IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIRST)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DEQUAYJAN D. JACKSON,** United States Air Force, *Appellant.*	)	No. ACM 40310
	)	12 September 2022

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for 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 **23 November 2022**. The record of trial was docketed with this Court on 26 July 2022. From the date of docketing to the present date, 48 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,

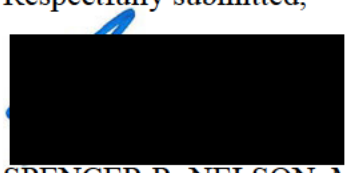
[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[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 Division on 12 September 2022.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

14 September 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEQUAYJAN D. JACKSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40310 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 September 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DEQUAYJAN D. JACKSON,** United States Air Force, *Appellant.*	)	No. ACM 40310
	)	16 November 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for his second 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 December 2022**. The record of trial was docketed with this Court on 26 July 2022. From the date of docketing to the present date, 113 days have elapsed. On the date requested, 150 days will have elapsed.

On 18 April 2022, consistent with his pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, one specification of failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ. Record (R.) at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct service characterization. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022.

The ROT consists of two volumes, four prosecution exhibits, four defense exhibits, and three appellate exhibits. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

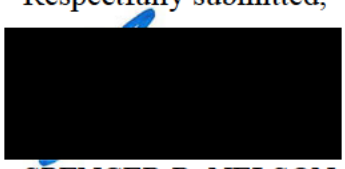
[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[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 Division on 16 November 2022.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

16 November 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEQUAYJAN D. JACKSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40310 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 November 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DEQUAYJAN D. JACKSON,** United States Air Force, *Appellant.*	)	No. ACM 40310
	)	16 December 2022

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her third 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 January 2023**. The record of trial was docketed with this Court on 26 July 2022. From the date of docketing to the present date, 143 days have elapsed. On the date requested, 180 days will have elapsed.

On 18 April 2022, consistent with her pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, one specification of failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ. Record (R.) at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct service characterization. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022.

The ROT consists of two volumes, four prosecution exhibits, four defense exhibits, and three appellate exhibits. Appellant is not confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started a review of Appellant's case. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

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

Respectfully submitted,

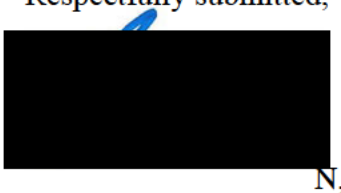
[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[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 Division on 16 December 2022.

Respectfully submitted,



N, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

16 December 2022

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEQUAYJAN D. JACKSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40310 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 December 2022.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FOURTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DEQUAYJAN D. JACKSON,** United States Air Force, *Appellant.*	)	No. ACM 40310
	)	12 January 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her fourth enlargement of time to file an Assignment of Error (AOE). Appellant requests an enlargement for a period of 30 days, which will end on **21 February 2023**. The record of trial was docketed with this Court on 26 July 2022. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 18 April 2022, consistent with her pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, one specification of failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ. Record (R.) at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct service characterization. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022.

The ROT consists of two volumes, four prosecution exhibits, four defense exhibits, and three appellate exhibits. Appellant is not confined.

Counsel is currently assigned 19 cases; nine cases are pending initial AOEs before this Court. Counsel has one Court of Appeals for the Armed Forces (CAAF) Grant Brief and one case pending a Supplement to CAAF. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of her right to speedy appellate review, extensions of time, and consents to this extension of time. Three cases have priority over the present case:

1. *United States v. Johnson*, ACM 40257 – On 30 October 2021, contrary to his pleas, members sitting at a general court-martial at Schriever Space Force Base, Colorado, convicted Appellant of abusive sexual contact, in violation of Article 120, UCMJ.[1] R. at 1111. The members sentenced Appellant to be reprimanded, reduced to the grade of E-1, confined for six months, and discharged from the service with a bad conduct discharge. R. at 1250. The convening authority took no action on the findings or sentence of the case. ROT, Vol. 1, Convening Authority Decision on Action, 10 December 2021. The ROT consists of seven volumes, eight prosecution exhibits, eight defense exhibits, two court exhibits, and 58 appellate exhibits. The transcript is 1,252 pages. The Appellant is not confined. Appellant's civilian counsel and military have reviewed the case file, including military appellate counsel having reviewed the sealed materials. Counsel is finalizing the AOE for submission to this Court.

2. *United States v. Fernandez*, ACM 40290 (f rev) – On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant

[1] Members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. R. at 1111.

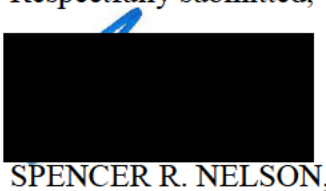
of one charge of wrongfully distributing child pornography in violation of Article 134, UCMJ. R. at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has finished reviewing the record of trial.

3. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of one charge and one specification of sexual assault, in violation of Article 120, UCMJ[2]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

[2] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

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

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[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 Division on 12 January 2023.

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

17 January 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEQUAYJAN D. JACKSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40310 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**MOTION FOR ENLARGEMENT OF TIME (FIFTH)**
v.	)	Before Panel No. 2
Senior Airman (E-4), **DEQUAYJAN D. JACKSON,** United States Air Force, *Appellant.*	)	No. ACM 40310
	)	14 February 2023

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for her fifth 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 March 2023**. The record of trial was docketed with this Court on 26 July 2022. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 18 April 2022, consistent with her pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, one specification of failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ. Record (R.) at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct service characterization. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022.

The ROT consists of two volumes, four prosecution exhibits, four defense exhibits, and three appellate exhibits. Appellant is not confined.

Counsel is currently assigned 20 cases; nine cases are pending initial AOEs before this Court. Counsel has one Court of Appeals for the Armed Forces (CAAF) Reply Brief and oral argument preparation. Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has not yet started his review of Appellant's case. Appellant is aware of her right to speedy appellate review, extensions of time, and consents to this extension of time. Two cases have priority over the present case:

1. *United States v. Fernandez*, ACM 40290 (f rev) – On 28 January 2022, contrary to his plea, a Military Judge sitting as a general court-martial, at Cannon AFB, NM, convicted Appellant of one charge of wrongfully distributing child pornography in violation of Article 134, UCMJ. R. at 441. The Military Judge sentenced Appellant to be reprimanded, reduced to the grade of E-1, forfeit all pay and allowances, confined for six months, and discharged from the service with a bad conduct discharge. R. at 469. The Convening Authority took no action on the findings, took no action on the sentence, and did not approve Appellant's request to defer forfeitures. ROT, Vol. 1, Convening Authority Decision on Action, 7 March 2022. The ROT consists of five volumes, 18 prosecution exhibits, 13 defense exhibits, and 49 appellate exhibits. The transcript is 471 pages. The Appellant is not confined. Counsel has finished reviewing the unsealed record of trial, motioned this Court to view sealed materials, and has started drafting the Assignment of Errors.

2. *United States v. Casillas*, ACM 40302 – On 18 March 2022, contrary to his plea, enlisted members in a General Court-Martial, at F.E. Warren AFB, WY, convicted Appellant of

one charge and one specification of sexual assault, in violation of Article 120, UCMJ[1]. R. at 687. The Military Judge sentenced Appellant to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for two years, and to be dishonorably discharged from the service. R. at 724. The Convening Authority took no action on the findings, took no action on the sentence, and denied Appellant's request for deferment of reduction in grade and adjudged forfeitures. ROT, Vol. 1. Convening Authority Decision on Action, 1 April 2022. The ROT consists of five volumes, seven prosecution exhibits, six defense exhibits, and 33 appellate exhibits. Appellant is currently confined. Counsel has not yet started his review of this case.

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

Respectfully submitted,

[redacted]

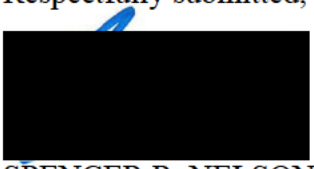
SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

[1] Members acquitted Appellant of one specification of digital penetration, in violation of Article 120 UCMJ.

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 Division on 14 February 2023.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
United States Air Force
[redacted]

14 February 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Senior Airman (E-4) DEQUAYJAN D. JACKSON, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40310 Panel No. 2

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 14 February 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40310**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Dequayjan D. JACKSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 February 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant's assignments of error. The Government opposes the motion.

The court has considered Appellant's motion, the Government's opposition, case law, and this court's Rules of Practice and Procedure. Accordingly, it is by the court on this 16th day of February, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **23 March 2023**.

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

FOR THE COURT

[redacted]E, Capt, USAF
Acting Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DEQUAYJAN D. JACKSON
Senior Airman (E-4),
United States Air Force
Appellant.

No. ACM 40310

BRIEF ON BEHALF OF APPELLANT

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEQUAYJAN D. JACKSON,** United States Air Force *Appellant*	)	No. ACM 40310 23 March 2023

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

ASSIGNMENTS OF ERROR

I.

WHETHER THE JUDICIALLY CREATED "CONTINUOUS COURSE OF CONDUCT" DOCTRINE IN *UNITED STATES V. MULLENS*, 29 M.J. 398 (C.M.A. 1990) IS A VIOLATION OF ARTICLE 56, UCMJ, 10 U.S.C. § 856, OR R.C.M. 1001(b)(4); AND, IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE PROPERLY APPLIED SAID DOCTRINE WHEN 1) THE UNCHARGED MISCONDUCT WAS REMOTE IN TIME TO THE CHARGED CONDUCT; 2) THE UNCHARGED MISCONDUCT INVOLVED A DIFFERENT PERSON; AND 3) THE UNCHARGED MISCONDUCT EXCEEDED THE PLAIN LANGUAGE OF THE CHARGE?

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN SRA JACKSON WAS CONVICTED OF NON-VIOLENT OFFENSES AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

III.

