IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Airman (E-2) **MARIO D. MOORE,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40600 30 May 2024

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

Pursuant to Rule 23.3(m)(2) of this Honorable Court's Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file assignments of error. Appellant requests an enlargement for a period of 60 days, which will end on **9 August 2024.** The record of trial was docketed with this Court on 11 April 2024. From the date of docketing to the present date, 49 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]

MATTHEW L. BLYTH, Maj, USAFR
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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 30 May 2024.

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3 June 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Airman (E-2) MARIO D. MOORE, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40600 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]
BRITTANY M. SPEIRS, Maj, USAFR
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Government Trial and Appellate Operations Division
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(240) 612-4800

CERTIFICATE OF FILING AND SERVICE

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

BRITTANY M. SPEIRS, Maj, USAFR
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40600**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Mario D. MOORE	)	
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 30 May 2024, counsel for Appellant submitted a Motion for Enlargement of Time (First) requesting an additional 60 days to submit Appellant's assignments of error. The Government 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 3d day of June, 2024,

ORDERED:

Appellant's Motion for Enlargement of Time (First) is **GRANTED**. Appellant shall file any assignments of error not later than **9 August 2024**.

Counsel should not rely on any subsequent requests for enlargement of time being granted. Each request will be considered on its merits. Counsel may request, and the court may order *sua sponte*, a status conference to facilitate timely processing of this appeal.

Appellant's counsel is advised that any subsequent motions for enlargement of time, shall include, in addition to matters required under this court's Rules of Practice and Procedure, statements as to: (1) whether Appellant was advised of Appellant's right to a timely appeal, (2) whether Appellant was provided an update of the status of counsel's progress on Appellant's case, (3) whether Appellant was advised of the request for an enlargement of time, and (4) whether Appellant agrees with the request for an enlargement of time. Counsel is not required to re-address item (1) in each subsequent motion for enlargement of time.

Appellant's counsel is further advised that any future requests for enlargements of time that, if granted, would expire more than 360 days after docketing, will not be granted absent exceptional circumstances.

FOR THE COURT

[redacted]

F FE, Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel 2
Airman (E-2) **MARIO D. MOORE,** United States Air Force *Appellant*	)	No. ACM 40600 16 July 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

II.

WHETHER AIRMAN MOORE'S SENTENCE IS INAPPROPRIATELY SEVERE.

III.

WHETHER, AS APPLIED TO AIRMAN MOORE, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."[1]

Statement of the Case

On 17 January 2024, at a general court-martial at Fort Meade, Maryland, Appellant, Airman (Amn) Mario D. Moore, pleaded guilty before a military judge to

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).

one specification of assault consummated by a battery in violation of Article 128, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 928 (2018).[2] (Entry of Judgment (EOJ), 23 Feb. 2024). The military judge sentenced Amn Moore to eleven days' confinement, a bad-conduct discharge, reduction to the grade of E-1, and a reprimand. (R. at 101; EOJ.) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action, 9 Feb. 2024.)

Statement of Facts

Amn Moore and YC were married in October 2020. (Pros. Ex. 1 at 1.) Early in their relationship they would engage in consensual "play fighting." (*Id.* at 2.) In January 2021, Amn Moore attempted to initiate a play fight with YC; she told him no and he playfully grabbed her arm. (*Id.* at 2.) When YC pulled her arm away, Amn Moore yanked the arm back. (*Id.*) He did not mean to hurt her. (R. at 19.)

Argument

I.

A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

Additional Facts

The plea agreement required the military judge to adjudge at least a bad-conduct discharge. (App. Ex. IV at 3 ¶ 4.b.) The military judge briefly discussed the provision on the record. (R. at 30.)

[2] All references to punitive articles are identified by year. All other references to the UCMJ and the Rules for Courts-Martial (R.C.M) are to the *Manual for Courts-Martial, United States* (2023 Ed.) [2023 *MCM*].

Standard of Review

Whether a condition of a plea agreement violates R.C.M. 705(c)(1)(B) is a question of law that this Court reviews de novo. *See United States v. Tate*, 64 M.J. 269, 271 (C.A.A.F. 2007).[3]

Law and Analysis

The mandatory bad-conduct discharge provision is contrary to public policy and this Court should not enforce it.

1. Legal framework for assessing plea agreements.

A plea agreement between an accused and convening authority may require either one to fulfill promises or conditions unless barred by relevant legal provisions. R.C.M. 705(a)-(c). The agreement may contain a minimum punishment, maximum punishment, both, or may specify a sentence or portion of the sentence. R.C.M. 705(d). Yet the terms cannot be contrary to law or public policy, R.C.M. 705(e)(1), such as those that "interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." *United States v. Cassity*, 36 M.J. 759, 762 (N.M.C.M.R. 1992) (citations omitted).

