted assertions in his unsworn statement to bring this information before the panel. (Defense Ex. D). The discrepancies in the records, their contradiction with Appellant's combat records, and the potential aggravating, rather than mitigating, effect was a reasonable

[1] Capt DS notes there were contradictions as to whether Appellant suffered from depression and neck/back pain and as to the origins of Appellant's injuries, which differed in his medical records from his narrative in his Purple Heart application and in the combat reports. (Appendix B).

explanation for trial defense counsel not to admit the records. 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 at the time." Thompson, 1998 CCA LEXIS at *7-8. Given their concerns, and Appellant's ability to bring the information before the panel in his unsworn statement, trial defense counsel's level of advocacy fell within the range of reasonable professional assistance. Appellant has failed to demonstrate a "reasonable probability" that but for trial defense counsel not submitting his medical records as evidence in mitigation, the military judge *would not have* sentenced Appellant to a punitive discharge. Given the evidence trial defense counsel had before them, and Appellant's continuing course of misconduct, a punitive discharge was nearly a certainty from a military judge sitting alone. Furthermore, the discrepancies trial defense counsel noted in his record likely would have been exploited by government counsel, because the government was already on the lookout for this accused to be untruthful in his medical records. Therefore, Appellant fails to show a reasonable probability that the outcome of his sentence would have been different.

Trial defense counsel's declarations are very clear on the fact that the convening authority would not have agreed to a plea without a punitive discharge, so it would require two leaps of probability to get to Appellant's proposed scenario where the military judge would not have adjudged a punitive discharge. First, a reasonable probability that the convening authority would have agreed to no punitive discharge, which the convening authority foreclosed during plea negotiations. Second, a reasonable probability the military judge would have been persuaded by medical records containing discrepancies with combat records. Appellant has failed to show a reasonable probability on both grounds.

Finally, the military judge did not have the ability to adjudge no punitive discharge due to Appellant's agreement to a dishonorable discharge so he would not receive more confinement than he had already served. Therefore, had trial defense counsel erred in submitting mitigation evidence, there would have been no prejudice to Appellant.

Appellant's assertions that trial defense counsel failed to investigate his records adequately and failed to use them in plea negotiations are false. (Appellant's Declaration). Trial defense counsel also offered reasonable explanations for why they chose to not use the actual records as evidence in mitigation during the presentencing hearing. Their level of advocacy fell within the range of reasonable professional assistance, and Appellant has failed to show prejudice. Thus, trial defense counsel effectively represented Appellant in reviewing his combat history and medical records and making strategic decisions about their use at various stages.

3. Trial Defense Counsel Effectively Advised Appellant Regarding his Plea Agreement, including the Mandatory Dishonorable Discharge Provision

Under the first-prong of the Gooch test, it is true that trial defense counsel initiated the discussion regarding a mandatory dishonorable discharge as part of the terms of the plea agreement. (Appendix B). It is false that trial defense counsel asserted that Appellant's sentence "would be subject to a more severe punishment without a plea agreement." (App. Br. 12). It is true that trial defense counsel advised Appellant of the possible outcomes at trial regarding potential punitive discharges, including the realistic possibility of a dishonorable discharge, and confinement times. (Appendix B). According to trial defense counsel, what Appellant considered a more severe sentence was one that contained more confinement after his stay in pre-trial confinement. (Appendix B). Trial defense counsel did advise Appellant based on their experience he was likely to receive more significant confinement without a plea agreement, plus the significant possibility of a punitive discharge. (Appendix B). Appellant fails to establish any

of the advice trial defense counsel provided to him was in error. Appellant confirmed he wanted to abide by the terms of the final plea agreement after extensive and repeated conversations with trial defense counsel. (Appendix B). He had almost a month and a half between signing the plea agreement and placing his pleas on the record where he could have withdrawn from the agreement at any point. (App. Ex. III). Appellant did not make this decision in the heat of the moment without the opportunity to meaningfully understand the agreement he entered into with the convening authority.

Trial defense counsel provided a reasonable explanation for their actions by advising Appellant (1) on the terms of the plea agreement, (2) his exposure at trial without the plea agreement, (3) and fully informing him of the ramifications of his desired plea agreement terms.