WHETHER SRA JACKSON'S SENTENCE IS INAPPROPRIATELY SEVERE?[2]

STATEMENT OF THE CASE

On 18 April 2022, consistent with her pleas, a Military Judge in a General Court-Martial, at Tinker AFB, OK, convicted Appellant of one charge, five specifications of wrongful distribution, manufacturing, and aiding in distribution of a controlled substance, in violation of Article 112a, Uniform Code of Military Justice (UCMJ); and one charge, one specification of wrongfully failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ, § 856. Record (R.) at 123. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct discharge. R. at 182. The Convening Authority took no action on the findings or sentence. Record of Trial (ROT), Vol. 1, Convening Authority Decision on Action, 4 April 2022.

STATEMENT OF FACTS

SrA Jackson pled guilty to Specification 6 of Charge I, which was a violation of Article 112a, UCMJ. R. at 51-52. The language of the specification was:

> In that SENIOR AIRMAN DEQUAYJAN D. JACKSON, United States Air Force, 72d Security Forces Squadron, Tinker Air Force Base, Oklahoma did, at or near Oklahoma City, Oklahoma, between on or about 1 August 2021 and on or about 5 October 2021, wrongfully distribute approximately 40 tablets of Alprazolam, a Schedule IV controlled substance.

[2] SrA Jackson raises this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

ROT, Vol. 1, Charge Sheet [hereinafter "Charge Sheet"]. During her *Care* inquiry, SrA Jackson explained why she was guilty of Specification 6:

> *On one occasion* approximately 29 September 2021, I knowingly and wrongfully sold *approximately 40* Alprazolam bars to A1C Jenkins. Alprazolam is commonly known as Xanax. I received approximately $250.00 for this distribution but only kept $50.00. I knew it was Alprazolam that I was distributing because I was told by the person that gave it to me. I know that what I was distributing was a controlled substance.

R. at 53 (emphasis added). SrA Jackson then emphasized that A1C Jenkins asked her for the pills, that she gave him approximately 40 tablets, and she did so at "15th Street and High Avenue" in Oklahoma City. R. at 54-56.

During presentencing, over Defense Counsel objection, the Military Judge admitted a portion of SrA Jackson's interview with the Air Force Office of Special Investigations (OSI). R. at 148, 158. During the OSI clip, SrA Jackson admitted that she sold two Xanax pills to a man named "Dan." R. at 149, 150. When asked, SrA Jackson said this happened around "late August, July" at "15th and High" in Oklahoma City. R. at 150, 153. The Government did not provide evidence on who "Dan" was. SrA Jackson only knew him as an Uber driver. R. at 149.

The Government admitted, "we do believe this is uncharged misconduct." R. at 154. The Government explained, however, that the uncharged misconduct was a "continuous course of conduct from the accused." *Id.* The Government also explained that it realized this transaction was "to this other member named Dan. So this ish [*sic*] a part of a continuous course of conduct her selling this specific drug to another member." *Id.*

The Government cited to *United States v. Turner*, 62 M.J. 504 (A.F. Ct. Crim. App. 2005) saying, "that's where it states that the uncharged misconduct was a part of a continuous course of conduct involved in similar crimes. So we believe this is a similar crime that she is selling these

Xanax pills to one 1 member and she is doing the same to another member within the same time frame." R. at 154-55.

The Defense Counsel initially objected on Mil. R. Evid. 403 grounds, but after hearing the Government's explanation objected again:

> The defense would also argue that the evidence in there it is not evidence in aggravation this is not directly resulting from or directly related to what Senior Airman Jackson been pled – pled guilty to and was found guilty for. This is talking about Dan and selling Bars,[3] whereas what she pled guilty to was with A1C Jenkins as well. We would say that this isn't actually evidence of aggravation that is being offered solely for propensity purposes.

R. at 156.

In overruling the objection, the Military Judge said that he would not "consider it for any propensity purposes" but that he could keep that separate from evidence "that is inadmissible [*sic*] as continuing course of conduct kind of evidence." R. at 157. After summarizing several cases, the Military Judge said, "I find it is evidence of continuous course of conduct that is admissible under 1001(b)(4)." *Id.* The Military Judge stated that he was aware he could only sentence SrA Jackson "for the crimes for which she has been accused but this does give context to understand the overall course of conduct." *Id.* He also found that the video clip was also "part of Specification 1 of Charge II where she pled guilty to active participation in a criminal gang. And this is another way in which she actively participated in the criminal gang." *Id.*

[3] Meaning, Xanax. R. at 150.

ARGUMENT

I.

THE JUDICIALLY CREATED "CONTINUOUS COURSE OF CONDUCT" DOCTRINE IN *UNITED STATES V. MULLENS*, 29 M.J. 398 (C.M.A. 1990) IS A VIOLATION OF ARTICLE 56, UCMJ, 10 U.S.C. § 856, OR R.C.M. 1001(b)(4); AND, IN THE ALTERNATIVE, THE MILITARY JUDGE DID NOT PROPERLY APPLY SAID DOCTRINE WHEN 1) THE UNCHARGED MISCONDUCT WAS REMOTE IN TIME TO THE CHARGED CONDUCT; 2) THE UNCHARGED MISCONDUCT INVOLVED A DIFFERENT PERSON; AND 3) THE UNCHARGED MISCONDUCT EXCEEDED THE PLAIN LANGUAGE OF THE CHARGE.

Standard of Review

This Court reviews the interpretation of statutes and Rules for Courts-Martial (R.C.M.) *de novo*. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019); *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). This Court reviews a military judge's decision to admit or exclude evidence for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted). A military judge abuses his or her discretion when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (citation omitted).

Law and Analysis

Article 56, UCMJ, 10 U.S.C. § 856(c) states:

> (1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—
>
> (A) the nature and circumstances *of the offense* and the history and characteristics of the accused;
>
> (B) the impact *of the offense* on—

(i) the financial, social, psychological, or medical wellbeing of any victim *of the offense*; and
(ii) the mission, discipline, or efficiency of the command of the accused and any victim *of the offense*;
(C) the need for the sentence—
(i) to reflect the seriousness *of the offense*;
(ii) to promote respect for the law;
(iii) to provide just punishment for *the offense*;
(iv) to promote adequate deterrence of misconduct;
(v) to protect others from further crimes by the accused;
(vi) to rehabilitate the accused; and
(vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

(emphases added). R.C.M. 1001(b)(4) states:

> (4) *Evidence in aggravation.* Trial counsel may present evidence as to any aggravating circumstances **directly** relating to or resulting from **the offenses of which the accused has been found guilty**. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

(bold added; italics in original).

1. *CAAF Judges Questioned The "Continuous Course of Conduct" Doctrine From Its Inception*

In *United States v. Mullens*, pursuant to his pleas, Mullens was convicted of, *inter alia*, sodomy with his minor son and indecent acts with his son and daughter. 29 M.J. 398, 398-99 (C.M.A. 1990). His stipulation of fact contained the facts for the charges to which he pled guilty and "uncharged identical acts with the same children; the uncharged acts occurred earlier (between 6 June 1979 and 30 September 1983) and at a different location (Fort Campbell, Kentucky)." *Id.* at 399.

The Court of Military Appeals (CMA) held that it could consider the earlier, uncharged misconduct under R.C.M. 1001. It reasoned that "[t]he stipulation evidenced a *continuous course*

of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community, *i.e.*, the servicemember's home." *Id.* at 400 (emphasis added). The CMA explained that "[t]hese incidents demonstrate not only the depth of appellant's sexual problems, but also the true impact of the charged offenses on the members of his family." *Id.* As such, these were "appropriate sentence considerations under the above Manual rule." *Id.*

In his concurrence, however, the Chief Judge expressed concern about this new doctrine. The Chief Judge stated that he had "some question as to whether the challenged evidence was 'directly relating to' the offenses of which Mullens was found guilty within the meaning of RCM 1001(b)(4)." *Id.* at 401 (Everett, C.J., concurring in the result). The Chief Judge explained that his concerns were mooted because Mullens had received a "substantial reduction in sentence" so the error could not have prejudiced him. *Id.*

At least two problems are apparent from the language of *Mullens*. First, the phrase, "[t]hese incidents demonstrate not only the depth of appellant's sexual problems" would go to rehabilitation potential, not evidence in aggravation under R.C.M. 1001(b)(4). In other words, "the depth of [his] sexual problems" would go to his "potential to be restored, through vocational, correctional, or therapeutic training or other corrective measures to a useful and constructive place in society." *Id.* at 400; R.C.M. 1001(b)(5). Second, the phrase, "[t]hese incidents [uncharged misconduct] demonstrate…the true impact of the charged offenses on the members of his family" is a non sequitur. Meaning, the "true impact of the charged offense on the members of his family" must relate to—and only to—the charged offenses, not additional misconduct. If additional, uncharged misconduct were considered—which the CMA did—the statement does not make sense because the "true impact" now includes *both* charged misconduct *and* uncharged misconduct.

Only two years later, another member of the CMA expressed caution regarding the newfound doctrine in *United States v. Ross*, 34 M.J. 183 (C.M.A. 1992). In that case, Ross pled guilty to numerous specifications of attempting to alter or wrongfully completing "Army Service Vocational Aptitude Battery" tests. *Id.* at 183. The uncharged misconduct, however, was Ross' admission to Army police of "his purported altering of a total of 20-30 military aptitude tests rather than the 4 alterations for which he was actually found guilty." *Id.* at 185. In allowing the uncharged misconduct into evidence under R.C.M. 1001, the CMA explained:

> [T]he continuous nature of the charged conduct and its full impact on the military community are proper aggravating circumstances….the additional acts of alteration within the same time period and at the same place as the charged acts were clearly relevant for this purpose and were not unduly prejudicial in this trial by military judge alone.