It is the military judge's "responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as

[3] This case implicates R.C.M. 705 from the 2023 *MCM*. However, the body of law on the plea agreement's predecessor, the pretrial agreement, is still applicable, as this Court has recognized. *See, e.g.*, *United States v. Marable*, No. ACM 39954, 2021 CCA LEXIS 662, at *10 (A.F. Ct. Crim. App. 10 Dec. 2021) (unpublished) ("We find our superior court's precedent with respect to [pretrial agreements] instructive when interpreting plea agreements.").

adherence to basic notions of fundamental fairness." *United States v. Partin*, 7 M.J. 409, 412 (C.M.A. 1979) (citation omitted). "To the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and not enforced." *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (citing *United States v. Clark*, 53 M.J. 280, 283 (C.A.A.F. 2000); R.C.M. 705(c)(1)(B)).

2. A plea agreement cannot render a proceeding an "empty ritual."

The mandatory discharge provision of the agreement is contrary to public policy and requires severance from the plea agreement. "A fundamental principle underlying [the CAAF's] jurisprudence on pretrial agreements is that 'the agreement cannot transform the trial into an empty ritual.'" *United States v. Davis*, 50 M.J. 426, 429 (C.A.A.F. 1999) (citing *United States v. Allen*, 25 C.M.R. 8, 11 (C.M.A. 1957)).

The mandatory discharge term hollowed out the presentencing proceeding and deprived Amn Moore of his opportunity to secure a fair and just sentence. While addressing a different issue, *United States v. Libecap* provides helpful insight for this case. There, the Coast Guard Court of Criminal Appeals (CGCCA) addressed a pretrial agreement that required the accused to request a punitive discharge. 57 M.J. 611, 615 (C.G. Ct. Crim. App. 2002). The court wrote that "whether or not to impose a punitive discharge as a part of the sentence in a court-martial is always a significant sentencing issue, and often is the most strenuously contested sentencing issue." *Id.* at 615. While the provision at issue still allowed the presentation of a complete presentencing case, the CGCCA believed the request for a bad-conduct discharge undercut any presentation. The court wrote:

> [W]e are convinced that although such a sentencing proceeding might in some sense be viewed as complete, the requirement to request a bad conduct discharge would, in too many instances, largely negate the value of putting on a defense sentencing case, and create the impression, if not the reality, of a proceeding that was little more than an empty ritual, at least with respect to the question of whether a punitive discharge should be imposed. Therefore, we conclude that such a requirement may, as a practical matter, deprive the accused of a complete sentencing proceeding.

Id. at 615–16. It reasoned that the Government had placed the appellant in a position where he would either be forced to forego a desirable deal or sacrifice a complete presentencing hearing. *Id*. at 616. For these reasons, the term violated public policy because the public would lose confidence in the integrity and fairness of the appellant's court-martial. *Id*.

Requiring the request for a punitive discharge, like the *mandatory* punitive discharge here, "create[s] the impression, if not the reality, of a proceeding that was little more than an empty ritual." *Id.* The presentencing session in *Libecap* was, for all intents and purposes, the "empty ritual"—where the result is a foregone conclusion—prohibited by *Allen*, *Davis*, and their progeny. 25 C.M.R. at 11; 50 M.J. at 429. If it violates public policy to require a *request* for a punitive discharge, it violates public policy to mandate the result.

The revisions to R.C.M. 705(d) that purport to allow this type of specified sentence stand contrary to this principal that sentencing cannot become an empty ritual. And as noted below, the revisions stand in conflict with the applicable statute.

3. A mandatory bad-conduct discharge obstructs individualized sentencing.

Court-martial sentences must be individualized; they must be appropriate to the offender and the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A.

1982). "[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." Article 56(c)(1), UCMJ (emphasis added); R.C.M. 1002(f). Because the statute sets forth this mandate, and because Article 53a(b)(4), UCMJ, prohibits plea agreement terms that are "prohibited by law," the mandatory bad-conduct discharge term is unenforceable because it prevents individualized sentencing. If Congress wanted to strip discretion from the sentencing authority and make such an offense bear a mandatory minimum sentence, it could have. But it did not for this Article 128, UCMJ, offense. Article 56(b), UCMJ. And its choice to leave discretion to the sentencing authority means the convening authority cannot usurp that role by mandating a certain result. The President cannot, by rule, circumvent the statute.

The *Manual for Courts-Martial* has, for generations, cherished the concept of individualized sentencing. *Snelling*, 14 M.J. at 268. If a court-martial *shall* impose punishment that is sufficient, but not greater than necessary, this mandatory discharge provision impermissibly precludes the sentencing authority from determining what is sufficient, but not greater than necessary, to achieve the principles of sentencing. No one in this case knows if the military judge believed a bad-conduct discharge was "not greater than necessary." All anyone knows is she was bound by the term mandating it. This Court should not enforce the provision and should reassess the sentence.