Based on trial defense counsel's engagement with government trial counsel regarding possible plea terms, they knew a plea agreement with only a bad conduct discharge and no confinement would not be supported. (Appendix B). Appellant made it clear to trial defense counsel at the time of the plea agreement he did not want to go back to confinement. (Appendix B). The only plea agreement acceptable to the convening authority without confinement was one that contained a mandatory dishonorable discharge provision. (Appendix B). Trial defense counsel fully informed Appellant on the effects of a dishonorable discharge and the likely outcomes of a court-martial without a plea agreement in place. (Appendix B). Appellant asserted to trial defense counsel and to the military judge he fully understood the effects of agreeing to a mandatory dishonorable discharge, including loss of retirement benefits, loss of Veteran's Affairs benefits, and stigma attaching for employment and education opportunities, and desired to do so. (R. at 67-69; Appendix B).

In accordance with R.C.M. 705, the record supports Appellant knowingly and voluntarily entered into this plea agreement and all its terms to receive the benefit of the bargain. (R. at 76). In advising Appellant on all the ramifications of his plea agreement, the likely outcomes at trial without the plea agreement, and the relation of the terms of the final plea agreement to Appellant's desired outcome, trial defense counsel's advocacy fell within the range of reasonable professional assistance.

Appellant rests his prejudice argument on the erroneous assertion that trial defense counsel advised him that he *would* be subject to a more severe sentence without the plea agreement. Even if that had been the case, he fails to show any reasonable probability that he would not have agreed to the terms of the plea agreement to avoid further jail time. However, as the record reflects, trial defense counsel advised him of all the possible outcomes, which included the sound advice that Appellant would likely face a punitive discharge and more confinement. Any advise that did not contain the possibility of more confinement would have been unsound looking to the facts of this case. Given it was Appellant's overwhelming desire to avoid further jail time, he has failed to demonstrate any reasonable probability that he would not have agreed to the terms of the plea agreement absent trial defense counsel's advice. Appellant received his number one priority through the benefit of his plea, knew all the disadvantages, and was effectively advised of the other avenues open to him. He chose, having been fully and effectively advised by trial defense counsel, to move forward with no jail time.

Appellant fails to show specifically that there is a reasonable probability, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. In this case, trial defense counsel did not err when they advised Appellant of both the likely outcome should he take his case to trial and the full effects of his plea agreement. Appellant

made a fully informed decision knowing the advantages and disadvantages of his plea agreement, thus he fails to demonstrate a reasonable probability that he would not have pleaded guilty.

II.

MSGT PETERSON'S SENTENCE TO A DISHONORABLE DISCHARGE IS NOT UNDULY SEVERE

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006). 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 and Analysis

Appellant's sentence is not unduly severe. Rather, it fits his actions and the findings of guilt in this case. The appropriateness of a sentence is assessed "by considering 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. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). Unlike the act of bestowing mercy through clemency, which was delegated to other hands by Congress, Courts of Criminal Appeals 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).

Appellant's sentence to a dishonorable discharge and confinement equal to his pretrial confinement credit – 6 days – is an appropriate punishment, because it fits the crimes in questions, the nature of the offenses, and this particular Appellant. Without the plea agreement, Appellant faced a maximum of forty years of confinement and a dishonorable discharge. Even

though he agreed to the sentencing terms in his plea agreement, Appellant argues his sentence was inappropriately severe. (App. Br. at 13). "Absent evidence to the contrary, an 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). Appellant now urges his agreement to the terms should not be considered as indicative of its reasonableness because his trial defense counsel did not adequately review his medical records for use in mitigation either during the plea process or at sentencing. However, that is not accurate. As mentioned above, trial defense counsel thoroughly reviewed his records, used them as part of the incentive for the convening authority to agree to Appellant's desired plea agreement terms, and fully advised Appellant on the terms of his agreement.

Appellant focuses his argument on emphasizing his medical and mental health issues. (App. Br. at 14-16). Appellant ignores the severity and aggravating factors of his own crimes, which warranted a dishonorable discharge on their own. Appellant was found guilty of three distinct specifications that involved continued drug use for using methamphetamine and fentanyl. He was found guilty of obstructing justice twice and conspiring to obstruct justice.

Appellant gained the benefit of the plea agreement and fully understood that benefit at trial. The benefit allowed him to plead not guilty to three charges and took away his confinement exposure. Appellant fully considered his plea agreement in light of alternative arrangements that included a bad conduct discharge in lieu of a dishonorable discharge, but chose the one that benefited him the most based on his priorities. Importantly, Appellant could have agreed to a plea agreement that contained some amount of confinement with a bad conduct discharge. However, for his own reasons and knowing the full consequences of receiving a dishonorable discharge, he chose a dishonorable discharge over confinement and a bad conduct

discharge. Now he seeks to gain the benefit not only of his agreement with the convening authority, but also the windfall of receiving effectively no punishment for his continual criminal behavior.