Id. at 187. In a concurrence, Judge Cox cautioned, "Bench and Bar should be mindful, however, that the prejudicial impact of these 'uncharged offenses' may outweigh their probative value. Court members should be carefully instructed as to their limited use." *Id.* at 188 (Cox, J., concurring). In his view, the Military Judge gave proper weight to the confession, so he found no prejudice. *Id.*

2. *Subsequent Court of Appeals for the Armed Forces (CAAF) Cases Embraced and Then Pushed Away from the Continuous Course of Conduct Doctrine*

The CAAF embraced the continuous course of conduct doctrine in two more cases: *United States v. Shupe*, 36 M.J. 431 (C.A.A.F. 1993) and *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). In *Shupe*, the appellant pled guilty to conspiring to distribute LSD. 36 M.J. at 436. However, the uncharged misconduct involved "five additional transactions" described by a witness. *Id.* The CAAF held that the witness testimony established that the additional transactions were not "an isolated transaction but [] part of an extensive and continuing scheme to introduce and sell LSD to numerous buyers assigned to the naval base." *Id*. Therefore, the witness testimony was proper

under R.C.M. 1001(b)(4) "because it showed the continuous nature of the charged conduct and its full impact on the military community." *Id.* (quotations and citations omitted). The CAAF in *Nourse* continued to uphold the doctrine for prior, uncharged larcenies, stating that "*Mullens, Ross*, and *Shupe* explain that when uncharged misconduct is part of a continuous course of conduct involving *similar crimes and the same victims*, it is encompassed within the language 'directly relating to or resulting from the offenses of which the accused has been found guilty.'" 55 M.J. at 232 (emphasis added).

In 2007, in *United States v. Hardison*, the CAAF quoted the continuous course of conduct doctrine, but did not apply it to the appellant's uncharged, pre-service drug use. 64 M.J. 279, 280 (C.A.A.F. 2007). Instead, the CAAF found that the Military Judge plainly erred when he allowed into evidence the pre-service drug use (and accompanying waiver documents) and that this admission prejudiced the appellant. *Id.*

The CAAF grounded its treatment of uncharged misconduct in the text of R.C.M. 1001(b)(4). Specifically, the CAAF said that aggravation evidence must track directly with the R.C.M.'s text of being "directly related." *Id.* The Court outlined two threshold principles. First, it stated that R.C.M. 1001(b)(4) does not "authorize introduction in general of evidence of…uncharged misconduct" and it is a "higher standard than mere relevance." *Id.* at 281. (quotations and citations omitted). Second, it said that aggravation evidence must pass a Mil. R. Evid. 403 balancing test. *Id.*

The Court went on to explain that "directly related" is a "function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *Id.* The Court explained that the "strength of the connection" between aggravation evidence and the charged conduct "must be direct as the rule states, and

closely related in time, type, and/or often outcome, to the convicted crime." *Id.* at 282. While it is true that the Court then discussed *Ross*, *Mullens*, and *Shupe*, it did not adopt their continuous course of conduct rationale or use its language. Rather, the Court focused on the plain text of R.C.M. 1001(b)(4) explaining that "[t]he correct standard for admission is not whether some prior instance is or is not isolated from a subsequent incident, but whether the former is *directly related to the crime for which Appellant was convicted*." *Id.* at 283 (emphasis in original).

One plausible interpretation of *Hardison* is that CAAF overturned, *sub silentio*, the cases that dealt with the continuous course of conduct doctrine. Since *Hardison*, the CAAF has not endorsed it again. Even if the CAAF did not implicitly overturn the continuous course of conduct doctrine, it implicitly rejected its analysis in favor of the plain meaning of R.C.M. 1001(b)(4)'s "directly relating to" language. As such, an analysis of uncharged misconduct as a matter in aggravation should hew to the plain language of R.C.M. 1001(b)(4) vice the judicially created continuous course of conduct doctrine.

3. The Continuous Course of Conduct Doctrine is an Atextual Aberration

The continuous course of conduct doctrine is not found in, nor does it align with, the plain language of Article 56, UCMJ, 10 U.S.C. § 856(c) or R.C.M. 1001(b)(4). Article 56, UCMJ, states that a court-martial "shall" punish an accused, "taking into consideration" enumerated factors. In those factors, the phrase "of the offense" or "the offense" is used six times to underscore the fact that an accused is to be sentenced only for "the offense" he or she was convicted of committing. This Court has echoed Article 56's plain language stating that it is "axiomatic that an accused must be sentenced only for the offense or offenses of which he has been found guilty." *United States v. Cantrell*, 44 M.J. 711, 714 (A.F. Ct. Crim. App. 1996). Nowhere in Article 56 is the phrase

"uncharged misconduct" or a proposition that an accused can receive a greater punishment because uncharged misconduct is contained in the record.

Likewise, R.C.M. 1001(b)(4) contains "the offense" language, stating that aggravating circumstances must be "directly relating to or resulting from the offenses of which the accused has been found guilty." R.C.M. 1001(b)(4) tracks closely with the language of Article 56, UCMJ, and where it departs, it says the aggravation must not only relate to the aggravation evidence, but be "*directly* relating to or *resulting from the offense*…." (emphasis added). The CAAF has interpreted this rule as "not authoriz[ing] introduction in general of evidence of…uncharged misconduct." *Hardison*, 64 M.J. at 281 (citations and quotations omitted).

In practical terms, the issue at hand is whether this Court will "elect[] to disregard the plain text of" Article 56 by engaging in an analysis that is not rooted in the plain text. *United States v. Edwards*, 82 M.J. 239, 244 (C.A.A.F. 2022) (explaining that this Court relied on what was "not 'obviously unreasonable'" to interpret R.C.M. 1001(A)(3) instead of the plain language). "Any suggestion" that this Court "should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020). To resolve this issue, this Court must "adhere to the plain meaning of any text—statutory, regulatory, or otherwise." *Id.* Indeed, "The controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands*, *Inc.*, 580 U.S. 405, 414 (2017).

Despite the plain language of Article 56, UCMJ, and R.C.M. 1001(b)(4), the continuous course of conduct doctrine has been permitted. This is true even though courts could have used the "directly relating to" or "resulting from" language in its place. Additionally, the continuous course of conduct doctrine led to the introduction of other atextual phrases that allowed courts to shoehorn

in additional uncharged misconduct. These phrases include, "the full impact on the military community," "full impact of appellant's crimes," and "depth of appellant's sexual problems." *Ross*, 34 M.J. at 187; *Shupe* 36 M.J. at 436; and *Mullens*, 29 M.J. at 400. Notably, none of these phrases are contained in, or allowed as avenues for aggravation, under Article 56, UCMJ, or R.C.M. 1001(b)(4). The continuous course of conduct doctrine is problematic because it is three steps removed from Article 56, UCMJ; these phrases are a fourth step removed and are additional justifications for allowing uncharged misconduct into evidence. In other words, the judicially created continuous course of conduct doctrine is out of step with Article 56, UCMJ, and R.C.M. 1001(b)(4).

4. *The Case* Sub Judice *Highlights the Problems with The Continuous Course of Conduct Doctrine*

In this case, there are three reasons why the Military Judge erred, which also show why the continuous course of conduct doctrine runs afoul of Article 56, UCMJ, and R.C.M. 1001(b)(4). First, the plain text of the charge alleged that SrA Jackson wrongfully distributed "approximately 40" Xanax pills. Charge Sheet. SrA Jackson confessed to selling "approximately 40" Xanax pills. R. at 53. Thus, any uncharged misconduct relating to selling additional Xanax pills was not "resulting from" or "directly relating" to "the offense" because it goes above and beyond the charge itself. *Cf. Shupe*, 36 M.J. at 436. Notably, this was not charged as "on divers occasions" either. *Cf. Mullens*, 29 M.J. at 399 ("The appellant was charged, *inter alia,* in a single specification with [committing] acts of sodomy with his son on *numerous* occasions…") (emphasis in original).

Second, the uncharged misconduct had a different "victim," Dan, vice A1C Jenkins for the charged misconduct. Additionally, the uncharged misconduct was distant in time to the charged misconduct and, arguably, outside of the charged timeframe since SrA Jackson said the uncharged

misconduct happened in "late August, July." R. at 153. If the uncharged misconduct happened in late July, it would fall outside of the charged timeframe. Regardless, since the charged conduct happened on 29 September, it is at least one full month removed—possibly two—from the charged misconduct. As such, without the continuous course of conduct doctrine, it is hard to understand how this misconduct at an earlier time, with a different person who is not a servicemember, is "*directly related to the crime for which Appellant was convicted*." *Hardison*, 64 M.J. at 283 (emphasis in original).

Third, and finally, these facts reveal that this uncharged misconduct had no tie to the offenses that SrA Jackson pled guilty to. The Government could have charged SrA Jackson with this entirely separate and distinct transaction but failed to do so. What appears to have happened, however, is that in reviewing the OSI interview before trial, the Government noticed that it forgot to charge this misconduct, so it sought to admit this evidence via the continuous course of conduct doctrine as an aggravating piece of evidence. *See generally United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) ("[I]t is the government that controls the charge sheet from the inception of the charges through the court-martial itself."); *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) ("The Government had complete discretion over how to charge Appellant…. Although the Government might have charged Appellant with hazing or aggravated assault, which would have eliminated the opportunity to raise a consent defense, it elected not to do so.").