WHEREFORE, Amn Moore requests this Honorable Court sever the term for the mandatory bad-conduct discharge, uphold the remainder of the plea agreement,

and reassess the sentence.

II.

AIRMAN MOORE'S SENTENCE IS INAPPROPRIATELY SEVERE.

Facts

Amn Moore grew up deeply involved in the church. (Def. Ex. G at 1.) It provided an anchor for his childhood and a promise for his future. (*Id.* at 1; R. at 84, 86.) He joined the Air Force after a chance meeting with an Air Force dependent at a fast-food establishment. (R. at 80–81.) He felt transformed by his Air Force experience and remains thankful for his opportunity to serve. (Def. Ex. G at 2.)

Amn Moore apologized profusely at his court-martial. (*Id.*) He accepted responsibility for letting those around him down. (*Id.*) He also apologized directly to YC both in his written and verbal unsworn statement. (*Id.*; R. at 87.)

Standard of Review

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

Law

This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2024 *MCM*). Considerations include "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. Anderson*, 67 M.J. 703, 705 (A.F.

Ct. Crim. App. 2009) (citations omitted). An accused's decision to agree to the terms of a plea agreement is but *one* factor to consider, and it "does not mean [the Court] surrender[s] to the parties or military judge [its] duty to determine sentence appropriateness" when considering all the circumstances of a case. *United States v. Williams*, No. 202300217, 2024 CCA LEXIS 111, at *6 (N.M. Ct. Crim. App. 15 Mar. 2024) (unpublished).

"The breadth of the power granted to the Courts of Criminal Appeals to review a case for sentence appropriateness is one of the unique and longstanding features of the [UCMJ]." *United States v. Hutchison*, 57 M.J. 231, 233 (C.A.A.F. 2002) (citations omitted). This Court's role in reviewing sentences under Article 66(d) is to "do justice," as distinguished from the discretionary power of the convening authority to grant mercy. *See United States v. Boone*, 49 M.J. 187, 192 (C.A.A.F. 1998).

Analysis

Amn Moore's bad-conduct discharge is inappropriately severe in light of the actual offenses remaining on the charge sheet. While the Government chose to stack the charge sheet with numerous offenses, the plea agreement reduced the case to a single specification of pulling YC's wrist. (App. Ex. IV.) The imposition of a bad-conduct discharge is inappropriately severe for *this* offense. And the task of the sentencing authority is to adjudge a sentence for the offense and the offender—not for an offense that *could* have been before the court but was not. As the Court of Military Appeals noted almost 40 years ago: "[T]he experienced and professional military lawyers who find themselves appointed as trial judges and judges on the courts of military review have a solid feel for the range of punishments typically

meted out in courts-martial." *United States v. Ballard*, 20 M.J. 282, 286 (C.M.A. 1985). This observation holds true today; experience dictates a bad-conduct discharge is inappropriately severe for this offense, a simple arm grab. *Cf. United States v. Richard*, No. ACM 39918 (rem), 2023 CCA LEXIS 371, at *9 (A.F. Ct. Crim. App. 6 Sep. 2023) (unpublished) (reassessing sentence to ten days' confinement for grabbing a victims hand and striking her shoulder). This Honorable Court should exercise its authority under Article 66, UCMJ, and disapprove the bad-conduct discharge as inappropriately severe.

WHEREFORE, Amn Moore respectfully requests this Honorable Court disapprove his bad-conduct discharge.

III.

AS APPLIED TO AIRMAN MOORE, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

Additional Facts

After his conviction, the Government determined that Amn Moore's conviction qualified for a firearms prohibition both under 18 U.S.C. § 922(g)(9) and, generally, 18 U.S.C. § 922. (EOJ; Statement of Trial Results (STR), 21 Feb. 2024.)

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

1. Section 922 is unconstitutional as applied to Amn Moore.

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."

Bruen, 597 U.S. at 24 (citation omitted).

This brief will address both the stated firearms prohibition—Section 922(g)(9) for domestic violence convictions—and the stated but vague annotation that Section 922 applies to the case. Presumably the Government intended to apply Section 922(g)(1), which bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, neither Subsections (g)(1) or (g)(9) can constitutionally apply to Amn Moore. Regarding Subsection (g)(1), to prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter the convicted offense. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show. And the Government similarly cannot show any tradition supporting restrictions on these facts under Subsection (g)(9).

The historical tradition took a narrow view of firearms regulation for criminal acts than that reflected in Section 922:

> [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*.