To further support the fact that Appellant deserves the adjudged sentence, Appellant had already been facing court-martial charges when he committed over three more instances of misconduct. The first instance of misconduct involved falsifying his medical documentation, having his mother deliver those falsified records to his initial trial defense counsel, and attempting to pass those documents through those trial defense counsel to the court-martial at an earlier hearing. (Pros. Ex. 1). When caught for the falsification of his records, he again sought to obstruct justice by smashing the computer used to falsify the records with a sledgehammer, dipping it in acid, and covering it in wood glue. (R. at 49-50). Third, in the months leading up to his court-martial for substance abuse and subsequent misconduct, he tested positive for cocaine and admitted to using five more illicit substances. (Appendix A). The record demonstrates Appellant is not someone who seeks to take responsibility for his actions. Appellant was fully aware of the wrongfulness and consequences of his misconduct and continued pursue his criminal ends without a hint of hesitation or remorse.

For these reasons, Appellant's punishment "fit[s] the offender" and his convictions. United States v. Mack, 9 M.J. 300, 317 (C.M.A. 1980)(citation omitted). The dishonorable discharge Appellant agreed to as part of his plea agreement was not inappropriately severe.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court deny Appellant's claims, because his trial defense counsel effectively represented him throughout all stages of the trial and his sentence is appropriate in light of his plea agreement and continuous misconduct.

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Appellate Defense Division on 31 October 2022.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME OUT OF TIME TO FILE**
	)	**REPLY BRIEF**
	)	
v.	)	Before Panel No. 1
	)	
Master Sergeant (E-7)	)	No. ACM 40220
MARK A. PETERSON,	)	
United States Air Force	)	4 November 2022
Appellant	)	

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

Pursuant to Rule 23.3(m)(7) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) out of time to file a reply to the Government's Answer. The reply is currently due **7 November 2022**. Appellant requests an enlargement for a period of 7 days, which will end on **14 November 2022.** The record of trial was docketed with this Court on 2 December 2021. From the date of docketing to the present date, 337 days have elapsed. On the date requested, 347 days will have elapsed.

On 4 October 2021, Appellant was tried by a military judge sitting as a general court-martial at Holloman Air Force Base, New Mexico. Consistent with his pleas pursuant to a plea agreement, the military judge found Appellant guilty of one charge with one specification of wrongful use of methamphetamine and two specifications of wrongful use of fentanyl, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ); one charge with two specifications of obstructing justice, both in violation of Article 131b, UCMJ; and one charge with one specification of conspiracy to obstruct justice in violation of Article 81, UCMJ.[1] R. at

[1] In accordance with Appellant's plea agreement, the convening authority withdrew and dismissed with prejudice one charge with one specification of absence without leave in violation of Article 86, UCMJ; one charge with one specification of violating a lawful general regulation

81, Record of Trial (ROT) Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021. The military judge sentenced Appellant to reduction to the grade of E-1, confinement for 6 days, and a dishonorable discharge. R. at 108. The convening authority took no action on the findings or sentence. ROT Vol. 1, Convening Authority Decision on Action – *United States v. MSgt Mark A. Peterson*, dated 27 Oct. 2021.

The Government filed its answer with this Court at 2028 hours on 31 October 2022. Undersigned counsel gave birth to a baby on 29 October 2022 and began postpartum convalescent leave on 31 October 2022 upon discharge from the hospital, and therefore did not receive the Government's filing until 4 November 2022. Due to email issues, leadership at the Appellate Defense Division was also unaware of the Government's answer. Thus, good cause exists for this seven-day delay.

Further, MSgt Peterson was informed of his right to a timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time.

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

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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and one specification of violating a lawful order, both in violation of Article 92, UCMJ; and one charge with one specification of making a false official statement in violation of Article 107, UCMJ. *See* Appellate Exhibit III; ROT Vol. 1, Entry of Judgment in the Case of *United States v. MSgt Mark A. Peterson*, dated 1 Nov. 2021.

CERTIFICATE OF FILING AND SERVICE

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

Respectfully submitted,

[redacted]
KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

7 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MARK A. PETERSON, USAF, *Appellant.*	))))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME TO FILE REPLY BRIEF ACM 40220 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 does not oppose to Appellant's Motion for Enlargement of Time, Out of Time, to file a Reply Brief to the United States' Answer to Assignment of Error in this case.

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

[redacted]

MARY ELLEN PAYNE
Associate Chief, 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 the Air Force Appellate Defense Division on 7 November 2022.

[redacted]
MARY ELLEN PAYNE
Associate Chief, 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*	)	**REPLY BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 1
Master Sergeant (E-7) **MARK A. PETERSON,** United States Air Force *Appellant*	)	No. ACM 40220 14 November 2022

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

COMES NOW, Appellant, Master Sergeant (MSgt) Mark A. Peterson, by and through his undersigned counsel pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, and submits this reply to the United States' Answer to Assignments of Error, filed on 31 October 2022 (hereinafter Gov. Ans.). Appellant primarily rests on the arguments contained in the Brief on Behalf of Appellant, filed on 19 August 2022, but provides the following additional argument in reply to the United States' Answer to Assignment of Error I.

Argument

MSGT PETERSON'S TRIAL DEFENSE COUNSEL WERE INEFFECTIVE.

The Government's Answer and the declarations from MSgt Peterson's trial defense counsel fail to rebut the opening brief's showing of deficient performance and prejudice. The Government claims that presenting MSgt Peterson's medical and mental health records would not have changed the outcome of his case as the convening authority insisted on a mandatory punitive discharge in the plea agreement, and the medical and mental health records would not have convinced the military judge to spare MSgt Peterson a punitive discharge. Gov. Ans. at 13. The Government's arguments and trial defense counsel's declarations present MSgt Peterson's case as a choice

between two options: entering into a plea agreement or pleading not guilty and litigating his case. This approach fails to consider a third viable option that likely would have resulted in a more favorable outcome—pleading guilty without a plea agreement and electing to be sentenced by a panel of court members. Additionally, the Government's answer does not account for the cumulative impact of trial defense counsel's shortcomings in plea agreement negotiations and presenting MSgt Peterson's sentencing case.

1. **Trial defense counsel were deficient in failing to request a sanity board, refusing to present MSgt Peterson's medical and mental health records, and negotiating a plea agreement with a mandatory dishonorable discharge.**

The Government describes the outcome of MSgt Peterson's case as predetermined, arguing that "a punitive discharge was nearly a certainty from a military judge sitting alone." Gov. Ans. at 13. Trial defense counsel made similar assertions. *See* United States' Motion to Attach Documents, dated 14 Oct. 2022, Appendix A at 5, Appendix B at 8. This belief permeated trial defense counsel's actions in the case, causing them to forego a sanity board as "futile," reject MSgt Peterson's medical and mental health records, and continue negotiating a plea agreement despite the convening authority's insistence on a punitive discharge. *Id.*, Appendix A at 3. These decisions were deficient and prejudiced MSgt Peterson.

With regards to trial defense counsel's negotiation of and advice on a plea agreement with a mandatory dishonorable discharge, the Government asserts that MSgt Peterson could not avoid a punitive discharge because (1) the convening authority would not agree to a plea without a punitive discharge; and (2) the military judge would not be persuaded against adjudging a punitive discharge by MSgt Peterson's medical and combat records. *Id.* Similarly, the declarations from trial defense counsel present their advice to MSgt Peterson as a binary choice between agreeing to the plea agreement with a mandatory dishonorable discharge or fully litigating his court-martial. *See* United States' Motion to Attach Documents, dated 14 Oct. 2022, Appendix A at 5, Appendix

B at 7-8. Notably, MSgt Peterson's trial defense counsel do not state whether they advised MSgt Peterson on the ability to plead guilty without a plea agreement and elect sentencing by a panel of court members. That course of action would have demonstrated MSgt Peterson's willingness to take responsibility for his actions, and the military judge would have instructed the panel that MSgt Peterson's "plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government usually are saved by a plea of guilty. Such a plea may be the first step towards rehabilitation." *Military Judges' Benchbook*, Dept. of the Army Pamphlet 27-9 at 92 (29 Feb. 2020). MSgt Peterson also could have presented his significant mitigating evidence—including his almost 20 years of service and his combat related physical injuries and mental health issues—to a receptive panel instead of to a military judge. To be clear, MSgt Peterson does not agree with the Government that the military judge would not have been persuaded by presentation of MSgt Peterson's medical and mental health records. However, there is certainly a reasonable probability that a panel of members presented with such substantial mitigation would be convinced that a punitive discharge was not warranted in this case. It was deficient for MSgt Peterson's trial defense counsel to advise him to enter into a plea agreement with a mandatory dishonorable discharge when this other option was likely to yield a more favorable result.

2. The cumulative impact of trial defense counsel's shortcomings prejudiced MSgt Peterson.

If this Court finds that the individual oversights of MSgt Peterson's trial defense counsel fail to establish defective performance as established by *Strickland v. Washington*, 466 U.S. 668 (1984), this Court should still consider whether the cumulative impact of trial defense counsel's conduct "as a whole might have been defective." *United States v. Loving*, 41 M.J. 213, 252 (C.A.A.F. 1994) (citing *Frey v. Fulcomer*, 974 F.2d 348, 361 n. 12 (3d Cir. 1992) ("Because the

prejudice question under *Strickland* is whether all of counsel's unprofessional errors *combined* undermine our confidence in the result.")). Trial defense counsel's shortcomings created a domino effect which amounted to defective performance.

First, trial defense counsel failed to request a sanity board because they believed it would be "futile." *See* United States' Motion to Attach Documents, dated 14 Oct. 2022, Appendix A at 3. However, even if a sanity board found that MSgt Peterson was competent to stand trial and assist in his own defense, as the trial defense counsel believed, the sanity board still would have provided a "clinical psychiatric diagnosis." Rule for Courts-Martial (R.C.M.) 706(c)(2)(B). Trial defense counsel's concerns with "inconsistencies" in MSgt Peterson's medical records should have prompted them to obtain a clinical psychiatric diagnosis from a sanity board—a "clean" record of MSgt Peterson's mental health struggles that could have been used in negotiating a plea agreement and as evidence in mitigation in sentencing. *See* United States' Motion to Attach Documents, dated 14 Oct. 2022, Appendix A at 2.

Second, trial defense counsel's failure to request a sanity board left them with insufficient information to present the full scope of MSgt Peterson's mental health issues to the convening authority in plea agreements. This combined with trial defense counsel's failure to competently use MSgt Peterson's medical records prevented trial defense counsel from persuading the convening authority to agree to a plea agreement without a punitive discharge. The convening authority's insistence on a mandatory dishonorable discharge was not an insurmountable hurdle as argued by the Government and claimed by trial defense counsel. Instead, there is a reasonable probability that, had trial defense counsel obtained a clinical psychiatric diagnosis of their client, and presented that diagnosis along with MSgt Peterson's medical records, the convening authority would have been persuaded to forego the mandatory dishonorable discharge. Armed with a mental

health diagnosis from a sanity board and MSgt Peterson's medical records, trial defense counsel would have been more successful in their strategy to depict MSgt Peterson as a wounded warrior whose wrongful use of controlled substances was an attempt to self-medicate and treat the mental and physical injuries he suffered throughout nearly twenty years of service. Instead, trial defense counsel did not negotiate a favorable plea agreement. One shortcoming cascaded into the next when trial defense counsel advised MSgt Peterson to accept the unfavorable plea agreement with a mandatory dishonorable discharge and ignored the feasible option of pleading guilty without a plea agreement and requesting sentencing by court members.

Finally, trial defense counsel's failure to obtain a sanity board and use MSgt Peterson's medical records not only limited the effectiveness of the plea negotiations in this case, it hamstrung MSgt Peterson's sentencing case. The only evidence of MSgt Peterson's mental and physical injuries was presented in MSgt Peterson's unsworn statement. Without corroboration, the military judge likely assigned less weight to this evidence, such that even without the mandatory dishonorable discharge provision of the plea agreement, the military judge was likely to adjudge a harsher sentence.

Trial defense counsel's errors in this case are all intertwined, beginning with their investigation of the case, continuing to the plea negotiations, and finally to the presentation of sentencing evidence. This Court should therefore consider the cumulative impact of these deficiencies on MSgt Peterson's case and find his trial defense counsel ineffective.

WHEREFORE, Appellant respectfully requests that this Honorable Court set aside his sentence.

Respectfully submitted,

[redacted]

KASEY W. HAWKINS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 14 November 2022.

[redacted]

KASEY W. HAWKINS, Maj, USAF
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