There is no doubt that admitting the uncharged misconduct under the continuous course of conduct doctrine was much easier than trying to explain how it was "*directly* relating to or *resulting from the offenses* of which the accused has been found guilty." R.C.M. 1001(b)(4). In other words, the continuous course of conduct doctrine is under the guise of R.C.M. 1001(b)(4), but provides an easier standard to meet. In fact, the Military Judge used at least one atextual phrase that has

arisen in the continuous course of conduct cases. He ruled that "this does give context to understand the overall course of conduct." R. at 157. Notably, "context" is not listed as a factor that can allow uncharged misconduct to be used as aggravating evidence. Nor is it clear from the Military Judge's analysis *how* this alleged aggravation evidence provided "context" to her conduct. Understanding the "context," is akin to understanding the "full impact" of an appellant's crimes which is also atextual under Article 56, UCMJ, or R.C.M. 1001(b)(4). *Shupe* 36 M.J. at 436. If the Military Judge would have used *Hardison*'s plain text analysis vice the continuous course of conduct doctrine, it is likely the uncharged misconduct would have been kept out. Not only was the uncharged misconduct not "directly related," to the offense, it was distant in "time" (pre-dating it, in fact); it was a different "type" of conduct (an additional two Xanax pills vice the 40 she pled guilty to); and the "outcome" was different (distribution to Dan vice A1C Jenkins). *Hardison*, 64 M.J. at 282. As such, the Military Judge erred.

WHEREFORE, SrA Jackson requests this Court find that the "continuous course of conduct" doctrine violates Article 56, UCMJ, or R.C.M. 1001(b)(4) and find Military Judge abused his discretion in admitting uncharged misconduct into evidence.

II.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[4] WHEN SRA JACKSON WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

[4] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

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

The test for applying the Second Amendment is as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-30 (2022) (citation omitted).

In applying this test, the Fifth Circuit recently held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' Therefore, the statute is unconstitutional, and Rahimi's conviction under that statute must be vacated." *United States v. Rahimi*, No. 21-11001, 2023 U.S. App. LEXIS 5114, at *31 (5th Cir. Mar. 2, 2023) (citation omitted). Notably, Rahimi was "involved in five shootings" and pled guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at *3-4. Rahimi agreed to this domestic violence restraining order. *Id.* at 10.

The Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 6 (citation omitted). Therefore, the Government bears the burden of justifying its regulation.

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment's application to "law-abiding, responsible citizens." *Id.* at 7. The Fifth Circuit explained that "*Heller*'s reference to 'law-abiding, responsible' citizens meant to exclude from the Court's discussion groups that have historically

been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* Here the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of her right to keep and bear arms after being convicted for a non-violent offense. *Id.*

Third, the Fifth Circuit held that "[t]he Government fails to demonstrate that § 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at *30. If the Government failed to prove that our Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed upon domestic violence restraining order violation, then it likely cannot prove that its firearm prohibition on SrA Jackson for non-violent offenses would be constitutional.

A further problem with the Statement of Trial results and Entry of Judgment is that the Government did not indicate which specific subsection of § 922 it relied on to find that SrA Jackson fell under the firearm prohibition. Notably, the Court did not convict her of an offense relating to her being "an unlawful user of or addicted to any controlled substance." 18 U.S.C. 922(g)(3). Thus, SrA Jackson is unable to argue which specific subsection of § 922 is unconstitutional in her case, although she knows it would not be the domestic violence or drugs section given the facts of her case. Regardless, given the non-violent nature of the facts of her case, and *Rahimi*'s holding, it appears that the Government would not be able to meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *United States v. Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, 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. However, this Court emphasized, "To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority." *Id.*

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. In that decision, CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.). The CAAF's direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is in contravention to this Court's holding in *Lepore*.

If logic follows, the CAAF's decision in *Lemire* reveals three things: First, the CAAF has the power to correct administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it "directed" the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCA's 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.

Additionally, *Lepore* is distinguishable from the case *sub judice*. In *Lepore*, this Court made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.)

are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. This Court then emphasized "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." *Id.* at 763 (emphasis added). The new 2019 rules, however, contain language that both the Statement of Trial Results and the Entry of Judgment contain "[a]ny additional information…required under regulations prescribed by the Secretary concerned." Rules for Courts-Martial (R.C.M.) 1101(a)(6); 1111(b)(3)(F). AFI 51-201, *Administration of Military Justice*, dated 8 April 2022, para 13.3 required that the Statement of Trial results to include "whether the following criteria are met…firearm prohibitions." 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. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, SrA Jackson requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Statement of Trial Results to reflect which subsection of § 922 it used to prohibit her firearm possession.

Respectfully submitted,

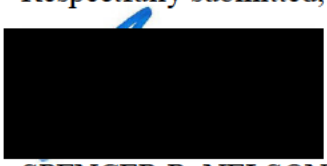
[redacted]

SPENCER R. NELSON, Maj, USAF Appellate Defense Counsel
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 Division on 23 March 2023.

Respectfully submitted,



SPENCER R. NELSON, Maj, USAF Appellate Defense Counsel
Appellate Defense Division
[redacted]

APPENDIX A

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), Appellant, Senior Airman (SrA) DeQuayjan Jackson, through Appellate Defense Counsel, personally requests that this Court consider the following matters:

III.

SRA JACKSON'S SENTENCE WAS INAPPROPRIATELY SEVERE.

In assessing sentence appropriateness, this Court considers "the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (*en banc*) (alteration in original) (citation omitted). This Court should consider several things about SrA Jackson. First, because of her upbringing, she came into the Air Force with significant trauma. Her father "was never around" so her uncle became her father figure. Defense Exhibit D at 1. Tragically, a train hit and killed her uncle while he was driving his semi. *Id.* This was especially hard for SrA Jackson because her uncle helped twice when she suffered through suicidial ideations as a kid. *Id.* Its apparent from the record that SrA Jackson did not have an easy childhood.

Second, SrA Jackson deployed to the middle east. Although there is not a lot of information in the record about that deployment, any deployment is a significant accomplishment in "the appellant's record of service." *Id.*; *Sauk*, 74 M.J. at 606.

That leads to the third factor this Court should take into consideration. A member of a foreign military sexually assaulted SrA Jackson during her deployment. Defense Exhibit D at 2. Thus, it is not surprising that SrA Jackson would have significant trauma that would necessitate mental health care. Defense Exhibit A.

These factors do not excuse SrA Jackson's conduct, but they provide strong evidence in mitigation and extenuation that this Court should review *de novo* to reduce her sentence.

WHEREFORE, SrA Jackson respectfully requests that this Honorable Court reassess her sentence.

7 April 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee* v. Senior Airman (E-4) **DEQUAJAN D. JACKSON** USAF, *Appellant.*	)))))))))	**UNITED STATES' MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40310

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

Pursuant to Rule 23.3(m)(5)-(6) of this Court's Rules of Practice and Procedure, the United States respectfully requests that it be granted an enlargement of time of 16 days, until 10 May 2023, to provide its Answer to Appellant's Assignments of Error.

This case was docketed with the Court on 26 July 2022. Since docketing, Appellant has been granted 5 enlargements of time. Appellant filed his assignments of error with this Court on 23 March 2023, 240 days after docketing. This is the United States' first request for an enlargement of time, and, as of the date of this request, 255 days have elapsed. On the date requested, 288 days will have elapsed.

The justification for this enlargement of time of 16 days is a combination of undersigned counsel's workload, training requirements, and approved leave. Appellant filed his assignments of error with this Court on 23 March 2024. Since Appellant filed his assignments of error undersigned counsel has completed Answer briefs on two cases with eight issues combined, United States v. Jones, ACM No. 40226, filed 3 April 2023, and United States v. Wilson, ACM No. 40274, filed 5 April 2023. Due to those Answers, undersigned counsel was not able to begin working on the present case until 6 April 2023. Undersigned counsel is assigned another case United States v. Pelletier, ACM No. 40277, a one-issue case, currently due 21 April 2023, and is

supervising/assisting JAJG's extern with completing United States v. Hernandez, ACM No. 40287, a two-issue case, due 24 April 2023. Due to Appellant raising several novel issues, significant research will be involved in answering her assignments of error.

While Appellant's case is now undersigned counsel's first priority, counsel has 17 days from the date of this filing to complete the Answer to Appellant's assignments of error, undersigned counsel has two (2) days of approved leave and five (5) days of training for counsel's PCA scheduled between now and the current due date for the United States' Answer. Due to timing and manning constraints at the Government Trial and Appellate Operations Division (JAJG), there is no other appellate government counsel who could complete a brief sooner, especially since undersigned counsel has already begun review of this case. At the time of this filing, JAJG has 9 Answers briefs pending before this Court, and 2 briefs pending at CAAF. JAJG currently has only 4 active-duty counsel available to write briefs, one of whom is currently on convalescent leave. JAJG is making use of reservists and our extern, but enlargements of time may be necessary for JAJG to tackle the current workload.

As of the date of this Motion, undersigned counsel has reviewed Appellant's assignments of error brief and begun research into the novel issues. The record of trial consists of 2 volumes, 4 prosecution exhibits, 4 defense exhibit, and 3 appellate exhibits; the transcript is 183 pages. Undersigned counsel requests an additional 16 days to ensure sufficient time to respond to Appellant's assignments of error, and to allow for adequate supervisory review before filing with the Court.

For these reasons, the United States respectfully requests an enlargement of time of 16 days, until 10 May 2023, to ensure a proper and responsive brief is filed with this Court.

[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 7 April 2023.

[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]

10 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee*	)	**UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR**
v.	)	Before Panel No. 2
Senior Airman (E-4) **DEQUAYJAN D. JACKSON** USAF, *Appellant.*	)	No. ACM 40310

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

ISSUES PRESENTED

I.

WHETHER THE JUDICIALLY CREATED "CONTINUOUS COURSE OF CONDUCT" DOCTRINE IN *UNITED STATES V. MULLENS*, 29 M.J. 398 (C.M.A. 1990) IS A VIOLATION OF ARTICLE 56, UCMJ, 10 U.S.C. § 856, OR R.C.M. 1001(b)(4); AND, IN THE ALTERNATIVE, WHETHER THE MILITARY JUDGE PROPERLY APPLIED SAID DOCTRINE WHEN 1) THE UNCHARGED MISCONDUCT WAS REMOTE IN TIME TO THE CHARGED CONDUCT; 2) THE UNCHARGED MISCONDUCT INVOLVED A DIFFERENT PERSON; AND 3) THE UNCHARGED MISCONDUCT EXCEEDED THE PLAIN LANGUAGE OF THE CHARGE?

II.

WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" WHEN SRA JACKSON WAS CONVICTED OF NON-VIOLENT OFFENSES AND WHETHER THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021)?

III.

WHETHER SRA JACKSON'S SENTENCE IS INAPPROPRIATELY SEVERE?[1]

STATEMENT OF THE CASE

The United States generally agrees with Appellant's Statement of the Case.

STATEMENT OF THE FACTS

At a general court-martial, the military judge sitting alone convicted Appellant consistent with her pleas of five specifications of Charge I in violation of Article 112a, Uniform Code of Military Justice (UCMJ), and Specification 1 of Charge II in violation of Article 92, UCMJ, for failing to reject active participation in criminal gang activity. (*Entry of Judgement (EOJ)*, dated 18 April 2022, ROT Vol. 1). The military judge sentenced Appellant to 351 days of confinement (with 161 days of pretrial confinement credit), a bad-conduct discharge, reduction to the grade of E-1, and forfeiture of all pay and allowances. (Id.)

For Specification 5 of Charge I, Appellant pled guilty to wrongfully distributing on divers occasions some amount of cocaine between on or about 1 April 2021 and on or about 5 October 2021. (*Charge Sheet*, last modified 15 March 2022, ROT Vol. 1). For Specification 6 of Charge I, Appellant pled guilty to wrongfully distributing approximately forty (40) tablets of alprazolam between on or about 1 August 2021 and on or about 5 October 2021 to A1C JJ. (Id.) Alprazolam is commonly referred to as "Xanax" or "Xanax bars." (Id.) For Specification 1 of Charge II, Appellant pled guilty to failing to obey a lawful general regulation by wrongfully failing to reject active participation in criminal gangs by advocating criminal activity between on or about 1 March 2021 and on or about 5 October 2021. (Id.)

[1] Appellant raises Assignment of Error III pursuant to United States v. Grostefon, 12 M.J. 421 (C.M.A. 1982).

When Air Force Office of Special Investigations (OSI) agents and local Oklahoma police executed a search warrant at Appellant's home on 5 October 2021, they found her and known Crip gang members CH and OC at her residence. (Pros. Ex. 1 ¶ 3).

In support of her plea of guilty to Specification 5, Appellant stipulated that she acted as a "middle man" for TB and QJ on multiple occasion by selling cocaine for them in Oklahoma City, Oklahoma. (Pros. Ex. 1 ¶10). She admitted that she sold cocaine to an individual named "Dan" in approximately August of 2021. (Id.) She also admitted that she acted as the "middle man" in selling cocaine for QJ three to four times at 15th Street and High Avenue in Oklahoma City. (Id.) TB, also known as "Mouse," gave Appellant money for food after she conducted the drug transactions. (Id.)

In support of her plea of guilty to Specification 6 of Charge I, Appellant stipulated that she sold approximately 40 tablets of Xanax/Xanax bars to A1C JJ on or about 29 September 2021. (Pros. Ex. 1 ¶13). Appellant gave the Xanax bars to A1C JJ at 15th Street and High Avenue in Oklahoma City. (R. at 55). Appellant kept $50 of the $250 A1C JJ paid her for the Xanax bars and gave the other $200 to Mouse. (Id.) OC helped coordinate the cost of the alprazolam for Appellant and Mouse and was with Appellant when she made the transaction with A1C JJ. (Id.)

Appellant admitted to a number of incidents to OSI that constitute active participation in Crips criminal gang activity. (Pros. Ex. 1 ¶22). She admitted to distributing drugs for known gang members, transporting known gang members in her car to conduct gang business, allowing known gang members to conduct criminal activity out of her home, and displaying gang signs to known gang members out of respect. (Id). She stated to OSI that she talks to all of the Crips in

their group, over ten of them, and they look at her like a sister and take care of her. (Pros. Ex. 1 ¶23). Appellant knew Mouse, QJ, and CH were all Crip members. (Pros Ex. 1 ¶24).

ARGUMENT

I.

UNITED STATES V. MULLENS, 29 M.J. 398 (C.M.A. 1990) DID NOT JUDICIALLY CREATE A "CONTINUOUS COURSE OF CONDUCT DOCTRINE" SEPARATE AND APART FROM THE PLAIN LANGUAGE OF ARTICLE 56, UCMJ, NOR R.C.M. 1001(b)(4). AND THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION WHEN HE DETERMINED APPELLANT'S UNCHARGED MISCONDUCT WAS DIRECTLY RELATED TO HER CONVICTIONS FOR DRUG DISTRIBUTION AND CRIMINAL GANG INVOLVEMENT SUCH THAT HE COULD CONSIDER IT AS EVIDENCE IN AGGRAVATION.

Additional Facts

At trial, trial counsel moved to admit Prosecution Exhibit 4, which was a disc containing two video clips from Appellant's OSI interview. (R. at 129). Trial defense counsel objected to the introduction of the evidence on the basis of Military Rule of Evidence (M.R.E.) 403. (R. 138-39; R. at 140). Trial defense counsel objected to the shorter of the two clips on the disc, approximately two minutes and thirty-one seconds, on the basis of cumulativeness. (Id.) They argued the evidence was already found in paragraphs 18 and 19 of Prosecution Exhibit 1, and Appellant spoke to the information during the *Care* inquiry. (Id.) United States v. Care, 18 U.S.C.M.A. 535.

The second clip trial counsel sought to introduce was titled "Dan Pills Last Month August" and was four minutes and forty-six seconds long. (R. at 147). In the video clip, Appellant described to OSI agents how she was the "middle man" for a transaction involving "Bars" with a man named "Dan" at apartments located at "15th and High." (R. at 148; Pros. Ex.

4). Appellant received the pills she distributed to "Dan" from Mouse. (R. at 149; Pros. Ex. 4). She stated that she met "Dan" through one of the other gang members. (Id.) Appellant went on to clarify that she sold him two bars, which were "Bars of Xanax," for $20, and then she gave that money to Mouse. (R. at 150 and 153; Pros. Ex. 4). She made the transaction in either late August or July of 2021. (R. at 153; Pros. Ex. 4).

When trial counsel offered the second clip into evidence, trial defense counsel renewed their objection on M.R.E. 403 grounds. (R. at 154). Trial counsel agreed that the second clip on Prosecution Exhibit 4 was uncharged misconduct, but argued it was a "continuous course of conduct from the accused" with regard to selling Xanax. (Id.) Trial counsel argued that it was close in time to the conduct of Specification 6 and was part of a continuous course of conduct in selling the specific drug to another member. (R. at 154-55). Trial counsel confirmed to the military judge they were not offering the evidence under M.R.E. 404(b), but strictly as aggravating evidence under R.C.M. 1004(b)(4). (R. at 155).

Trial defense counsel argued the "Dan" clip from Appellant's OSI interview was not evidence in aggravation because it was not directly resulting from or directly related to what Appellant pled guilty to and was found guilty of, but evidence offered solely for propensity purposes. (R. at 156).

The military judge found that the case law on aggravation evidence tracked similar circumstances to Appellant's case, noting similar facts where an appellant helped others cheat on tests, he pled guilty to only some of the instances, and trial counsel was allowed to use more instances as evidence in aggravation. (R. at 157). The military judge also noted other drug cases where appellants pled guilty to only a few instances of drug offenses, but additional evidence was allowed of similar crimes. (R. at 157). As to the M.R.E. 403 objection, the military judge

stated that it was a judge alone case and that he would not consider the evidence for any propensity purposes and would keep the evidence separate. (R. at 157). He then made the following ruling:

> So the person and the kind of drug and the action are all charged, but with the ones that she pled guilty to with Dan before were distribution of Cocaine and when she talked about distributing Xanax before it was to A1C [JJ] but is in the charged time frame and it is – I find it is evidence of continuous course of conduct that is admissible under 1001(b)(4) and therefore has probative value in that regard. And I find that probative value is not substantially outweighed by the danger of unfair prejudice which is significantly mitigated by the fact that this is a judge alone case, and that I am aware that she can only be sentenced for the crimes for which she has been accused but this does give context to understand the overall course of conduct. And I find that it is actually part of Specification 1 of Charge II where she pled guilty to active participation in a criminal gang. And this is anoth]er [*sic*] way in which she actively participated in the criminal gang. She – well what it says in the video that she – that Mouse asked her to take the drugs to Dan and she did so. Indicating that she knew what she was doing. So yeah, I find that it is a continuous course conduct. It is admissible under 1001(b)(4) as aggravation evidence and that it is not substantially outweighed by the danger of unfair prejudice or any of the other concerns in M.R.E. 403.

(R. at 157-58).

Standard of Review

This Court reviews a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. United States v. Stephens, 67 M.J. 233, 235 (C.A.A.F. 2009) (citations omitted). A military judge abuses his discretion when his legal findings are erroneous or when he makes a clearly erroneous finding of fact. Id. (citing Barker, 77 M.J. at 383; United States v. Eugene, 78 M.J. 132, 134 (C.A.A.F. 2018)). To be overturned on appeal, the military judge's ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous. United States v. Taylor, 53 M.J. 195, 199 (C.A.A.F. 2000) (*citing* United States v.

Travers, 25 M.J. 61, 62 (C.M.A. 1987)). For a ruling to be an abuse of discretion, it must be more than a mere difference of opinion. United States v. Brown, 72 M.J. 359, 362 (C.A.A.F. 2013) (*citing* United States v. Collier, 67 M.J. 347, 353 (A.F. Ct. Crim. App. August 19, 2020) (citations omitted)).