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (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, 704 (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.* at 701 (quotations omitted). Amn Moore's offense falls short of these. 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.* at 698. "[I]t 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.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. 2. Jul. 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S.

___, 2024 U.S. LEXIS 2714 (21 Jun. 2024).[4] Evaluating Section 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to violent criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05. While Amn Moore's convictions may colloquially qualify as "violent," the real question is whether they meet the historical tradition of regulating firearms based on a more limited framing of "violent."

In addition to the distinction on violence, 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.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. 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

[4] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent Bryan David Range at 5, *Garland v. Range*, No. 23-374 (U.S. 18 Oct. 2023.)

[64] 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 this country's history and tradition.

The recent case of *United States v. Rahimi* does not change the analysis. 2024 U.S. LEXIS 2714 (21 Jun. 2024). In *Rahimi*, the Supreme Court addressed the validity of Section 922(g)(8)(C)(i), which applies once a court has found that a defendant "represents a credible threat to the physical safety of another" and issues a restraining order. *Id.* at *26. The Supreme Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at *25.

But the historical analogue breaks down when applied here. In *Rahimi*, the Supreme Court noted that the "surety" and "going armed laws" which supported a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id.* at *26. The Supreme Court also noted that surety bonds were of limited duration, and that Section 922(g)(8) only applied while a restraining order was in place. *Id.* Additionally, the majority pointed out that Section 922(g)(8) "involved judicial determinations," comparable to the historical surety laws' "significant procedural protections." *Id*. at *23.

By contrast, this case never involved a weapon threat, is devoid of any procedural protection, and the firearms ban will last forever. Ultimately, the

Supreme Court itself noted the limited nature of its holding "only this: An individual found by a court to pose a credible threat to the physical safety of another may be *temporarily* disarmed consistent with the Second Amendment." *Id.* at *30 (emphasis added). Such a narrow holding cannot support the broad restriction encompassed here.

2. This Court may order correction of the EOJ.

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

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) decision, and "directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender." 82 M.J. 263, 2022 CAAF LEXIS 182, at *1 n.* (C.A.A.F. 2022) (decision without published opinion). This disposition stands in tension with *Lepore*.

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[5] Second, the CAAF believes that CCAs have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. In the 2019 *MCM*, both the STR and EOJ contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under Section 922. As such, this Court's analysis in *Lepore* is no longer controlling since the Rules for Courts-Martial now require—by incorporation—a determination on

[5] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

whether the firearm prohibition is triggered.[6] Thus, this Court can rule in Amn Moore's favor without taking the case en banc.[7] If this Court disagrees, Amn Moore offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, Amn Moore respectfully requests this Court hold Section 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

Respectfully submitted,

[redacted]

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

[7] Amn Moore recognizes this Court has repeatedly ruled against this argument. *See, e.g.*, *United States v. Vanzant*, No. ACM 22004, 2024 CCA LEXIS 215, at *23–26 (A.F. Ct. Crim. App. 28 May 2024). However, this Court has not yet addressed the question of whether the Rules change provides a basis for this Court to reach a different result.

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 16 July 2024.

[redacted]

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	No. ACM 40600
Airman (E-2) **MARIO D. MOORE**, USAF, *Appellant.*	)	Panel No. 2 7 August 2024

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

ASSIGNMENTS OF ERROR

I.

WHETHER A PLEA AGREEMENT REQUIRING A BAD-CONDUCT DISCHARGE RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

II.

WHETHER [APPELLANT'S] SENTENCE IS INAPPROPRIATELY SEVERE.

III.

WHETHER, AS APPLIED TO [APPELLANT], 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

A. Stipulation of Fact

The parties entered into a Stipulation of Fact (Pros. Ex. 1), which the Military Judge accepted (R. at 39). It stated, among other things, the following: Appellant was married to victim Y.C. (Pros. Ex. 1, para. 1.) Although their relationship involved consensual "play fighting," that consent ended in March 2019, and there were instances after their son was born in July 2020 during which Y.C. made it clear to Appellant she did not want to engage in playfighting. (Id., para 5.)

In January 2021, Appellant initiated a "play fight," and Y.C. told him she did not want to play fight with him. (Pros. Ex. 1, para. 6.) Appellant grabbed Y.C.'s arm, and she told him, "No," and pulled her hand away. (Id.) Appellant said, "Don't ever do that again," and he yanked and pulled Y.C.'s arm back towards him. (Id.) Appellant reached out, grabbed Y.C.'s wrist, and held her wrist tight as she pulled it back, causing her wrist to make a cracking noise. (Id., para. 7.)

