UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40324 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Dekota M. DOUGLAS	)	**DOCKETING**
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	

The record of trial in the above-styled case was returned to this court on 29 January 2024 by the Military Appellate Records Branch (JAJM) for re-docketing with the court.

Accordingly, it is by the court on this 29th day of January, 2024,

ORDERED:

That the record of trial in the above styled matter is referred to Panel 3.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40324 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dekota M. DOUGLAS	)	
Cadet	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

After a remand from this court, appellant's case was re-docketed on 29 January 2024. On 19 March 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government generally opposes the motion.

This court held a status conference on 22 March 2024 to discuss the progress of Appellant's case. Ms. Mary Ellen Payne represented the Government, and Major Heather M. Bruha and Ms. Megan P. Marinos represented Appellant. Major Bruha expressed that there may be another assignment of error to be filed regarding the new post-trial processing completed in the case. Further, she relayed her upcoming schedule illustrating the unlikelihood that she would be able file the brief in this case before May 2024.

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 22d day of March, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED IN PART**. Appellant shall file any assignments of error not later than **2 May 2024**.

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

FOR THE COURT

[redacted]

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

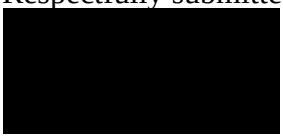
UNITED STATES	)	**MOTION FOR ENLARGEMENT OF**
Appellee	)	**TIME (FIRST)**
	)	
v.	)	Before Panel No. 3
	)	
Air Force Cadet	)	No. ACM 40324 (f rev)
DEKOTA M. DOUGLAS,	)	
United States Air Force	)	19 March 2024
Appellant	)	

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 Assignments of Error (AOE). Appellant requests an enlargement for a period of 60 days, which will end on **28 May 2024**. The record of trial was re-docketed with this Court on 29 January 2024. From the date of re-docketing to the present date, 50 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,

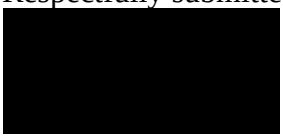


HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604
Office: (240) 612-4772
Email: heather.bruha@us.af.mil

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 19 March 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
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20 March 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Air Force Cadet DEKOTA M. DOUGLAS, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40324 (f rev) Panel No. 3

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
(240) 612-4800

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 20 March 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline
United States Air Force
(240) 612-4800

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40324 (f rev)**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL**
Dekota M. DOUGLAS	)	**CHANGE**
Air Force Cadet	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 12th day of April, 2024,

ORDERED:

That the record of trial in the above-styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. The Special Panel in this matter shall be constituted as follows:

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	Before Special Panel
	)	
Air Force Cadet	)	No. ACM 40324 (f rev)
DEKOTA M. DOUGLAS	)	
United States Air Force	)	26 April 2024
Appellant	)	

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

Assignments of Error

I.

WHETHER THE CONVENING AUTHORITY ERRED BY CONSIDERING R.H.'S SUBMISSION OF MATTERS WHEN SHE IS NOT A VICTIM UNDER R.C.M. 1106A.

II.

WHETHER THE GOVERNMENT ERRED IN POST-TRIAL PROCESSESING BY NOTING THE FIREARM PROHIBITION WAS TRIGGERED UNDER 18 U.S.C. § 922 WHEN CADET DOUGLAS HAS NOT "BEEN DISCHARGED FROM THE ARMED FORCES UNDER DISHONORABLE CONDITIONS."

Additional Statement of the Case

Air Force Cadet (Cadet) Dekota M. Douglas filed his initial assignments of error (AOE) with this Court on 13 September 2023. *See* App. Br. The Government filed their answer on 19 October 2023. *See* Gov. Ans. On 26 October 2023, Cadet Douglas filed his reply brief. *See* Reply.

On 5 December 2023, this Court issued its unpublished opinion in the case. *United States v. Douglas*, No. ACM. 40324, 2023 CCA LEXIS 502 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpub. op.). This Court agreed with the Government's concession that the case should be remanded given

Cadet Douglas was not provided an opportunity to rebut R.H.'s submission of matters prior to the convening authority's decision on action. *Id.* at *2. It remanded the case to the Chief Trial Judge, Air Force Trial Judiciary, to provide Cadet Douglas an opportunity to rebut R.H.'s submission of matters and for correction of Prosecution Exhibit 3. *Id.* This Court deferred addressing the other AOEs until the record was returned. *Id.* On 29 January 2024, this case was redocketed with this Court. After the case was redocketed, Cadet Douglas submitted a Motion for Enlargement of Time (First), for a period of 60 days to end on 28 May 2024. On 22 March 2024, this Court ordered that any additional AOE be filed no later than 2 May 2024.

Previous Assignments of Error

Cadet Douglas maintains the AOEs raised in his initial brief to this Court. App. Br. Cadet Douglas respectfully requests this Honorable Court consider the following additional argument on the issues raised in this brief.