Law and Analysis

1. Uncharged misconduct that is part of a continuous course of conduct by an appellant is directly related to the offenses of which that appellant has been found guilty. Thus, it is admissible as evidence in aggravation and not an "atextual aberration."

R.C.M. 1001(b)(4) states:

> Trial counsel may present evidence as to any aggravating circumstances directly relating to or resulting from the offenses of which the accused has been found guilty. Evidence in aggravation includes, but is not limited to, evidence of financial, social, psychological, and medical impact on or cost to any person or entity who was the victim of an offense committed by the accused and evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

In United States v. Mullens, the Court of Miliary Appeals considered, *inter alia*, whether the military judge abused his discretion in admitting evidence of earlier uncharged misconduct as R.C.M. 1001(b)(4) aggravation evidence following the appellant's conviction for acts of sodomy and indecent liberties with his children. United States v. Mullens, 29 M.J. 398, 400 (C.M.A. 1990). Appellant focuses on the CMA's use of the phrase "continuous course of conduct" but fails to address how the CMA framed its analysis. Namely, the court began by looking at how the rule itself defined what evidence may constitute evidence in aggravation. Applying the rule to the facts of the appellant's case, the CMA concluded that "[c]learly, the uncharged misconduct delineated in this stipulation was directly related to the conduct for which appellant was found guilty." Id. Put another way, the court used the terminology "continuous course of conduct" to

describe how they found the appellant's uncharged misconduct to be "directly related" to the conduct for which appellant was found guilty. Id. The court went on to explain that "[t]he stipulation evidenced a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs within the military community, *i.e.*, the servicemember's home." Id.

Contrary to Appellant's assertions, Mullens did not create a new doctrine. Just two years prior, the CMA found in United States v. Silva, 21 M.J. 336, 337 (C.M. A. 1986), that an appellant's uncharged misconduct was an "integral part of his criminal course of conduct" and that "'the circumstances surrounding that offense or its repercussions . . . [might] be understood by the sentencing authority.'" Id. citing United States v. Vickers, 13 M.J. 403, 406 (C.M.A. 1986) (alterations in original). Like its predecessor, CAAF continued to use the phrase "continuous course of conduct" to enunciate why it found an appellant's uncharged misconduct directly related to his or her convictions, rather than creating an "atextual aberration" as Appellant asserts. (App. Br. 10). In United States v. Ross, CAAF examined how the continuous nature of the appellant's conduct – altering 20-30 more military aptitude tests than the four he was found guilty of – was proper aggravation evidence because the additional alterations took place within the same time period and at the same place as the charged acts. 34 M.J. 183, 187 (C.A.A.F. 1992). CAAF found there that "the continuous nature of the charged conduct and its full impact on the military community are proper aggravating circumstances[.]" Id. (citations omitted). Notably, both the majority and Judge Cox's concurring opinion concluded evidence of the uncharged misconduct did not unduly prejudice the appellant in his judge alone trial. Id. at 187-88. In United States v. Shupe, 36 M.J. 431, 436 (C.A.A.F. 1993), CAAF cited R.C.M. 1001(b)(4) to find that five additional lysergic acid diethylamide (LSD) transactions, beyond the

one appellant pled guilty to, were admissible as "circumstances directly relating to or resulting from" the offenses of which the appellant was convicted. In explaining why it was proper aggravation under the rule, CAAF noted how the uncharged misconduct "was not an isolated transaction but was part of an extensive and continuing scheme to introduce and sell LSD to numerous buyers assigned to the naval base." Shupe, 36 M.J. at 436. None of these cases used "continuous course of conduct" as a doctrinal or talismanic incantation to determine that uncharged misconduct could be used in aggravation without finding that the uncharged misconduct was directly related to an appellant's convictions. Rather, CAAF ultimately decided these cases based on the direct connections between the uncharged misconduct and the convicted offenses.

Appellant asserts CAAF veered away from what she calls the "continuous course of conduct doctrine" in its United States v. Hardison decision. 64 M.J. 279, 280 (C.A.A.F. 2007); (App. Br. 8-10). But this Court should decline Appellant's invitation to interpret Hardison as having overruled *sub silencio* the precedent regarding continuous course of conduct. Contrary to Appellant's creative interpretation, CAAF's analysis in Hardison employed the same analysis it previously utilized when deciding whether the uncharged misconduct was proper aggravation evidence. Indeed, in rejecting the evidence, CAAF noted that it had "*consistently held* that the link between the R.C.M. 1001(b)(4) evidence of uncharged misconduct and the crime for which the accused has been convicted must be direct, as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." Hardison, 64 M.J. at 281-82 (emphasis added). Citing a series of CMA and CAAF cases between 1986 and 2001, CAAF pointed to how the courts consistently analyzed whether the uncharged misconduct at issue was truly a continuous course of conduct directly related to or resulting from the appellant's crime(s) in

accordance with R.C.M. 1001(b)(4). Put plainly, CAAF was not overruling its precedent to apply the rule's plain language; it was upholding it.

Likewise, this Court should not be persuaded by Appellant's argument that considering whether uncharged misconduct is a proper matter in aggravation as a "continuous course of conduct" is an "atextual aberration." (App. Br. at 10). Appellant argues that because "of the offense" or "of offense" is used six times in Article 56, UCMJ, and also used in R.C.M. 1001(b)(4), an accused cannot receive greater punishment for uncharged misconduct in the record. (App. Br. 10-11). However, this argument overlooks the text surrounding "the offenses" in R.C.M. 1001(b)(4), which allows a trial counsel to present evidence as to any aggravating circumstances that is directly related to "the offenses." When directly related to the offenses, the evidence in aggravation can be used "to aid the court-martial in determining an appropriate sentence." R.C.M. 1001(a)(1). As CAAF made clear in Hardison, the authoritative cases have used a variety of language to articulate the same analysis of whether there was a direct link between uncharged misconduct and the crime(s) of which an appellant was convicted. Using the uncharged misconduct does not create a doctrine three steps removed from the language of Article 56, UCMJ. There is no separate doctrine, only analysis describing when CAAF has found certain conduct to be directly related to an appellant's convictions, and thus proper evidence in aggravation.

2. The military judge did not abuse his discretion when he admitted the uncharged misconduct of Appellant's additional drug distribution as evidence in aggravation, because it was directly related to her convictions for drug distribution and gang activity.

The military judge accurately followed CAAF's precedent when he admitted Appellant's uncharged misconduct because it is directly related to her convictions for failing to resist gang activity in violation of Article 92, UCMJ, and distributing drugs, specifically alprazolam, in

violation of Article 112a, UCMJ. The military judge found that Appellant's uncharged instance of distributing alprazolam to "Dan" was directly related to her active participation in the criminal gang, as she took the drugs to "Dan" because a known gang member asked her do it. It therefore represented Appellant's continuous course of conduct in gang-related activity and was admissible under R.C.M. 1001(b)(4) as aggravation evidence. (R. at 157-58). The military judge also found that it showed a continuous course of conduct with Appellant's other drug distribution offense for Xanax (alprazolam) and cocaine. The military judge found that Appellant pled guilty to distributing cocaine to "Dan" and pled guilty to distributing Xanax to A1C JJ. (R. at 157). He determined the person, the kind of drug, and the action are all charged and that the uncharged misconduct was in the charged time frame. (Id.)

Furthermore, although the military judge did not cite to the cases by name, his analysis on the record shows he analyzed whether he could consider Appellant's uncharged misconduct as evidence in aggravation under the appropriate case law, such as Shupe and Ross. (Id.) In making his determination he did not rely on any talismanic or doctrinal incantation of "continuous course of conduct," but analyzed whether the uncharged misconduct was related to Appellant's convictions because they involved the same individuals and the same type of crime as Appellant's convictions, and occurred within the same time period of the convicted offenses, which is in keeping with CAAF precedent, including Hardison.

Appellant focuses on her conviction for distributing Alprazolam to A1C JJ as the only conviction that links her to the uncharged misconduct. She advocates that the military judge failed to show that her distribution of alprazolam to "Dan" was directly related to her conviction for distributing alprazolam to JJ. (App. Br. 12-13). However, that argument fails to take into consideration that the military judge viewed the evidence as being directly related to both

Appellant's conviction for distributing cocaine to "Dan" on a previous occasion and her involvement in gang activity. Furthermore, the transactions for cocaine for "Dan," alprazolam for A1C JJ, and alprazolam for "Dan" all took place at the same location – 15th Street and High Street – and at the direction of the gang. Appellant argues that the uncharged instance of alprazolam distribution involved a different "victim" in "Dan," and thus, her conduct is not directly related to her convictions. (App. Br. at 12). However, in United States v. Lowe, 56 M.J. 914, 916 (N-M. Ct. Crim. App. May 29, 2002), the Navy-Marine Corps court recognized that the CMA's opinions in both Shupe and Ross identified the Naval Service as the "victim" of the drug offenses. In the present case, Appellant's crimes undermined the discipline and readiness of the Air Force and introduced a significant criminal element into its ranks.

Finally, and perhaps most notably, the military judge appropriately analyzed the evidence in aggravation under M.R.E. 403, a significant factor CAAF and its predecessor consistently highlighted in assessing uncharged misconduct. (R. at 158). The military judge found the evidence probative and not substantially outweighed by the dangers of unfair prejudice or any other concern. (Id.) Furthermore, given trial defense counsel's objection, the military judge stated on the record that he would only consider the uncharged misconduct as evidence in aggravation, but not for "any propensity purposes." (R. at 157). He further stated, "I am aware that [Appellant] can only be sentenced for the crimes for which she has been accused but this does give context to understand the overall course of conduct." (Id.)

As seen from his analysis on the record, the military judge made no erroneous findings of law or fact and adhered to the standards set forth by CAAF when determining whether Appellant's uncharged misconduct was directly related to her convicted crimes. His decision to admit the evidence was neither arbitrary, fanciful, nor clearly unreasonable in light of the

uncharged misconduct's place within Appellant's continual criminal enterprises to which she pled guilty. Since the military judge did not abuse his discretion, this Court should deny Appellant's assignment of error.

II.

AS THIS COURT DETERMINED IN UNITED STATES V. LEPORE, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021), THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL MATTER NOT SUBJECT TO REVIEW UNDER ARTILECE 66, UCMJ. EVEN IF IT DID HAVE SUCH JURISDICTION, THE STAFF JUDGE ADVOCATE'S FIRST INDORSEMENT TO THE STATEMENT OF TRIAL RESULTS CORRECTLY ANNOTATES THAT APPELLANT'S CONVICTIONS REQUIRED SHE BE CRIMINALLY INDEXED FOR FIREARM PROHIBITION UNDER 18 U.S.C. § 922 BECAUSE SHE WAS CONVICTED FOR A CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, WHICH IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts

For the six offenses Appellant pled guilty to at her general court-martial she faced a maximum of sixty-two (62) years in confinement. (R. at 91). The staff judge advocate's First Indorsement to the Statement of Trial Results annotates, "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes[.]" (*First Indorsement*, dated 15 March 2022*, Statement of Trial Results*, dated 18 April 2022, ROT Vol. 1) The First Indorsement is part of the Statement of Trial Results signed by the military judge and listed as an attachment to the Entry of Judgement. (*EOJ*, dated 18 April 2022, ROT Vol. 1).

Standard of Review

"The scope and meaning of Article 66[] is a matter of statutory interpretation, which, as a question of law, is reviewed de novo." United States v. Gay, 75 M.J. 264, 267 (C.A.A.F. 2016) (citation omitted).

The proper completion of post-trial processing is a question of law the court reviews *de novo*. United States v. Zegarrundo, 77 M.J. 612 (A.F. Ct. Crim. App. 2018) (*citing* United States v. Kho, 54 M.J. 64 (C.A.A.F. 2000)).

Law and Analysis

18 U.S.C. § 922(g)(1) makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Pursuant to her pleas and plea agreement, the military judge convicted Appellant at a general-court martial of (1) five violations of Article 112a, UCMJ, for distributing marijuana, cocaine, and Alprazolam and aiding the in the manufacturing and distribution of cocaine; and (2) violating a lawful general regulation by wrongfully failing to reject participation in criminal gangs by advocating criminal activity, in violation of Article 92, UCMJ. (*EOJ*, dated 18 April 2022, ROT Vol. 1). Had Appellant only received one of the Article 112a, UCMJ, convictions or only the Article 92, UCMJ, conviction she would still have been convicted of a crime punishable by imprisonment for a term exceeding one year, yet she faced sixty-two years confinement. Id.

1. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because it is not part of the findings or sentence.

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the first indorsement to the statement of trial results on the grounds requested by Appellant. Appellant argues that because CAAF ordered the Army to correct a promulgating order that annotated Appellant as a sex offender in Lemire: (1) CAAF has the authority to correct administrative errors in promulgating orders even when concerning collateral consequences; (2) CAAF thinks CCAs have power to correct administrative errors under Article 66, UCMJ; and (3) if CAAF and CCAs have the power to correct administrative errors then they also have the authority to address constitutional errors in promulgating orders even if they are collateral consequences. (App. Br. at 17); *See* United States v. Lemire, 82 M.J. 263 (C.A.A.F. 2022) (unpub. op.) Appellant bases this argument solely on a *footnote* to an order in an *unpublished* opinion issued by CAAF that contained no analysis nor reasoning why this was a viable remedy in that case. Id. But this Court has previously declined to rely on such an incomplete analysis. In United States v. Lepore, 81 M.J. 759, 762 (A.F. Ct. Crim. App. 2021), this Court even declined to rely on its own past decision in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007) because that opinion contained no analysis of jurisdiction when this Court summarily ordered the correction of the promulgating order when it referenced 18 U.S.C. § 922(g) allegedly in error. Here, Appellant asks this Court to follow a footnote in an unpublished opinion from CAAF, which contains no analysis of jurisdiction for directing correction of a promulgating order.

Furthermore, Rule 30.4(a) of this Court's Rules of Practice and Procedure states,

> Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the

> Court's decision to the public, the parties, military practitioners, and judicial authorities.

Therefore, Lemire does not qualify as precedent and should not be followed, because the unpublished order from CAAF does not call attention to a rule of law or procedure and does not provide CAAF's rationale to this judicial authority. In any event, Lemire involves sex offender registration, not firearms prohibitions. CAAF ordering removal of the designation for sex offender registration from a promulgating order did not involve the Court adjudicating a constitutional question unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring it to evaluate the constitutionality of firearms prohibitions for convicted airmen.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act with "respect to the finding and sentence" of a court-martial "as approved by the convening authority." Lepore, 81 M.J. at 762 (*citing* 10 U.S.C. § 866(c)); *see* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the numerous times it has held that it lacks jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." Id. (citations omitted).

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. The question Appellant asks this Court to determine is fundamentally different from the situations where our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, the Army Court of Criminal Appeals

ordered modification of the statement of trial results to correct erroneous dates, wording in charges, reflection of pleas appellant entered, and other such clerical corrections. 2021 CCA LEXIS 101 (Army Ct. Crim. App. March 2, 2021) (unpub. op.). Pennington represents the type of error R.C.M. 1111(c)(2) is in place to correct. Both the Navy-Marine and the Air Force's courts of criminal appeals have held that matters outside the UCMJ and the Manual for Courts-Martial, such as Defense Incident-Based Reporting System codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corp. Ct. Crim. App. 2018) and Lepore, 81 M.J. at 763. The courts reasoned that they only had jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. Here, under updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The staff judge advocate's annotation on the first indorsement to the statement of trial results still is not part of the finding or sentence entered into the record.

Following that logic, R.C.M. 918 makes no mention of the firearm prohibitions requirements in 18 U.S.C. § 922(g) as being part of a court-martial finding, and a firearms prohibition is not an authorized punishment in the Manual for Courts-Martial. Therefore, firearms prohibitions are not a findings or sentence, and indexing requirements under 18 U.S.C. §922 are outside the scope of this Court's authority.

In sum, this Court should decline to review this issue, because it is outside this Court's jurisdiction under Article 66(d), UCMJ.

2. The First Indorsement to the Statement of Trial Results was correctly prepared in accordance with the applicable Air Force Instruction.

Even if this Court does have jurisdiction to review this issue, Appellant is not entitled to relief. This Court should decline to order a corrected first indorsement, because Appellant has not established the staff judge advocate's erred in annotating that Appellant was subject to firearm prohibition. The staff judge advocate followed the appropriate Air Force regulations. Appellant received convictions for six different qualifying offenses under 18 U.S.C. §922(g)(1). Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 18 January 2019[2], paragraph 13.3.3 states, "Prior to distribution, the SJA must sign and attach to the Statement of Trial Results a first indorsement, indicating whether…firearm prohibitions are triggered[.]" Furthermore, paragraph 15.28.1. applies in this case, which shows the staff judge advocate correctly annotated firearms prohibition on the first indorsement:

> Persons convicted of a crime punishable by imprisonment for a term exceeding one year. If a service member is convicted of a crime for which the maximum punishment listed in the MCM exceeds a period of one year, this prohibition is triggered, regardless of the term of confinement adjudged or approved.

(*citing* 18 U.S.C. § 922(g)(1)).

Appellant's numerous convictions qualify her for criminal indexing in accordance with 18 U.S.C. § 922(g)(1), and the first indorsement annotates this in accordance with AFI 51-201, so there was no error for this Court to correct.

[2] Appellant cites to a version of AFI 51-201 issued with a date of 8 April 2022, which would not have been in effect at the time Appellant's Statement of Trial results was indorsed by the SJA on 15 March 2022. However, the language and paragraph Appellant cites is found in the AFI in effect at the time of the indorsement, AFI 51-201, dated 18 January 2019.

3. It was constitutional for the SJA to annotate the firearms prohibition on the STR because Appellant is not a "law abiding, responsible citizen" and 18 U.S.C. § 922(g)(1) is part of the longstanding prohibition on the possession of firearms by felons.

In N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129-2130 (2022), the Supreme Court held the standard for applying the Second Amendment is

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

(citations omitted).

In his concurrence in Bruen, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) and McDonald v. City of Chicago, 561 U.S. 742 (2010) and further explained in the Bruen decision, the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Justice Kavanaugh concurring) (citations omitted). The proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (*citing* Heller, 554 U.S. at 636). The principal opinions in Heller and McDonald stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose….Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Footnote 26: We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.]

Id. (citations omitted).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 15). However, Appellant then cites United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023) for the proposition that the Government cannot prove that Appellant's firearm prohibition for a "non-violent offense" is in keeping with the United States' historical tradition of firearm regulation. (App. Br. at 15-16). But this is contrary to what Rahimi actually says. Rahimi concluded that the term "law abiding, responsible citizens," as used in Heller, is a shorthand in explaining that the holding in Heller should not be taken to cast doubt on longstanding prohibitions on possession of firearms by felons. Rahimi, 61 F. 4th at 451 (*citing* Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different – it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. But the Court determined that Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), because Rahimi was only subject to an agreed upon domestic violence restraining order at the time he was convicted. He did not have a felony conviction at the time he was charged with illegal possession of a firearm. And the Fifth Circuit found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of Second Amendment rights "fits within our Nation's historical traditional of firearm regulation. Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant finds herself in here. Here, Appellant has been convicted of multiple offenses punishable by well over a year in confinement, thus qualifying her as a felon prohibited from owning a firearm under

18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions, which limit the Second Amendment to "law abiding citizens." These cases make no distinction between violent and non-violent felonies. However, prior to Bruen, the Fifth Circuit noted "[i]rrespective of whether his offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id. *See also* Folajtar v. AG of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons at large – including nonviolent felons – based on its consistency with history and tradition.) This understanding is in keeping with the Supreme Court's decision in Bruen, because the Fifth and Third Circuits made the determination that prohibiting felons from possessing firearms was consistent with this Nations historical tradition of firearm prohibition.

Appellant's multiple convictions for drug distribution, manufacturing, and gang activity demonstrate she falls squarely into the category of individuals that should be prohibited from possession a firearm. Therefore, (1) Appellant's Statement of Trial Results correctly annotates firearm prohibition and (2) the United States' longstanding prohibition on felons possessing firearms appropriately applies to her. For these reasons, the criminal indexing annotation on Appellant's Statement of Trial Results was correct.

If this Court should find it has the authority to review Appellant's firearm prohibition annotation on the Statement of Trial Results, it should find consistent with the Supreme Court and the Fifth Circuit that this Nation has a longstanding tradition consistent with the Second Amendment of prohibiting felons such as Appellant from possessing firearms. This Court should deny this assignment of error.

III.

APPELLANT'S SENTENCE IS APPROPRIATE.[3]

Standard of Review

This Court reviews sentence appropriateness *de novo*. United States v. Baier, 60 M.J. 382, 383-384 (C.A.A.F. 2005). The Court may only affirm the sentence if it finds the sentence to be "correct in law and fact and determines, on the basis of the entire record, [it] should be approved." Article 66(d)(1), UCMJ.

Law

Sentence appropriateness is assessed "by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial." United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009).

Although this Court has great discretion to determine whether a sentence is appropriate, the Court has no authority to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted). Unlike the act of bestowing mercy through clemency, which was delegated to other channels by Congress, CCAs are entrusted with the task of determining

[3] Appellant raises Assignment of Error III pursuant to United States v. Grostefon, 12 M.J. 421 (C.M.A. 1982).

sentence appropriateness, thereby ensuring the accused gets the punishment he deserves. United States v. Healy, 26 M.J. 394, 395-96 (C.M.A. 1988).

A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." United States v. Perez, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 September 2021) (unpub. op.). "Absent evidence to the contrary, 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) (citing United States v. Johnson, 41 C.M.R. 49, 50 (U.S.C.M.A. 1969)).

Analysis

Appellant received the benefit of her plea in two significant ways. First, Appellant reduced her confinement exposure to at most 490 days in confinement rather than the 62 years she was facing without the agreement only for the offenses to which she pled guilty. (App. Ex. II). The military judge then only sentenced Appellant to 350 days confinement and credited her with 161 days of pretrial confinement credit. (*EOJ*, dated 18 April 2022, ROT Vol. 1). Second, by virtue of the plea agreement, the convening authority withdrew five specifications against Appellant. (Id.). Through her plea agreement, in which she agreed to a mandatory bad-conduct discharge, Appellant indicated she felt the sentence being imposed was a fair and appropriate sentence for her numerous offenses. Appellant now seeks a windfall from this Court's *de novo* review under Article 66, UCMJ; however, Appellant's sentence is appropriate for her conduct, and she has not established that relief is warranted.

Appellant engaged in criminal gang activity and actively supported a known criminal gang by distributing drugs and aiding in the manufacture of cocaine. She distributed drugs not only to the public in support of gang activity, but the military judge sentenced her for selling two

separate illegal drugs – marijuana and alprazolam – to a fellow Airman. (Pros. Ex. 1). She has proven her disregard for discipline in the military and her fellow Airmen by involving A1C JJ in the criminal enterprises of a gang and for advocating criminal activity through the use of gang signs, allowing gang members to use her home to manufacture drugs, and for transporting gang members as they conducted criminal activity. As trial counsel argued in sentencing, Appellant also lied to OSI agents on numerous occasions during her interview until confronted with the evidence against her, which showed her lack of rehabilitative potential. (R. at 173-74). The character of this particular appellant and the nature and seriousness of the offenses she committed is apparent from the record. Based on the full record, Appellant received the sentence she deserved and does not deserve any relief from this Court.

For these reasons, this Court should uphold Appellant's sentence as appropriate.

CONCLUSION

WHEREFORE, the United States respectfully requests this Court deny Appellant's Assignments of Error and affirm the findings and sentence in this case.

[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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NAOMI P. DENNIS, Colonel, USAF
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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 10 May 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee,

v.

DEQUAYJAN D. JACKSON
Senior Airman (E-4),
United States Air Force
Appellant.

No. ACM 40310

APPELLANT'S REPLY BRIEF

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

Counsel for Appellant

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Senior Airman (E-4) **DEQUAYJAN D. JACKSON,** United States Air Force *Appellant*	)))))))))	**REPLY BRIEF** Before Panel No. 2 No. ACM 40310 17 May 2023

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

Appellant, Senior Airman (SrA) DeQuayjan D. Jackson, by and through her undersigned counsel and pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 10 May 2023 [hereinafter Answer]. SrA Jackson stands on the arguments in her initial brief, filed on 23 March 2023, and submits additional arguments for the issues listed below.

ARGUMENT

II.

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN SRA JACKSON WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION UNDER *UNITED STATES V. LEMIRE*, 82 M.J. 263 (C.A.A.F. 2022) (UNPUB. OP.) OR *UNITED STATES V. LEPORE*, 81 M.J. 759 (A.F. CT. CRIM. APP. 2021).

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

The Government argued that "[b]oth the Supreme Court and the Fifth Circuit acknowledge that felony convictions are part of the United States' longstanding tradition on firearm prohibitions, which limit the Second Amendment to 'law abiding citizens.'" Answer at 21. The Government then stated, "These cases make no distinction between violent and non-violent felonies." *Id.* The Government then used these statements to argue that 18 U.S.C. § 922's firearm prohibition is constitutional. Unfortunately, the Government has fallen into the same trap that has beset lower courts; namely, giving the Second Amendment short shrift or treating it as a "second class right":

> Members of the Supreme Court have repeatedly criticized lower courts for disfavoring the Second Amendment. The Supreme Court has now responded by setting forth a new legal framework in *Bruen*. It is incumbent on lower courts to implement *Bruen* in good faith and to the best of our ability.

United States v. Rahimi, 61 F.4th 443, 462-63, 464 (5th Cir. 2023) (Ho, J., concurring). Stated differently, the courts must now be "more forceful guardians" of the right to keep and bear arms by using the text, history, and tradition test. *Id.* at 461.

The Government's cursory review of the text, history, and tradition of firearms regulation has two main problems. First, it failed to recognize that a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 697 (2009). Notably, the "federal felon disability--barring any person convicted of a crime punishable

by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with the majority of this country's history and tradition.

The Government's second problem is its assertion that there is "no distinction between violent and non-violent felonies" in the historical record. Answer at 21. In fact, the Government is dead wrong, as this was the actual test that was used throughout this country's history *if* a law imposed a ban at all:

> [A]ctual "longstanding" precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that…its basis credibly indicates *a present danger that one will misuse arms against others and the disability redresses that danger*.

Id. at 698 (emphasis added).

Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver…." *Id*. at 701 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." *Id.* (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* 698.

As mentioned previously, prior to World War I, firearm prohibitions on convicts were largely nonexistent. There were no federal firearms regulations and to the extent that states

regulated firearms, it was against *carrying* weapons in a concealed manner, not banning *possession*. *Id.* at 707. Notably, "it is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

For an understanding of the founder's thinking, three proposals from the constitutional convention emerged that show the distinction was between violent and non-violent crimes. First, "that the Constitution protect the right to bear arms and also provide that 'no law shall be passed for disarming the people or any of them unless for crimes committed, or real danger of *public injury from individuals*.'" *Id*. at 712 (emphasis added, quotations omitted). Second, from Samuel Adams, that the Constitution "be never construed . . . to prevent the people of the United States who are *peaceable* citizens, from keeping their own arms." *Id.* at 713 (emphasis added, quotations omitted). Third, that "Congress shall never disarm any Citizen unless such as are or have been in *Actual Rebellion*." *Id.* (emphasis added, quotations omitted).

The text, history, and tradition from the founding indicates that 18 U.S.C. § 922's firearm ban, as applied to SrA Jackson, is not constitutional. The Government not only failed to meet its burden of proof, but it did not cite to accurate history on firearms regulations. "The right to keep and bear arms has long been recognized as a fundamental civil right. Blackstone saw it as an essential component of 'the natural right' to 'self-preservation and defence.'" *Rahimi*, 61 F.4th at 461 (Ho, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 593-94 (2008)). This Court should follow Judge Ho's lead in finding it "incumbent" to "implement *Bruen* in good faith." *Id.* at 463. In doing so, this Court will find "how respect for the Second Amendment is entirely compatible with respect for our profound societal interest in protecting citizens from *violent* criminals." *Id.* at 461-62 (emphasis added).

WHEREFORE, SrA Jackson requests this Court find the Government's firearm prohibition is unconstitutional, overrule *Lepore* in light of *Lemire*, and order that the Government correct the Entry of Judgment to reflect which subsection of § 922 it used to prohibit her firearm possession.

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
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 Division on 17 May 2023.

Respectfully submitted,

[redacted]

SPENCER R. NELSON, Maj, USAF
Appellate Defense Counsel
Appellate Defense Division
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40310**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Dequayjan D. JACKSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 5th day of July, 2023,

ORDERED:

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

RICHARDSON, NATALIE D., Colonel, Senior Appellate Military Judge
MERRIAM, ERIC, Colonel, Appellate Military Judge
CADOTTE, ERIC J., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

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