Victim Y.C.'s pain felt as though Appellant had pulled her wrist out of its socket. (Pros. Ex. 1, para. 7.) In the next few days, Y.C. told Appellant her wrist was still in pain, and she asked him to take her for medical attention, but Appellant refused. (Id.) She did not receive medical attention for her wrist, but she did wear a brace. (Id.; Pros. Ex. 2.)

In October 2022, Appellant was convicted, in another case, of one charge and three specifications of unlawfully touching another Airman in violation of Article 128, UCMJ. (Pros. Ex. 1, para. 8; Pros. Ex. 7.) Those convictions were based on an incident in February 2021, when Appellant had pulled the wrists of another Airman when she did not want Appellant to touch her and, after she pulled away, he pursued and assaulted her. (Id.)

B. Appellant's Plea Agreement, Plea Colloquy, and Sentencing

Pursuant to a written plea agreement (App. Ex. IV), Appellant pleaded guilty to one Specification of one Charge, that is, Specification 3 of Charge IV, for Assault Consummated by a Battery (upon a Spouse), in violation of Article 128, UCMJ. (ROT, *Statement of Trial Results (STR)*, 17 January 2024; *Entry of Judgment (EOJ)*, 17 January 2024.) In exchange, the United States dismissed and withdrew charges of Sexual Assault in violation of Article 120, Child Endangerment in violation of Article 119b, False Official Statement in violation of Article 107, Assault and Assault Consummated by a Battery (upon a Spouse) in violation of Article 128, and Domestic Violence in violation of Article 128b. (Id.) Those crimes could have exposed Appellant to sentences including confinement for 30 years, 1 year, 5 years, 3 months, 2 years, and 3 years and months, respectively. (Manual for Courts-Martial (MCM), pt. IV, paras. 60.d(2), 59.d(6), 41.d(1), 77.d(1)(a), 77.d(2)(f), and 78a.d(1).) The parties also agreed to limit Appellant's potential term of confinement to 30 days. (App. Ex. IV, para. 4.a; R. at 30.) And they agreed the military judge must adjudge a bad-conduct discharge. (Id., para. 4.b; R. at 30.)

During his plea colloquy, Appellant agreed he entered into that last provision of his own free will, and he understood the terms of the plea agreement and how they affect his case. (R. at 30, 38.)

The maximum punishment for Assault Consummated by a Battery (upon a Spouse) is a dishonorable discharge, forfeiture of all pay and allowances, reduction to E-1, and confinement for 2 years. (MCM, pt. IV, para. 77.d(2)(f) (2019 ed.); R. at 19-20.)

The United States' sentencing evidence included Appellant's disciplinary history. Prior to Appellant's court-martial, he had received a counseling for failing to abide by dress and appearance standards, and a letter of reprimand for failing to obey a lawful written order to provide

appropriate financial assistance to his dependents. (Pros. Exs. 4, 5.) Appellant's enlisted performance reports gave overall assessments of "Met all expectations" in 2020 and 2022, "Exceeds most, if not all expectations" in 2021, and "Met some but not all expectations" (referral EPR) in 2023. (Pros. Ex. 8.)

Victim Y.C. provided a one-page impact statement, which she read to the military judge. (R. at 51-52; Ct. Ex. A.) She discussed briefly her background and relationship with Appellant, the physical and emotional impact of the charged offense on her, and her request for a sentence of 30 days of confinement for Appellant. (Id.) Y.C. became fearful of all military members after the assault, because Appellant told her he was close to important people in the military who would ensure she was ignored. (Id.) Y.C. had nightmares and flashbacks, remembered Appellant's lack of empathy when she begged him to take her to the hospital, and looks at her wrist and recalls having to put it back into its socket after the "cruel assault." (Id.) Y.C. still had sleepless nights worrying about her safety and her son's safety, and she struggled trusting others. (Id.)

Defense sentencing exhibits included his ribbon rack, a 17-page slide show presentation, three good-character statements, and Appellant's 3-page unsworn statement. (Def. Exs. B through G.) The defense also called three witnesses to testify.

The defense called Ms. T.L. as a witness. (R.at 55.) She was the chief of staff for the NSA Central Security Service, and Appellant was her office manager from May 2020 to August 2021. (R. at 56.) Ms. T.L. had positive things to say about Appellant's work, and she believed he had a "high" potential for rehabilitation. (R. at 59, 60.)

The defense called SrA D.B. as a witness. (R. at 62.) Appellant was SrA D.B.'s sponsor in their unit, and Appellant helped SrA D.B. (R. at 63, 64.) SrA D.B. opined Appellant had a "very high chance" of rehabilitation. (R. at 64.)

The defense called Ms. W.M. as a witness. (R. at 65.) She is Appellant's mother. (R. at 66.) She described Appellant's family and his upbringing. (R. at 66-67.) She described Appellant's career opportunities and his decision to join the military. (R. at 69-70.) She opined that Appellant would "rehabilitate quickly." (R. at 72, 74.)