Additional Facts

1. The Government and the Defense Agreed that R.H. was Not a Victim Under R.C.M. 1106A or Article 6b, UCMJ, for the Convicted Offenses.

The military judge at trial asked both parties what their positions were regarding whether R.H. was a victim of the convicted Article 92, UCMJ, offenses. R. at 729. Trial counsel stated, "I'm not aware of any direct emotional, financial, or other harm that may have been suffered as a result of the unprofessional relationship or underage drinking." *Id.* The military judge asked trial counsel if that meant the Government's position was that R.H. was not a victim and if trial counsel wanted to confer with the victims' counsel. *Id.* After conferring with victims' counsel, trial counsel stated the Government did not have a position. *Id.* He followed up stating R.H. may have some information that could be related, but he was not sure if it would meet the definition and the

Government did not have a position. *Id.* The Defense agreed that R.H. was not a victim under the rules of the convicted offenses. R. at 730. The victims' counsel claimed:

> I believe that my client could testify to psychological impact of the unprofessional relationship, and that she believed that this person was a friend, when he was in a position where he should not have been. That deceit by itself. Although potentially minimal, I think it does meet the low bar for being a victim, at least, of these – of these convicted offenses.

Id. The military judge indicated there was case law on the issue that he would need to look up. *Id.* He then asked the victims' counsel whether R.H. wanted to be heard if considered a victim for the convicted offenses. *Id.* The victims' counsel indicated R.H. did not wish to be heard. *Id.* Later, the military judge found R.H. was a victim under R.C.M. 1106A and Article 6b, UCMJ, after reviewing "the rules and case law." R. at 737. The military judge did not cite any specific case law. R.H. did not submit or read any victim impact statement.

2. Cadet Douglas Asked the Convening Authority Not to Consider R.H. a Victim Under R.C.M. 1106A or Article 6b, UCMJ, but the Convening Authority Did Consider the Matters.

On 21 December 2023, Cadet Douglas was notified of his opportunity to submit matters in rebuttal to R.H.'s submission of matters. Remand Documents. On 22 December 2023, Cadet Douglas responded to R.H.'s submission of matters. Rebuttal to R.H.'s Submission of Matters. He first asked the convening authority not to consider "the post-trial submission of matters provided by R.H. as she is not a crime victim under R.C.M. 1106A." *Id.* at 1.

3. In the Alternative, Cadet Douglas Rebutted R.H.'s Submission of Matters.

Cadet Douglas provided counter evidence to several comments made in the submission by R.H. *Id.* R.H. claimed:

> Based on his utter lack of integrity alone, by tricking me into a friendship that he knew was unprofessional and taking me to a remote area of the woods outside the cadet area where he coerced me into drinking an entire pint of hard liquor, he demonstrated to the members that he is not fit to serve.

R.H.'s Submission of Matters. At no point during trial did R.H. describe Cadet Douglas as "tricking" her into a friendship nor that Cadet Douglas "coerced" her into drinking. Cadet Douglas pointed to several instances of R.H. choosing to engage in a friendship with him: hanging out in the squadron study room in order to get help studying for Japanese class; meeting up in the squadron media room to talk about issues back home, with her roommates, and with her classes; meeting up multiple times to watch movies with him; and eating Chick-fil-A in the classrooms. Rebuttal to R.H.'s Submission of Matters at 2.

R.H. described to Cadet Douglas multiple occasions of her drinking back home prior to the night he negligently provided her alcohol. *Id.* R.H. went to college parties and drank. *Id.* She also went to a party with friends and blacked out when she went home on emergency leave. *Id.* R.H. stated vodka was her favorite liquor. *Id.* R.H. testified "we agreed on going to the woods" and "we agreed to drink." *Id.*; R. at 372-73.

4. The Convening Authority Again Considered R.H.'s Submission of Matters Prior to Signing the Decision on Action.

On 13 May 2022, the convening authority originally signed the Decision on Action after reviewing Cadet Douglas's submission of matters and R.H.'s submission of matters. Then on 3 January 2024, the convening authority signed the second Decision on Action after reviewing the same submission of matters as well as Cadet Douglas's Rebuttal to R.H.'s Submission of Matters. Convening Authority Decision on Action [2nd CADA], 3 January 2024.

Additional Arguments

I.

THE CONVENING AUTHORITY ERRED BY CONSIDERING R.H.'S SUBMISSION OF MATTERS WHEN SHE IS NOT A VICTIM UNDER R.C.M. 1106A.

Standard of Review

Correct completion of post-trial processing is a question of law reviewed *de novo*. *United States v. Zegarrundo*, 77 M.J. 612, 614 (A.F. Ct. Crim. App. 2018) (citations omitted).

Law and Analysis

R.H. did not qualify as a crime victim under R.C.M. 1106A for the offenses Cadet Douglas was convicted of. As such, the convening authority should not have considered R.H.'s submission of matters. Rule for Courts-Martial 1106A defines a crime victim as "an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense of which the accused was found guilty." R.C.M. 1106A(b)(2). But there was no evidence at trial that R.H. suffered *any* direct physical, emotional, or pecuniary harm as a result of Cadet Douglas negligently having an unprofessional relationship with her or providing her alcohol while she was underage.

1. R.H. Did Not Suffer any Direct Physical, Emotional, or Pecuniary Harm from Cadet Douglas Negligently having an Unprofessional Relationship with her.

The only discussion regarding potential psychological harm was from the victims' counsel in an Article 39(a), UCMJ, session. R. at 730. The victims' counsel stated he believed R.H. "could testify to psychological impact of the unprofessional relationship" because R.H. believed Cadet Douglas was a friend and he deceived her by being "in a position where he should not have been." *Id.* However, R.H. never testified as to psychological harm based on the friendship, so there was no evidence of such. Of note, discussion by victims' counsel is not evidence. *See* Dep't of Army,

Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-13 (29 Feb. 2020) (Benchbook) (stating arguments by counsel are not evidence); R. at 659. Further, Cadet Douglas was convicted of *negligent*—not willful—dereliction of duty by having an unprofessional relationship with R.H. Corrected Entry of Judgment (EOJ), 14 January 2024. Negligent is defined as "an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which [] a reasonably prudent person would have exercised under the same or similar circumstances." R. at 647. There was no deceit. RH is describing the impact of an offense the Government did not charge.

R.H. chose to hang out with Cadet Douglas. Rebuttal to R.H.'s Submission of Matters at 2. R.H. decided to accept help with her Japanese from Cadet Douglas since they were both enrolled in a Japanese language class. R. at 369. R.H. was struggling in several classes and by mid-semester, she was facing academic probation. R. at 403, 509. She also talked to Cadet Douglas about being behind academically due to her emergency leave. R. at 369. R.H. chose to talk to Cadet Douglas about her issues back home. Rebuttal to R.H.'s Submission of Matters at 2. She also talked to Cadet Douglas about her issues with her roommates. R. at 369-70. R.H. was grateful for Cadet Douglas because he listened to her and gave her advice. R. at 370. While Cadet Douglas was negligent in engaging with R.H. in these ways due to him being an upperclassman, he was not willfully deceiving her or trying to "trick" her into an unprofessional relationship. He was being supportive and listened to her talk about her problems when she felt like she had no one in her squadron to confide in. *Id.*

2. R.H. Did Not Suffer any Direct Physical, Emotional, or Pecuniary Harm from Cadet Douglas Negligently Providing her Alcohol while she was Underage.

R.H. did not qualify as a crime victim under R.C.M. 1106A for negligently being provided alcohol by Cadet Douglas. There was no evidence she suffered direct harm from being given

alcohol. At trial, R.H. did not discuss any harm she suffered from negligently being provided alcohol while she was underage. And while not evidence, her victims' counsel also did not mention any harm regarding the alcohol.

In R.H.'s submission of matters, for the first time, she claimed Cadet Douglas "coerced" her into drinking.[1] That was simply not the case. She wanted to drink with Cadet Douglas, she agreed to meet up, and they made plans to drink together. R. at 372. R.H. did not need to be "coerced" into drinking. She drank alcohol before on multiple occasions, including to the point of being blacked out. Rebuttal to R.H.'s Submission of Matters at 2. R.H. wanted to drink alcohol that night with Cadet Douglas. She thought it would help her forget her problems and worries. R. at 372. Before meeting up, R.H. told Cadet Douglas her favorite liquor was vodka. Rebuttal to R.H.'s Submission of Matters at 2. That's exactly what Cadet Douglas brought and gave R.H. to drink. R. at 375. While Cadet Douglas was negligent in providing her alcohol while she was underage, he did not force, trick, or coerce R.H. into drinking with him. They agreed weeks before to meet up and drink together. R. at 372 -73. The night of, they agreed to go into the woods together to drink, and that's what they did. *Id.*

3. Cadet Douglas's Substantial Rights were Materially Prejudiced.

Cadet Douglas asked for a reduction in confinement, but the convening authority denied the request after he considered R.H.'s submission of matters. Req. for Clemency, 3 May 2022; Convening Authority Decision on Action, 13 May 2022; Convening Authority Decision on Action, 3 January 2024. The convening authority was empowered to grant the requested relief and did not take action on the sentence after improperly considering matters submitted by R.H., who was not

[1] Since this was the first time R.H. ever described being "coerced" into drinking, she was not cross examined on it in trial.

a crime victim under R.C.M. 1106A. *Cf. United States v. King*, No. ACM. 39927 (f rev), 2023 CCA LEXIS 383, *28-29 (A.F. Ct. Crim. App. 11 Sep. 2023) (unpub. op.) (finding there was material prejudice to appellants substantial rights when the convening authority had the power to grant the requested relief and took action without considering the matters appellant submitted). Since Cadet Douglas has made a colorable showing of possible prejudice, there was a material prejudice to his substantial rights. *Id.* at *25 (*citing United States v. Rosenthal*, 62 M.J. 261, 263 (C.A.A.F. 2005)) (additional citations omitted).

4. Conclusion.

R.H. was not a crime victim under R.C.M. 1106A of the negligent dereliction of duty convictions. There was no evidence in trial that she suffered physical, mental, or pecuniary harm from the Article 92, UCMJ, offenses. Further, the substance of R.H.'s submission of matters was contradicted by the facts at trial. R.H. never testified that Cadet Douglas "tricked" her into a friendship or "coerced" her into drinking. In fact, the words "trick" and "coerce" do not occur anywhere in the transcript. Cadet Douglas made a colorable showing of possible prejudice since he did not receive any request relief and the convening authority did consider R.H.'s submission of matters. Rather than remanding this case yet again, Cadet Douglas asks this Court to exercise its Article 66(d), UCMJ, authority and grant the relief requested under AOE I in his initial brief—set aside the sentence to a dismissal. App. Br. at 11-12; *see King*, 2023 CCA LEXIS at *29 (where this Court declined to remand the case a second time for proper post-trial processing and instead exercised its Article 66(d), UCMJ, authority to not affirm the reduction in rank to the grade of E-1).

WHEREFORE, Cadet Douglas respectfully requests that this Honorable Court set aside the sentence to a dismissal.

II.

THE GOVERNMENT ERRED IN POST-TRIAL PROCESSESING BY NOTING THE FIREARM PROHIBITION WAS TRIGGERED UNDER 18 U.S.C. § 922 WHEN CADET DOUGLAS HAS NOT "BEEN DISCHARGED FROM THE ARMED FORCES UNDER DISHONORABLE CONDITIONS."

Additional Facts

After the case was remanded, the Government determined that Cadet Douglas's case still qualified for a firearms prohibition under 18 U.S.C. § 922. Corrected EOJ, 14 January 2024. The EOJ does not indicate which subsection of § 922 applies to Cadet Douglas's conduct. *Id.*

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation *de novo*. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

Cadet Douglas's convictions do not qualify under any of the nine enumerated categories of 18 U.S.C. § 922(g) that would bar her from possessing firearms. There is no evidence in the record—nor does any evidence exist—that Cadet Douglas is convicted of a crime punishable by confinement for more than one year (18 U.S.C. § 922(g)(1)), a fugitive from justice (18 U.S.C. § 922(g)(2)), an unlawful user of or addicted to any controlled substance (18 U.S.C. § 922(g)(3)), adjudicated as a mental defective or committed to a mental institution (18 U.S.C. § 922(g)(4)), an alien (18 U.S.C. § 922(g)(5)), a citizen who renounced his citizenship (18 U.S.C. § 922(g)(7)), subject to a court order to refrain from harassing, stalking, or threatening an intimate partner (18 U.S.C. § 922(g)(8)), or convicted of a misdemeanor crime of domestic violence (18 U.S.C. § 922(g)(9)). The argument below will address the Government's potential misapplication of section 922(g)(6) to Cadet Douglas's convictions.

1. 18 U.S.C. § 922 was Not Triggered as Cadet Douglas has Not Been Discharged.

Section 922(g)(6) bars the possession of firearms for those convicted who have "been discharged from the Armed Forces under dishonorable conditions." While Cadet Douglas was sentenced to be dismissed from the Air Force, he has not yet been discharged from the Armed Forces. *See* Article 57, UCMJ (stating a sentence to a dismissal may be executed after completion of appellate review). His case is still being reviewed on appeal. As such, section 922(g)(6) has not been triggered, and the Government erred in post-trial processing when noting the firearm prohibition was triggered.

2. This Court May Order Correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 R.C.M., this Court held, "the mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ." 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021). Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the "correction relates to a collateral matter and is beyond the scope of our authority under Article 66." *Id.* at 760.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) (unpub. op.). The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. at n.*. This disposition stands in tension with *Lepore*.[2]

[2] The CAAF is currently reviewing this issue in *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. 24 Jan. 2024) (granting review on application of another § 922

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[3] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. In the 2019 *MCM*, both the Statement of Trial Results (STR) and the EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered.[4] Thus, this Court can rule in Cadet Douglas's favor

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subsection and whether CAAF has jurisdiction to review the Army Court of Criminal Appeals' action to correct the statement of trial results.).

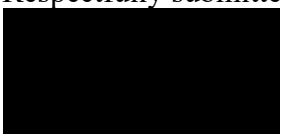
[3] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *MCM*, App. 15 at A15-22.

[4] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpub. op.) (ordering correction of an STR because it incorrectly stated § 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpub. op.) (ordering correction of the STR to change the Section 922(g)(1) designator to "No").

without taking the case en banc. If this Court disagrees, Cadet Douglas offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, Cadet Douglas respectfully requests this Honorable Court order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

Respectfully submitted,

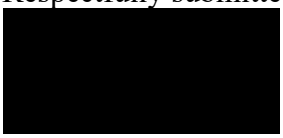


HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
(240) 612-4770

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 26 April 2024.

Respectfully submitted,



HEATHER M. BRUHA, Maj, USAF
Appellate Defense Counsel
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(240) 612-4770

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Air Force Cadet **DEKOTA M. DOUGLAS** United States Air Force *Appellant*.	))))))))))	**UNITED STATES MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Special Panel No. ACM 40324 (f rev) 20 May 2024

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

Pursuant to Rule 23.3(m)(5), the United States respectfully requests a 7-day enlargement of time to respond to the assignments of error outlined in the Appellant's brief. Undersigned Counsel filed a previous version of this motion on 20 May 2024 and withdrew the same day because the wrong panel was listed, this case is now a Special Panel.

This case was re-docketed with this Court on 29 January 2024. Since the case was re-dockted, Appellant requested, and was granted, one enlargement of time. Appellant filed his brief with this Court on 26 April 2024. This is the United States' first request for an enlargement of time. As of the date of this request, 113 days have elapsed since the re-docketed date. The United States' response in this case is currently due on 28 May 2024. If the enlargement of time is granted, the United States' response will be due on 4 June 2024, and 128 days will have elapsed since docketing.

There is good cause for the enlargement of time in this case. Undersigned counsel, who is assigned to this case, is a reservist who just came on orders and began working on her assigned cases last week. The record of trial for this case is five volumes, the trial transcript is over 700

pages, and there are two assignments of error to review and respond to. In addition to this case, undersigned counsel is also assigned to two other cases: US v. Dominguez-Garcia (S32694) which is due on 24 May 2024 and In Re A.G., a petition for extraordinary relief, which is due on 28 May 2024, the same day as this case is currently due. Due to those Answers, undersigned counsel is not able to begin working on the present case until 28 May 2024. Maj Speirs is also backfilling JAJG's Director of Operations while he is away at AFJAGs military judge's course for the next three weeks. Due to current workload, there is no other attorney at JAJG who could file a brief sooner.

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

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 20 May 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*, v. Air Force Cadet **DEKOTA M. DOUGLAS** United States Air Force *Appellant*.	))))))))))	**UNITED STATES ANSWER TO ASSIGNMENTS OF ERROR** Special Panel No. ACM 40324 (f rev) 3 June 2024

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

ISSUES PRESENTED

I.

WHETHER THE CONVENING AUTHORITY ERRED BY CONSIDERING R.H.'S SUBMISSION OF MATTERS WHEN SHE IS NOT A VICTIM UNDER R.C.M. 1106A.

II.

WHETHER THE GOVERNMENT ERRED IN POST-TRIAL PROCESSING BY NOTING THE FIREARM PROHIBITION WAS TRIGGERED UNDER 18 U.S.C. § 922 WHEN [APPELLANT] HAS NOT "BEEN DISCHARGED FROM THE ARMED FORCES UNDER DISHONORABLE CONDITIONS."

STATEMENT OF THE CASE

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

STATEMENT OF FACTS

On 2 September 2021, Appellant was charged with one charge and two specifications of dereliction of duty for negligently failing to refrain from providing alcohol to an underage Cadet, R.H., and having an unprofessional relationship with R.H. in violation of Article 92, Uniform

Code of Military Justice (UCMJ). (Charge Sheet, 2 September 2021, ROT, Vol. 1.) He was also charged with the sexual assault of R.H. in violation of Article 120, UCMJ. (Id.) At a General Courts-martial, a panel of members found Appellant guilty of the two dereliction specifications and not guilty of the two sexual assault specifications. (Entry of Judgment, 29 April 2022, ROT, Vol. 1.)

Appellant was sentenced to a dismissal, confinement for 31 days, forfeitures of $1,185 per month for one month, and a reprimand. (Id.) The 1st Indorsement of the Entry of Judgement (EOJ) noted that Firearm Prohibition was triggered under 18 U.S.C. § 922. (Id.)

After this Court's review, the case was remanded, in part, because Appellant was not provided with the required time to respond to R.H.'s submission of matters. United States v. Douglas, No. ACM. 40324, 2023 CCA LEXIS 502 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpub. op.). On remand, Appellant was provided five calendar days to submit his rebuttal to R.H.'s submission of matters. (Opportunity for Accused to Submit Matters in Rebuttal, 21 December 2023, ROT, Vol. 5.) The next day Appellant submitted his rebuttal. (Response to R.H.'s Submission of Matters, 22 December 2023, ROT, Vol. 5.)

In his rebuttal, Appellant requested that the convening authority not consider R.H.'s submission of matters as he believed she did not qualify as a crime victim under R.C.M. 1106A. (Id.) He then rebutted portions of her submission, specifically he argued he did not "trick" R.H. into a friendship with him nor did he "coerce" her into drinking with him. (Id.) After receiving Appellant's rebuttal, the convening authority explained he considered both submission of matters, Appellant's and R.H.'s, and Appellant's rebuttal and chose to take no action. (Convening Authority Decision on Action, 3 January 2024, ROT, Vol. 5.)

The corrected copy of the EOJ also noted that Firearm Prohibition was triggered under 18 U.S.C. § 922. (Entry of Judgment, 14 January 2024, ROT, Vol. 5.)

ARGUMENT

I.

R.H. WAS A VICTIM UNDER R.C.M. 1106A AND THE CONVENING AUTHORITY DID NOT ERR WHEN HE CONSIDERED R.H.'S SUBMISSION OF MATTERS.

Additional Facts

R.H. and Appellant met while they were both cadets at the United States Air Force Academy (USAFA). (R. at 368.) Appellant was an upperclassman and introduced himself to R.H. (*Id.*) Upperclassmen were supposed to be mentors to cadets in lower classes. (R. at 368-70.) After meeting, to communicate with R.H., Appellant requested her snapchat. (R. at 371.)

Appellant and R.H. would then spend time talking over Snapchat or Teams, watching movies, and eating together. (R. at 368-390.) At some point, Appellant invited R.H. to a hotel off-base to drink alcohol. (R. at 317.) R.H. declined because she did not feel comfortable being in a hotel room with Appellant. (R. at 364.) But she was willing to drink alcohol with him because she thought it would help her forget her "problems" and "worries" – R.H. had just returned from emergency leave due to a medical emergency concerning her father and the death of her friend. (R. at 364, 373.)

On the weekend of 16 October 2020, Appellant brought R.H. to a secluded area in the woods near USAFA to drink alcohol he provided. (R. at 374-75.) While in the woods, R.H. became so intoxicated that Appellant encouraged her to throw up, which she did, because he was worried he would have to call another cadet for help and he would get in trouble. (R. at 380.)

Following Appellant's finding of guilty, R.H. chose not to give an unsworn statement. (R. at 730.) She did, however, submit matters for the convening authority to consider prior to taking, or not taking, action. (Victim's Submission of Matters, 2 May 2022, ROT, Vol 4.) In her submission, R.H. asked the convening authority not to mitigate Appellant's sentence. (Id.) She explained she felt he deserved the sentence because his misconduct was the "result of separate and deliberate decisions on his part" when he "trick[ed] [her] into a friendship that he knew was unprofessional and he [took her] to a remote area of the woods where he coerced [her] into drinking an entire pint of hard liquor." (Id.)

Standard of Review

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. United States v. Sheffield, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing United States v. Kho, 54 M.J. 63, 65 (C.A.A.F. 2000). Interpretations of statutes and Rules for Courts-Martial are reviewed de novo. United States v. Valentin-Andino, 83 M.J. 537, 541 (A.F. Ct. Crim. App. 2023).

Law & Analysis

A victim under Article 6b "means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under" the UCMJ. 10 USC 806b(b). Under R.C.M. 1106A, a crime victim may submit matters to the convening authority for consideration that may reasonably tend to inform the convening authority's exercise of discretion under R.C.M. 1109 or 1110. *See* R.C.M. 1106A. DAFI 51-201, Administration of Military Justice, dated 24 January 2024, ¶ 20.14 reiterates that in "any case resulting in a guilty finding for an offense that involved a victim who has suffered direct physical, emotional or pecuniary harm, the SJA must ensure the victim is provided an opportunity to submit written

matters for consideration by the convening authority before the convening authority considers taking action."[1]

A. R.H. was a victim under R.C.M. 1106A.

Appellant argues, without citing to any case law, that R.H. was not victim under R.C.M. 1106A. Instead, to support his position, he simply argues there was no evidence at trial that R.H. suffered any "direct physical, emotional, or pecuniary harm as the result of" his charged misconduct. (App. Br. at 5.) However, in United States v. Brooks, this Court explained that the "UCMJ and Rules for Courts-Martial define 'victim' broadly." No. ACM S32394, 2017 CCA LEXIS 190, at *13 (A.F. Ct. Crim. App. 22 Mar. 2017) (unpub. op.). In Brooks, the appellant, an instructor, was charged with having an unprofessional relationship with a student. Id. at 3. Like this case, the appellant began interacting with the victim over "text messages and social media websites," watched a movie, ate food, and drank alcohol with her. Id. Following his conviction, the staff judge advocate notified the victim, over the appellant's objection, of her right to submit matters to the convening authority. Id. at 12-13. This Court held,

> it is entirely foreseeable that [victim] might have suffered direct emotional or pecuniary harm as a result of Appellant's dereliction of duty. Appellant was [victim's] superior both by virtue of his rank and his position as her instructor. The record indicates he initiated and pursued the relationship with [victim]. Regardless of any independent duty on [victim's] part to avoid such a relationship, Appellant's actions could foreseeably have caused emotional or pecuniary harm to [victim] through damage to her Air Force career or otherwise.

Id. at 13-14. This Court reaffirmed this decision in United States v. Da Silva, No. ACM 39599, 2020 CCA LEXIS 213, at *51 (A.F. Ct. Crim. App. 25 Jun. 2020) (unpub. op.).

[1] A previous version of DAFI 51-201, Administration of Military Justice, was in effect at the time of Appellant's trial. However, this section remains the same.

Similarly, here the record showed that Appellant was the upperclassman and, as such, in a mentorship role, and he pursued and initiated the relationship with R.H., an underclassman. Despite Appellant's claims that there was not any evidence at trial that R.H. suffered any physical, mental, or pecuniary harm, as this Court found in Brooks, Appellant's actions could "foreseeably have caused emotional or pecuniary harm to [victim] through damage to her Air Force career or otherwise." Brooks, 2017 CCA LEXIS 190 at *13. Importantly, the record shows that, following Appellant's misconduct, R.H. was no longer enrolled at USAFA and was attending Embry-Riddle Aeronautical University despite the Academy being her "dream school." (R. at 400.) She also no longer hoped to be an Air Force Officer even though it was something she had "worked for . . . [her] whole life." (R. at 360.)

Even though R.H. chose not to provide an unsworn or lay out bullet points demonstrating the harm Appellant caused her through his actions, it was conceivable that she suffered emotional damage because of Appellant. By considering R.H.'s submission of matters, the convening authority "ensure[d] a potential victim's rights under the law were upheld" and this Court should find that R.H. was a victim under R.C.M. 1106A. Brooks, 2017 CCA LEXIS 190 at *14.

B. Even if this Court determines R.H. was not a victim and the convening authority erred by considering her submission of matters, Appellant was not prejudiced.

Even if this Court were to determine the convening authority's consideration of R.H.'s submission of matters was improper, any such error did not prejudice Appellant. Appellant contends that a substantial right was materially prejudiced because he asked for a reduction in confinement, and it was denied. (App. Br. at 7.) But Appellant ignores the severity of his crimes. Appellant committed his misconduct while he was a cadet at the United States Air Force Academy and in a position of trust over an underclassman. This case is distinguishable from

United States v. King, which Appellant cites to, where this Court found a "colorable showing of possible prejudice" when the "convening authority was empowered to grant the requested relief – commutation of the adjudged reduction in rank – and took action without considering matters submitted by [the] [a]ppellant." United States v. King, No. ACM. 39927 (f rev), 2023 CCA LEXIS 383, *28-29 (A.F. Ct. Crim. App. 11 Sep. 2023) (unpub. op.). Here, unlike in King, the convening authority had Appellant's request for clemency and his rebuttal to R.H.'s submission of matters, which detailed his argument that R.H. was not a victim under R.C.M. 1106A. He was not missing anything. Appellant's sentence appropriately addressed the seriousness of his misconduct and the convening authority chose not to take any action based on all the information. Accordingly, this Court can be satisfied that any errant consideration R.H.'s submission of matters of Court did not have a substantial impact on Appellant's final sentence.

II.

THE 18 U.S.C. § 922 FIREARMS PROHIBITION – WHICH IS CONSTITUTIONAL AS APPLIED TO APPELLANT – IS NEVERTHELESS A COLLATERAL MATTER BEYOND THE SCOPE OF THIS COURT'S JURISDICTION.

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law & Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he or she has been, *inter alia*, "discharged from the Armed Forces under dishonorable conditions." 18 U.S.C. § 922(g)(6).

Appellant having been adjudged a dismissal unquestionably falls under section (g)(6). 10 U.S.C.S. § 856 (Charge Sheet, 21 September 2021, ROT, Vol. 1.)

Appellant is not entitled to relief – first and foremost, because his conviction triggers the statute; second because this nation has long barred the possession of firearms by persons who are not law-abiding, responsible citizens; and third, irrespective of whether the statute is constitutional, this Court lacks jurisdiction to grant any relief.

A. Appellant's sentence, which included a dismissal, triggers 18 U.S.C. § 922(g)(6).

The prime principle of administrative construction is to give effect to the plain meaning of a statute of regulation. United States v. Blair, 10 U.S.M.C.A. 161 (1959). "When statutory language is unambiguous, the statute's plain language will control." United States v. Jacobsen, 77 M.J. 81, 84 (C.A.A.F. 2017) (citations omitted). Where there is ambiguity in terms, then "[t]he meaning of a statement often turns on the context in which it is made, and that is no less true for statutory language." United States v. Briggs, 141 S. Ct. 467, 470 (2020). Here the plain language of 18 U.S.C. § 922(g)(6) states it shall be unlawful for an individual "who has been discharged from the Armed Forces under dishonorable conditions . . . [to] receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g)(6). Appellant was adjudged a dismissal; therefore the statute was triggered.

Yet, Appellant attempts to create a loophole which would prevent 18 U.S.C. § 922(g)(6) from applying until after completion of appellate review.[2] (App. Br. at 10.) This would create an absurd result. Any person who is conviction under one of the nine enumerated categories would be permitted to receive a firearm or ammunition up until appellate review affirms their conviction. But the purpose of the statute is to ban "special risk groups" from having access to

[2] Importantly, Appellant does not argue that a dismissal does not fall under one of the nine enumerated categories which triggers 18 U.S.C. § 922(g), only that the timing is premature.

firearms, and requiring the triggering of the statute to be dependent on appellate review is contrary to Congress' intent. Confinement – the deprivation of liberty – is not dependent on such a premise and neither should this. This Court should not be persuaded to deviate from the plain language of the statute and wait until the completion of appellate review to find that Appellant met the requirements of 18 U.S.C. § 922(g)(6).

B. The firearms prohibition is a collateral matter outside the scope of this Court's authority under Article 66, UCMJ.

"The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court "may only act with respect to the findings and sentence as entered into the record under section 860c of this title." 10 U.S.C. § 866(d). It does not authorize this Court to act on the collateral consequences of a conviction, such as the firearms prohibition. And this Court has said as much before. In United States v. Lepore, this Court held that the firearms prohibition was a collateral matter outside the scope of this Court's authority under Article 66, UCMJ, and that the Court therefore lacked authority to "direct correction of the 18 U.S.C. § 922 firearms prohibition" on a court-martial order. 81 M.J. at 760-63. In so holding, this Court reasoned that the firearms prohibition "relates to a reporting mechanism external to the UCMJ and Manual for Courts-Martial," and "was not a finding or part of the sentence, nor was it subject to approval by the convening authority." Id. at 763. "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within [this Court's] limited authority under Article 66, UCMJ." Id. Just as recently as a few days ago, in United States v. Vanzant, this Court reiterated that "firearm prohibition remains a collateral consequence of the conviction, rather than an element of the finding or sentence, and

is therefore beyond our authority to review." ___ M.J. _____, No. ACM. 22004, slip op. at 14 (A.F. Ct. Crim. App. May 28, 2024).

Naturally, Appellant disagrees. According to Appellant, Lepore is both distinguishable from the instant case and no longer good law. (App. Br. at 10-11.) Citing the 2019 versions of R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F) – which provide for the inclusion of "[a]ny additional information … required under the regulations prescribed by the Secretary concerned" in the statement of trial results and entry of judgment, respectively – Appellant suggests that the rules now require the firearms prohibition annotation "by incorporation." (App. Br. at 11.) But what Appellant fails to realize is that annotation by incorporation has *always* been the posture, even under the 2016 rules that governed in Lepore. R.C.M. 1114(a) in the 2016 Manual for Courts-Martial provided that promulgating orders were to be prepared as set forth in the rule, "[u]nless otherwise prescribed by the Secretary concerned." At the time the court-martial order at issue in Lepore was published, Air Force Instruction 51-201, *Administration of Military Justice,* ¶ 15.30 (18 Jan. 2019), prescribed the following requirement: "'FIREARMS PROHIBITION - 18 U.S.C. § 922' must be annotated in the header [of the court-martial order]." *See* Lepore, 81 M.J. at 761. Thus, there is no appreciable distinction between the entry of judgment in this case and the court-martial order in Lepore.

Appellant also avers that Lepore is "no longer controlling" in light United States v. Lemire, in which the Court of Appeals for the Armed Forces ordered the Army to delete an annotation regarding sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion) (App. Br. at 10-11.) Relying entirely on a

20-word footnote[3] in a summary decision without a published opinion, Appellant insists that the Lemire decision stands for the proposition that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF and the have the power to address "constitutional errors…even if the Court deems them to be a collateral consequence." (App. Br. at 11.) However, this Court has been unpersuaded by this argument as recently as a few days ago and, again, determined that Lemire did not require it "to revisit or overrule Lepore." Vanzant, No. ACM. 22004, slip op. at 15.

In any event, if Appellant believes he was incorrectly coded regarding firearms possession, he has other means of relief. He can apply for expungement of her record in the National Instant Criminal Background Check System (NICS). *See generally* Air Force Manual (AFMAN) 71-102, *Air Force Criminal Indexing*, Chapter 9. (21 Jul. 2020)

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Thus, Appellant is not only unentitled to relief, but also powerless to obtain any from this Court at all.

[redacted]
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[3] "It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." Lemire, 82 M.J. at 263 n.*.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 3 June 2024.

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