The defense also presented Appellant's unsworn statement in a question-and-answer format. (R. at 78-88.)

During the sentencing arguments, the United States asked the military judge to sentence Appellant to a bad-conduct discharge, forfeiture of all pay and allowances, reduction to E-1, and confinement for 30 days. (R. at 90). Trial defense counsel asked for no confinement. (R. at 94-98.)

The Military Judge sentenced Appellant to a bad-conduct discharge, forfeiture of all pay and allowances, reduction the grade of E-1, and confinement for 11 days. (ROT, *STR* and *EOJ*; R. at 101.) The Staff Judge Advocate's first indorsement to the STR And EOJ in Appellant's case contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes. Domestic Violence Conviction Under 18 U.S.C. § 922(g)(9): Yes." (*STR* and *EOJ*.)

The convening authority took no action on the findings, but he disapproved the adjudged forfeitures of $1,300 per month for six months, and waived automatic forfeitures for six months and directed them to be paid to victim Y.C. for the benefit of her and their dependent children. (ROT, *Convening Authority Decision on Action Memorandum*, dated 8 December 2022.)

ARGUMENT

I.

APPELLANT'S PLEA AGREEMENT REQURING A BAD-CONDUCT DISCHARGE DID NOT RENDER THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS DID NOT VIOLATE PUBLIC POLICY.

Standard of Review

This Court determines whether a term in a plea agreement violates Rule for Courts-Martial (R.C.M.) 705 *de novo*. United States v. Hunter, 65 M.J. 399 (C.A.A.F. 2008). Even where the appellate court is reviewing an issue *de novo*, it normally defers to any findings of fact by the military judge unless they are clearly erroneous. United States v. Ayala, 43 M.J. 296, 298 (C.A.A.F. 1995).

Law and Analysis

The term requiring the military judge to adjudge a bad-conduct discharge did not render the sentencing proceeding an "empty ritual" in violation of public policy. Neither case law nor the Rules for Courts-Martial preclude a provision in a plea agreement that requires the military judge to adjudge a punitive discharge. This Court has addressed and rejected this same issue in the past. *See, e.g.*, United States v. Conway, No. ACM 40372, 2024 CCA LEXIS 290, *10 (A.F. Ct. Crim. App. 19 Jul. 2024) (unpub. op.); United States v. Reedy, No. ACM 40358, 2024 CCA LEXIS 40, *14 (A.F. Ct. Crim. App. 2 Feb. 2024) (unpub. op.); United States v. Kroetz, No. ACM 40301, 2023 CCA LEXIS 450, *4, 9, 17-18 (A.F. Ct. Crim. App. 27 Oct. 2023) (unpub. op.); United States v. Walker, No. ACM S32737, 2023 CCA LEXIS 355, *2-3 (A.F. Ct. Crim. App. 21 Aug. 2023) (unpub. op.); United States v. Geier, No. ACM S32689 (f rev), 2022 CCA LEXIS 468, *13 (A.F. Ct. Crim. App. 2 Aug. 2022) (unpub. op.).

Article 53a, UCMJ, states a convening authority and an accused "may enter into a plea agreement with respect to such matters as—(A) the manner in which the convening authority will dispose of one or more charges and specifications; and (B) limitations on the sentence that may be adjudged for one or more charges and specifications." 10 U.S.C. § 853a(a)(1)(A), (B). Article 56, UCMJ, states, "In sentencing an accused under . . . [Article 53, UCMJ], 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 . . . ." 10 U.S.C. § 856(c)(1).

Rule for Courts-Martial (R.C.M.) 705(a) allows for an appellant and a convening authority to enter into a plea agreement in accordance with this rule, subject to limitations prescribed by the service's secretary. Case law favors the "ability of an [appellant] to waive his rights as part of a pretrial agreement, absent some affirmative indication the accused entered the agreement unknowingly and involuntarily." United States v. Edwards, ACM S29885, 2001 LEXIS 302, at *7 (A.F. Ct. Crim. App. 29 Nov 2001) (unpub. op.) (citing United States v. Mezzanatto, 513 U.S. 196 (1995)). The record supports that Appellant knowingly and voluntarily entered into this plea agreement and all its terms to receive benefit of the bargain. (R. at 21-38.)

R.C.M. 705(d)(1) through (3) state that plea agreements limiting the sentence that can be adjudged by a court-martial for one or more charges and specifications may contain limitations on the maximum punishment, the minimum punishment that may be imposed by the court-martial, or both.

Despite having negotiated for the terms of his plea agreement, Appellant now argues the exchange of his guilty plea for dismissal of several charges and specifications, with a cap on his term of confinement and a cap on the severity of his punitive discharge, violated public policy. In part, he argues such a term precluded the sentencing authority from determining what is sufficient, but not greater than necessary, to achieve the principles of sentencing. (App. Br. at 6.)

If Appellant did not want to abide by the terms of his plea agreement, he did not have to sign the agreement and confirm it before the military judge. He and his counsel negotiated the term requiring a bad-conduct discharge in exchange for a significant dismissal of charges and

reduction in his potential confinement term. The record supports that Appellant knowingly and voluntarily entered into his plea agreement.

Appellant's presentencing proceeding was not transformed into an "empty ritual." Not only has this Court already dismissed this argument about this exact same plea agreement term, but also the Court of Appeals for the Armed Forces has held that "[j]udicial scrutiny of [plea agreement] provisions at the trial level helps to ensure" trials are not turned into empty rituals. United States v. Soto, 69 M.J. 304, 307 (C.A.A.F. 2011). Here, in the plea agreement inquiry, the military judge told Appellant that should the court accept the plea agreement, the court and parties, to include Appellant, would be bound by the terms of the agreement, including imposing a sentence that comports with the limitation contained in the agreement. (R. at 36.)

Moreover, the plea agreement did not limit Appellant's ability to present matters in mitigation and extenuation, showing that Appellant was not deprived of complete presentencing proceedings. In fact, the record shows he did present a full sentencing case. Appellant called three good-character witnesses, provided an unsworn statement, and submitted a lengthy slideshow. And his trial defense counsel argued for a sentence with no confinement other than the one day for time served to which he was entitled. The mandatory discharge provision did not transform Appellant's presentencing proceedings into an empty ritual.

To support that a mandatory bad-conduct discharge is against public policy, Appellant relies on the 2002 Coast Guard case of United States v. Libecap, 57 M.J. 611 (C.G. Ct. Crim. App. 2002), which found invalid the requirement for the appellant to request a bad conduct discharge. (App. Br at 4-5.) However, Appellant fails to acknowledge that, in Geier, this Court distinguished Libecap based on current military justice rules:

> Libecap does little to advance Appellant's argument because the ruling is based on the fact that the military judge was unaware of the

> pretrial agreement's sentence limitations and was still deciding whether or not to adjudge a punitive discharge. . . . Under the current rules, however, the military judge is aware of—and bound by—the sentence limits in the plea agreement, so the Libecap concerns are absent. In fact, one could rationally conclude the rules regarding plea agreements were designed for the purpose of limiting, if not eliminating, defense efforts to "beat the cap" in sentencing proceedings.

2022 CCA LEXIS 468, *9-10.

Even if the term requiring the military judge to adjudge a bad-conduct discharge violated public policy and was not enforceable, there was no prejudice to Appellant. Even without the plea agreement's requirement for a bad-conduct discharge, the military judge would have adjudged a bad-conduct discharge in any event. The Military Judges' Benchbook explains that a bad-conduct discharge is "a severe punishment, although less severe than a dishonorable discharge, and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct…." Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 at 2-6-10. Appellant's conviction for domestic violence involved a lasting injury to his spouse. And he demonstrated he was an airman with low rehabilitative potential. He had been convicted of a prior series of assaults and had received a counseling and a letter of reprimand. Appellant deserved to be adjudged a bad-conduct discharge, his plea agreement did not violate public policy, and his assignment of error has no merit.

II.

APPELLANT'S SENTENCE IS NOT INAPPROPRIATELY SEVERE.

Law

The Court's authority to review a case for sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to,

considerations of uniformity and evenhandedness of sentencing decisions." United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). This Court "may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved."

Article 66(d)(1)(1)(A), UCMJ. The Court "assess[es] sentence appropriateness by considering 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*) (*per curiam*) (alteration in original) (citations omitted). Although the Court has discretion to determine whether a sentence is appropriate, it has no power to grant mercy. United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

Analysis

Appellant challenges his sentences as too severe, but his argument fails to acknowledge Appellant's injurious crime of domestic violence, his prior conviction for assault, and his substellar military record. He merely claims his crime was "a simple arm grab." (App. Br. at 9.)

Appellant refers to the unpublished opinion in United States v. Richard, No. ACM 39918 (rem), 2023 CCA LEXIS 371, at *9 (A.F. Ct. Crim. App. 6 Sep. 2023). (App. Br. at 9). However, Appellant does not explain how Richard is closely related to his case or that the sentences are highly disparate, so he provides no basis upon which to invoke the Court's ability to ensure uniformity and evenhandedness. *See* United States v. Stanford, No. ACM 40327, 2024 CCA LEXIS 77, *11-12 (rejecting appellant's reference to another case in alleging sentence disparity).

Appellant in this case and the appellant in Richard were not co-actors involved in a common crime, nor were they servicemembers involved in a common or parallel scheme, and

there is no direct nexus between the servicemembers whose sentence Appellant seeks to compare. *See* Stanford, 2024 CCA LEXIS 77, at *12. Moreover, the appellant in Richard, was convicted of simple assault, with a maximum sentence of six months of confinement, not the two years of confinement Appellant in this case faced for domestic assault. Richard, 2023 CCA LEXIS 371, at *7. Moreover, Richard's original sentence of 30 days was based on child pornography convictions that were subsequently overturned on appeal, so the Court deemed a much lower sentence necessary. Id. at *8. Finally, the Richard opinion does not address the mitigating factors in that case, so it does not permit a thoughtful comparison to Appellant's case.

Appellant should have received a bad-conduct discharge even if he had not agreed to receive it. But his affirmative agreement to the bad-conduct discharge is a reasonable indication of its fairness to him. United States v. Fields, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015). Similarly, regarding his 11-day term of confinement, his plea agreement reduced his confinement exposure down from 2 years to 30 days and was a windfall for him before he even stepped into the courtroom.

Appellant violated his wife's love and trust, caused her terrible physical and emotional pain, refused to help her get treatment, and tried to dissuade her from appealing to military authorities. Appellant was a recidivist violent offender, and he was a disciplinary problem and underperformer during his tenure with the Air Force. The bad-conduct discharge and 11-day term of confinement were within the provisions Appellant negotiated, and the sentence was sufficient but not greater than necessary.

In conclusion, the nature and seriousness of the offenses, even considering any mitigating factors might have Appellant raised in his appeal, support the sentence as entered.

III.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION, FOR A VIOLENT OFFENSE, REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Law and Analysis

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him. (App. Br. at 25-31.) Appellant asserts that any prohibitions on the possession of firearms imposed runs afoul of the Second Amendment, U.S. CONST. AMEND. II, the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review.

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922.

This Court recently held in its published opinion in United States v. Vanzant, No. ACM 22004, 2024 CCA LEXIS 215, __ M.J. __ (A.F. Ct. Crim. App. 28 May 2024), that 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are collateral consequences of the conviction, rather than elements of the findings or sentence, so they are beyond the scope of this Court's jurisdiction under Article 66, UCMJ. Id. at *24.

B. Appellant's reliance on his conviction being for other than a violent offense is misplaced, because it was a "crime of violence."

Appellant's argument presumes, incorrectly, that his crime was not a violent offense. (App. Br. at 27-28.) Federal law defines the term "crime of violence" as "an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another." 18 U.S.C. §§ 924(c)(3)(A), 3156(a)(4)(A). The elements, as well as the name of the crime, of Domestic Violence make obvious that it is a "crime of violence." MCM, para. 78a.b.

C. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The Gun Control Act of 1968 makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. 18 U.S.C. § 922(g)(1). Appellant was found guilty of four specifications of Domestic Violence, in violation of Article 128b, UCMJ, which are crimes punishable by imprisonment for a term exceeding one year, that is, by 3 years of confinement. (MCM, pt. IV, para. 78a.d(1) (2023 ed.); R. at 19-20.) And the firearms possession prohibition from 18 U.S.C. § 922(g)(9) applicable to those convicted of misdemeanor crimes of violence applies, under Department of Defense policy to those convicted in a court-martial of "an offense that has as its factual basis, the use . . . of physical force . . . committed by a current or former spouse." DoD Instruction 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Peronnel*, E2.8, ¶ 6.1.4.3 (21 August 2007, incorporating Change 1, 20 September 2011). Thus, the Staff Judge Advocate followed the appropriate Air Force regulations in signing the first indorsement to the STR and EOJ. DAFI 51-201, dated 14 April 2022, paras. 29.30, 29.32.

D. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

The Supreme Court's opinion in Rahimi confirmed that prohibiting felons from possessing firearms is "presumptively lawful" and part of the United States' longstanding tradition. United States v. Rahimi, 602 U.S. _, at 15, 74, Docket No. 22-915, 2024 U.S. LEXIS 2714 (21 June 2024) (slip op.).

Because Appellant's constitutional argument is without merit and is a collateral matter beyond this Honorable Court's authority to review, the Court should deny the assignment of error.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 August 2024 via electronic filing.

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40600**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF**
Mario D. MOORE	)	**PANEL CHANGE**
Airman (E-2)	)	
U.S. Air Force	)	
Appellant	)	

It is by the court on this 27th day of August, 2024,

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
KEARLEY, CYNTHIA T., Colonel, Appellate Military Judge
ORTIZ, ANTHONY D., Colonel, Appellate Military Judge

This panel letter supersedes all previous panel assignments.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal