IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee,	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A), UCMJ**
v.	)	
	)	
	)	
Staff Sergeant (E-5)	)	
TAYARI S. VANZANT,	)	
United States Air Force	)	11 August 2023
Appellant.	)	

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

On 14 October 2021, a military judge, in a Special Court-Martial, convicted Staff Sergeant (SSgt) Tayari S. Vanzant,

consistent with his pleas, of violating Article 112a, Uniform Code of Military Justice (UCMJ). The panel of officer and enlisted members sentenced SSgt Vanzant to be reduced to the grade of E-3, to be restricted to the limits of Holloman AFB, NM for 30 days, and a Reprimand.

SSgt Vanzant has not submitted any materials to The Judge Advocate General in accordance with Article 69, UCMJ. On 6 June 2023, the Government sent SSgt Vanzant the required notice by mail of his right to appeal, within 90 days, because his court-martial sentence did not contain any punishment which would trigger automatic review by the Air Force Court of Criminal Appeals. Pursuant to Article 66(b)(1)(A), SSgt Vanzant respectfully files his notice of direct appeal with this Court.

Respectfully submitted,

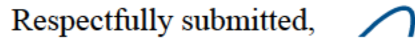
NICOLE J. HERZBERG, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division

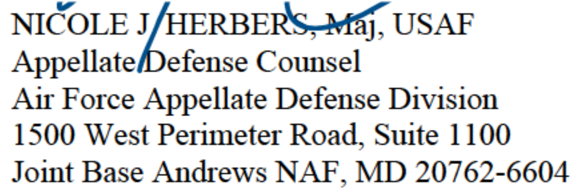
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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 11 August 2023.

Respectfully submitted,





NICOLE J. HERBERS, Maj, USAF
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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee* **v.** **Tayari S. VANZANT** **Staff Sergeant (E-5)** **U.S. Air Force** *Appellant*	)))))))))	**No. ACM 22004** **NOTICE OF DOCKETING**

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was submitted by Appellant and received by this court in the above-styled case on 11 August 2023. On 28 August 2023, the record of trial was delivered to this court by the Military Appellate Records Branch.

Accordingly, it is by the court on this 29th day of August, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 3. Briefs will be filed in accordance with Rule 18 of the Joint Rules of Appellate Procedure and Rule 23.3(m) of this court's Rules of Practice and Procedure. *See* JT. CT. CRIM. APP. R. 18, A.F. Ct. Crim. App. R. 23.3(m).

FOR THE COURT

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**MOTION TO ATTACH**
Appellee	)	**AND SUSPEND RULE 18**
	)	
v.	)	
	)	Before Panel 3
	)	
Staff Sergeant (E-5)	)	No. ACM 22004
TAYARI S. VANZANT	)	
United States Air Force	)	30 August 2023
Appellant	)	

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

Pursuant to Rule 23.3(b) and 23.3(r) of this Honorable Court's Rules of Practice and Procedure, Staff Sergeant (SSgt) Tayari S. Vanzant (Appellant) hereby moves (1) to attach the below document to the Record of Trial and (2) moves this Honorable Court to suspend its rules in regards to the time for filing a Brief on Behalf of Appellant, JT. CT. CRIM. APP. R. 18, until such a time as the verbatim transcript is produced.

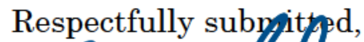
1. Government's Email to JAT Central Docketing Workflow, dated 16 August 2023, 2 pages (Appendix)

The attached email is relevant to the Appellant's request that this Honorable Court suspend its rules in regards to the time for filing a Brief on Behalf of Appellant. The authenticity of the email should be apparent. The email shows a request from the Government to the Trial Judiciary (JAT) to produce a verbatim transcript in the case. Since the Government has already requested JAT prepare a verbatim transcript, it is unnecessary for Appellant to move this court to order its production.

However, Appellant still respectfully requests this Honorable Court suspend Rule 18 until such a time as a verbatim transcript has been produced by the Government.

WHEREFORE, Appellant respectfully requests this Honorable Court grant this Motion to Attach and to Suspend Rule 18.

Respectfully submitted,



NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
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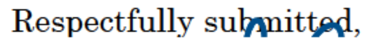
Joint Base Andrews NAF, MD 20762-6604

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 30 August 2023.

Respectfully submitted,



NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

5 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) TAYARI S. VANZANT, USAF, *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO ATTACH AND SUSPEND RULE 18 ACM 22004 Panel No. 3

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States does not oppose Appellant's Motion to Attach and Suspend Rule 18. A verbatim transcript is being prepared for Appellant's case. The United States respectfully requests that this Court not set a particular due date for production of the verbatim transcript, unless it later becomes necessary to intervene. Should Appellant believe production of the verbatim transcript has taken too long, he can file for relief in his assignments of error brief.

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

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

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 5 September 2023.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
Military Justice and Discipline

United States Air Force Court of Criminal Appeals

UNITED STATES	)	No. ACM 22004
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Tayari S. VANZANT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	**Panel 3**

On 14 October 2021, Appellant was convicted at a special court-martial of one specification of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 112a.[1] A panel of officer and enlisted members sentenced Appellant to 60 days restriction to base, reduction to the grade of E-3, and a reprimand. On 11 August 2023, Appellant filed a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A),[2] which was docketed with this court on 28 August 2023.

On 30 August 2023, Appellant moved to attach an email to present to this court that the Government requested the Air Force Trial Judiciary produce a verbatim transcript in his case. Appellant further requested that this court suspend Rule 18 until such time a verbatim transcript has been produced by the Government. *See* JT. CT. CRIM. APP. R. 18.

On 5 September 2023, the Government responded indicating that they do not oppose Appellant's motion but requested no deadline be set at this time.

In consideration of the foregoing, and the Government's position, the court grants Appellant's Motion to Attach, suspends Rule 18, and establishes a timeline for the completion of this transcript in the decretal paragraph below.

Accordingly, it is by the court on this 5th day of September 2023,

---

[1] References to the punitive articles of the UCMJ in this order are to the *Manual for Courts-Martial, United States* (2019 ed.).

[2] *See* National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582 (2022).

ORDERED:

Appellant's Motion to Attach and Suspend Rule 18 is **GRANTED.**

It is further ordered:

The Government will provide the verbatim transcript, either in printed or digital format, to the court, appellate defense counsel, and appellate government counsel not later than **7 November 2023**. If the transcript cannot be provided to the court and the parties by that date, the Government will inform the court in writing not later than **31 October 2023** of the status of the Government's compliance with this order.

Appellant's brief will be submitted in accordance with the timelines established under Rule 18 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals with one exception: Appellant's brief shall be filed within 60 days after appellate defense counsel has received a printed or digital copy of the certified verbatim transcript.

FOR THE COURT

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	**UNITED STATES' MOTION TO ATTACH DOCUMENTS**
	)	
v.	)	Before Panel No. 3
	)	
Staff Sergeant (E-5) **TAYARI S. VANZANT** United States Air Force *Appellant.*	)	No. ACM 22004 7 November 2023

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

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

A. **Appendix A – Court Reporter Chronology and Certification of Transcript – *United States v. Staff Sergeant Tayari S. Vanzant,* several dates, (6 pages)**

B. **Appendix B – Transcript and Exhibit Index– *United States v. Staff Sergeant Tayari S. Vanzant,* dated 12 October 2021 (6 pages)**

C. **Special Court-Martial Verbatim Transcript – *United States v. Staff Sergeant Tayari S. Vanzant*, dated 12 October 2021 (327 pages)**

On 5 September 2023, this Court ordered the Government to prepare a "verbatim transcript, either in printed or digital formal, to the court, appellate defense counsel, and appellate government counsel not later than 7 November 2023." (*Order*, dated 5 September 2023.) These appendices are responsive to the Court's order.

This filing withdraws the United States previous filing with the same name, because it contained the wrong attachment for Appendix C.

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

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 7 November 2023.

MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**BRIEF ON BEHALF OF**
Appellee	)	**APPELLANT**
	)	
v.	)	
	)	Before Panel 3
	)	
Staff Sergeant (E-5)	)	No. ACM 22004
TAYARI S. VANZANT	)	
United States Air Force	)	22 December 2023
Appellant	)	

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

ASSIGNMENT OF ERROR

WHETHER, AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING POSSESSION OF FIREARMS FOR THE CONVICTION OF A NONVIOLENT DRUG OFFENSE IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."[1]

STATEMENT OF THE CASE

Staff Sergeant (SSgt) Tayari S. Vanzant, (hereinafter "Appellant") pled guilty to, and consistent with his plea, was convicted of wrongful use of cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ)[2], 10 U.S.C. §

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

[2] Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

912a, and was sentenced by a panel of officer and enlisted members at Holloman Air Force Base (AFB), New Mexico, in October 2021. R. at 59, 75, 322; Entry of Judgment [EOJ], dated 4 November 2021. The members sentenced Appellant to reduction to the grade of E-3, restriction to Holloman AFB for 60 days, and a reprimand. R. at 322; EOJ. By memorandum dated 28 October 2021, the convening authority granted Appellant's request for clemency in part, reducing the adjudged restriction to Holloman AFB from 60 to 30 days. Convening Authority Decision on Action [CADA], dated 28 October 2021. The Entry of Judgment and the Statement of Trial Results (STR) note that as a result of Appellant's conviction, an 18 U.S.C. §922 Firearm Prohibition is triggered. EOJ; STR, dated 14 October 2021. Neither of these documents stated which provisions of 18 U.S.C. § 922 apply to Appellant.

STATEMENT OF FACTS

Appellant pled guilty to and was convicted of a one-time use of cocaine, in violation of Article 112(a), UCMJ. EOJ; R. at 59-75. He was not sentenced to confinement, and the punishment adjudged would have been available to Appellant's commander at an Article 15, UCMJ, proceeding. R. at 322.[3] The use of cocaine by Appellant did not involve any violent act nor was there evidence of ongoing use. R. at 59-75. Specifically, Appellant described using cocaine on one occasion at a house party in Las Cruces, New Mexico, with a civilian friend. R. at

[3] Appellant was sentenced to a reduction in grade from E-5 to E-3, a reprimand, and restriction to base for 60 days. R. at 322. 10 U.S.C. §815 provides a restriction of 60 days, a reprimand, and reduction of two grades would have been available for Appellant's commander. 10 U.S.C. §815 (b)(2)(H).

59-75. The Government did not supplement the basis of the guilty plea with any matters in aggravation. R. at 79-84. Appellant was first notified of the federal firearms prohibition under § 922 with the STR. STR.

Argument

AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL. THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING POSSESSION OF FIREARMS FOR THE CONVICTION OF A NONVIOLENT DRUG OFFENSE IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

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. 18 U.S.C. § 922 is unconstitutional as applied to Appellant.

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, 142 S. Ct. at 2129–30 (citation omitted).

In light of *Bruen,* several provisions of § 922 have faced scrutiny. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have

accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

The Fifth Circuit provided three points for consideration. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it 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 451 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). Here, the issue is whether the Founders would have "presumptively" tolerated a citizen being stripped of his right to keep and bear arms after being convicted of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 922(g)(8)'s restriction of the Second Amendment right fits within our Nation's historical tradition of firearm regulation." *Id*. at 460. If the Government in *Rahimi* 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 similarly cannot prove that barring Appellant from possessing firearms for a one-time, nonviolent use of cocaine is constitutional.

Thus, we turn to *Daniels,* where the Fifth Circuit found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id.* at 340. In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

> [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). 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), *petition for cert. filed*, No. 23-374 (U.S. 5 Oct. 2023).[4] Evaluating § 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.

The provision of § 922 that appears to apply to Appellant in light of the lack of clarity in the EOJ and STR is § 922(g)(3), which covers unlawful use of a controlled substance as defined in the Controlled Substances Act. Appellant stands convicted of the non-violent offense of wrongful use of cocaine, without any evidence of continuing use or dependence upon controlled substances.

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

To prevail in light of *Daniels*, the Government has to show a historical tradition of applying an undifferentiated ban on firearm possession, for a singular past instance of drug use. *Daniels*, 77 F.4th at 340. Either that, or the Government has to show that a singular instance of past drug use is consistent with the regulation of violent or dangerous individual's access to firearms, which is the historical norm. *See generally, Rahimi*, 61 F.4th at 460; and *Range*, 69 F.4th at 103-05. This is not possible. Moreover, the facts of this case do not indicate any ongoing or recurring drug use by Appellant, which is inconsistent with sober, non-violent citizen's Second Amendment rights. R. at 59-75; *See generally, Bruen*, 142 S. Ct. at 2129-30; *Heller*, 544 U.S. at 635; and *Daniels*, 77 F.4th at 340. There is no logical link to the historical prohibition of firearm possession that was originally reserved for violent felons and Appellant – an individual who committed a one-time non-violent drug use offense.

This is complicated further, as in this case, when Appellant received a punishment commensurate with non-judicial punishment proceedings and inconsistent with a "felony" conviction. STR, EOJ. The Government must articulate how this firearms prohibition is consistent with the Nation's traditions of firearms regulation as applied to Appellant, both as a non-violent offender, a sober law abiding citizen, and with conduct that the members did not deem commensurate with a felony.

In exercising its mandate under Article 66 – to ensure this guilty plea and sentence is correct in law in fact – this Court should also consider whether this ban on firearm possession is also correct in law and fact. The firearms ban should not be considered a collateral consequence of the plea given it is a "particularly severe

penalty" given the lifelong consequences, just like sex offender registration. *United States v. Riley*, 72 M.J. 115, 122 (citing *United States v. Inabinette*, 66 M.J. 320, 321 (C.A.A.F. 2008).

Review of this consequence of Appellant's guilty plea and correction of the effectuating documents will ensure that the Government can meet the Constitution's demand. The Government may not restrict an otherwise sober, law-abiding citizen's right to bear arms without particularity and exacting justification, consistent with the Nation's historical tradition of firearm regulation. *Bruen*, 142 S. Ct. at 2129-30; *Heller*, 544 U.S. at 635; and *Daniels*, 77 F.4th at 340. The Government fails to meet the burden to establish the constitutionality of this provision for Appellant's conduct at issue, a non-violent, one-time use of cocaine.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 R.C.M., this Court held, "[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within 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, at n.* (C.A.A.F. 2022) (unpublished). 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 Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs have the power to fix administrative errors under Article 66 as they relate to collateral consequences, then they also have the power to address constitutional errors in promulgating orders, even if the Court deems them to be a collateral consequence.

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

[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." *MCM*, App. 15 at A15-22.

R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered.[6]

WHEREFORE, Appellant respectfully requests this Honorable Court hold §992(g)'s firearm prohibition is 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,

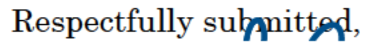
NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

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

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 22 December 2023.

Respectfully submitted,



NICOLE J. HERBERS, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	No. ACM 22004
Staff Sergeant (E-5) **TAYARI S. VANZANT**, USAF, *Appellant.*	)	Panel No. 3 22 January 2024

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

ISSUE PRESENTED

WHETHER, AS APPLIED TO APPELLANT, 18 U.S.C. §922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING POSSESION OF FIREARMS FOR THE CONVICTION OF A NONVIOLENT DRUG OFFENSE IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."[1]

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

The maximum punishment for Appellant's crime of conviction, Wrongful Use of Cocaine in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S. Code § 912a, is forfeiture of all pay and allowances, confinement for five years, and a dishonorable discharge. Manual for Courts-Martial (MCM), pt. IV, ¶ 50.d(1)(a) (2019 ed.)

The Staff Judge Advocate's first indorsement to the Entry of Judgment and Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered

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

Under 18 U.S.C. § 922: Yes." (Statement of Trial Results, 14 October 2021, and Entry of Judgment, 4 November 2021, ROT, Vol. 1.)

ARGUMENT

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 REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Law and Analysis

As a preliminary matter, the United States asserts that this Court has no jurisdiction to review Appellant's case. The United States is also filing today a motion to dismiss for lack of jurisdiction.

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because, in his opinion, he was convicted of a non-violent offense. (App. Br. at 4-7.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit.

The Gun Control Act of 1968, 18 U.S.C. § 922, 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. Id. at § 922(g)(1). Appellant was found guilty of

Wrongful Use of Cocaine, in violation of Article 112a, UCMJ, which is a felony, because it is a crime punishable by imprisonment for a term exceeding one year.[2]

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

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (*en banc*), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March 2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 7-8). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

Appellant bases his argument solely on an asterisk footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was

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[2] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

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.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

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 generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited

jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

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. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) 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. Corps. Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the 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

annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

B. 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 SJA followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, paragraph 29.32.

Furthermore, paragraph 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Paragraph 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Paragraph 29.30.5.

Appellant's conviction and sentence qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), and the first indorsements to the Entry of Judgment and Statement of Trial Results

properly annotated the prohibition in accordance with DAFI 51-201.[3] Thus, there is no error for this Court to correct.

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

In Bruen, 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.

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also 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 …. *[N]othing 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

[3] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

> 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.

Heller, 554 U.S. at 573 (emphasis added).

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 4.) Even so, Appellant nonetheless cites to 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. (Id.) But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" 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 than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant 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), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony). He is thus 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. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] 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.; *accord* Folajtar v. Attorney General 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—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, whether Appellant's crime constituted a violent or non-violent offense would not matter for purposes of restricting Appellant's ability to own a firearm.

Appellant also cites to United States v. Daniels, 77 F.4th 337 (5th Cir. 2023). However, Daniels is distinguishable from Appellant's case for several reasons. First, the defendant was charged as an "unlawful user" of a controlled substance in possession of a firearm, in violation of 18 U.S.C. § 922(g)(3), Id. at 340; whereas the documents in Appellant's case noted the firearm possession prohibition based on a felony conviction pursuant to 18 U.S.C. § 922(g)(1). Second, while there is no ambiguity whether Appellant was convicted of a crime punishable by more than

one year of imprisonment, the Fifth Circuit noted the insufficiency of the facts supporting the conclusion that Daniels was an "unlawful user" at the time he was found in possession of the firearm. That is, although Daniels admitted to smoking marijuana multiple days per month and was found in possession of a small quantity of marijuana in the form of "butts" in his ashtray, there was insufficient evidence presented to prove the last time he used marijuana or that he was under the influence of controlled substances at the time of the stop and seizure. Id. at 339-40.[4] Third, the Fifth Circuit made clear the limitation of its decision in Daniels: "We conclude only by emphasizing the narrowness of that holding. We do not invalidate the statute in all its applications, but, importantly, only as applied to Daniels." Id. at 355.

We note that several courts have been quick to reject the reasoning and/or application of Daniels and, instead, continue to find Section 922(g)(3) constitutional. In United States v. Espinoza-Melgar, 2023 U.S. Dist. LEXIS 144847 (D. Utah 16 August 2023), in rejecting the defendant's claim that Section 922(g)(3) is unconstitutional, the District Court analyzed all 28 district court cases on point since the Bruen decision and found 26 of them found Section 922(g)(3) to remain constitutional. Id. at *9. The court went on to address the Daniels opinion, "This court is not persuaded by the Daniels court's decision because that court sought to find in the historical record not a 'well-established and representative historical *analogue'* to Section 922(g)(3), but rather a 'historical *twin'* -- thereby imposing a 'regulatory straightjacket [sic]' on Congress that vastly exceeds what the Supreme Court requires." Id. at *10.

[4] In the Fifth Circuit, an "unlawful user" is someone who uses illegal drugs regularly and in some temporal proximity to the gun possession. Daniels, 77 F.4th at 340 (internal citation omitted).

In United States v. Ledvina, 2023 U.S. Dist. LEXIS 143224 (N.D. Iowa 16 August 2023) (unpub. op.), the district court rejected the defendant's constitutional challenge to Section 922(g)(3) and stated:

> [The Daniels] decision is not only not binding on this Court, but [this court] also respectfully disagrees with that court's reasoning and treatment of analogues in that case. This narrow reading and demand for near perfect analogues -- despite acknowledging Bruen's pronouncement analogues need not be perfect -- is too severe and places too great an emphasis on the specific controlled substance [the defendant] used – marijuana – when Section 922(g)(3) regulates unlawful users and addicts of any controlled substance, not specific controlled substances.

Id. *6 and n.2. *See also* United States v. Grubb, 2023 U.S. Dist. LEXIS 188933, at *4 and n.1 (N.D. Iowa 10 October 2023) (unpub. op.) (same).

In United States v. Lewis, 2023 U.S. Dist. LEXIS 170257 (M.D. Tenn. 25 September 2023) (unpub. op.), after citing "the vast majority of courts addressing the issue have found Section 922(g)(3) post-Bruen constitutional," the district court declined to follow the "notable exception" in Daniels, citing the Espinoza-Melgar reasoning, noting Daniels was not binding on the district court because it was another circuit, and emphasizing the limited application of Daniels in any event. Id. at *3-4.

In United States v. Doney, 2023 U.S. Dist. LEXIS 178333 (D. Montana 3 October 2023) (unpub. op.), the district court, in rejecting the defendant's claim that Section 922(n) was unconstitutional, held that Daniels was inapplicable because its holding was narrowly tailored to its facts and that it was bound by Ninth Circuit law, which held Section 922(g)(3)'s prohibition on unlawful drug users possessing firearms is constitutional in light of Bruen. Id. at *2.

Even within the Fifth Circuit, where Daniels is binding precedent, the district court in United States v. Haynes, 2023 U.S. Dist. LEXIS 155633 (W.D. Louisiana 1 September 2023)

(unpub. op.), affirmed the constitutionality of the defendant's conviction and distinguished the defendant's facts – including that he was a convicted felon charged under Section 922(g)(1) – from Daniels – which involved Section 922(g)(3), focused on the lack of evidence of current drug use, and emphasized it involved marijuana. Id. at *5. Similarly, Daniels is simply inapplicable to the Appellant in this case.

Appellant also cites Range v. AG United States, 69 F.4th 96 (3rd Cir. 2023), which found Section 922(g)(1) unconstitutional as applied to the defendant. However, it was a close 5-4 opinion, which states it was a "narrow" decision, limited to the constitutionality as applied to the defendant given his violation of the Pennsylvania statute prohibiting the making a false statement to obtain food stamps, what the statute labeled a "misdemeanor" despite being punishable by more than one year of imprisonment. Id. at 20. An apparent outlier, the Range opinion found that references to "law abiding responsible citizens" was mere dicta, and it rejected the notion that only "law abiding responsible citizens" are protected by the Second Amendment. Id. at 101, 102-03, respectively.

We note that Appellant fails to cite two other 2023 Federal Circuit opinions that have found 18 U.S.C. § 922(g)(1) constitutional. First, in United States v. Jackson, 69 F.4th 495 (8th Cir. 2023), the Eighth Circuit found, "Consistent with the Supreme Court's assurances that recent decisions on the Second Amendment cast no doubt on the constitutionality of laws prohibiting the possession of firearms by felons, we conclude that [Section 922(g)(1)] is constitutional as applied…." Id. at 505-06.

Second, in Vincent v. Garland, 80 F.4th 1197 (10th Cir. 2023), the Tenth Circuit upheld as constitutional the prohibition on appellant or any felon possessing a firearm, even where he was convicted of a non-violent felony (in Vincent's case, bank fraud). Id. at 1202.

Appellant's conviction for a felony proves that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Appellant is not entitled to relief.

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 22 January 2024 via electronic filing.

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22 January 2024

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Staff Sergeant (E-5) TAYARI S. VANZANT, USAF, *Appellant.*	)	**MOTION FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION TO DISMISS** No. ACM 22004 Panel No. 3

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

Pursuant to Rules 23 and 23.3 of this Court's Rules of Practice and Procedure, the United States moves for leave to file a motion to dismiss and moves to dismiss Appellant's direct appeal for lack of jurisdiction. Under the previous version of Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2021), which applies to Appellant's court-martial, Appellant has no right to direct appellate review before this Court.[1]

INTRODUCTION

The jurisdictional controversy in this case stems from the Fiscal Year 2023 National Defense Authorization Act[2] (FY 2023 NDAA), passed on 23 December 2022, which amended Article 66, UCMJ. While the prior version of Article 66 allowed only servicemembers who received a court-martial sentence above a certain threshold to apply to a Court of Criminal Appeals (CCA) for appellate review, the new statute gives *all* servicemembers with a general or special court-martial conviction the right to appeal to a CCA. Before passage of the FY 2023 NDAA

[1] The United States acknowledges that this Court has denied similar motions in other cases. But those denials did not consider the new changes to the Rules For Courts-Martial through Executive Order 14103, dated 28 July 2023. These changes support the United States' position that there is no jurisdiction in this case and justify this Court taking a closer look at this issue.

[2] James M. Inhofe National Defense Authorization Act (NDAA) for Fiscal Year 2023, Public Law No. 117-263, 136 Stat. 2395

amendments, based on his sentence, Appellant had no right to appeal to a CCA under Article 66, and appellate review of his court-martial and his conviction had become "final" under Articles 57(c) and Article 76, UCMJ. 10 U.S.C. § 857(c) (2021); 10 U.S.C. § 876 (2021). The pertinent question is whether the jurisdiction broadening amendments to Article 66 apply to convictions like Appellant's that were already final before the amendments were passed.

This Court should conclude the amendments do not apply to Appellant's case. Nothing in the FY 2023 NDAA states that the Article 66 amendments apply retroactively, much less to cases that had already reached finality before the enactment of the NDAA. And interpreting the 2023 NDAA to resurrect already final courts-martial raises serious constitutional, separation of powers concerns. The Supreme Court has held that Congress may not pass legislation to reopen final judgments without violating the separation of powers doctrine. Plaut v. Spendthrift Farm, 514 U.S. 211 (1995). To avoid this constitutional conundrum, this Court must decline to read language into the 2023 NDAA that reopens courts-martial that have already reached finality under Article 57 and Article 76.

In addition to raising constitutional concerns, interpreting the 2023 amendments to Article 66 to apply retroactively conflicts with the plain language of the rest of the UCMJ. Even after the 2023 NDAA amendments, Article 65(d)(2) UCMJ, 10 U.S.C. § 865(d) (2023), and R.C.M. 1201 (2019, 2023, 2024 eds.) contemplate that there will still exist a category of cases that are "ineligible for direct review" under Article 66 and that will still receive only Article 65 review. If, after 23 December 2022, all non-waived courts-martial are now entitled to Article 66 review, this would render Article 65(d)(2) superfluous. Congress's decision to keep Article 65 intact after the 2023 NDAA amendments to Article 66 evinces clear congressional intent that some special and general

courts-martial – including Appellant's – remain ineligible for Article 66 review. Since Appellant is ineligible for Article 66 review, this Court should dismiss this case for lack of jurisdiction.

STATEMENT OF CASE

Appellant was charged with one charge and one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ; 10 U.S.C. § 912a. (Statement of Trial Results, dated 14 October 2021, ROT, Vol. 1.) In accordance with his plea, Appellant was convicted at a special court-martial of the charge and specification. (Id.) On 14 October 2022, a military judge sentenced Appellant to reduction to the grade of E-3, restrictions to the limits of Holloman AFB, NM for 60 days, and a reprimand. (Id.)

The convening authority took no action on the findings and approved only 30 of the 60 adjudged days of restriction. (Convening Authority Decision on Action, dated 28 October 2021, ROT, Vol. 1.) The military judge entered judgment on 4 November 2021. (Entry of Judgment (EOJ), dated 4 November 2021, ROT, Vol. 1.)

On 6 January 2022, an attorney "designated under regulations prescribed by" the Secretary of the Air Force completed the Article 65(d), UCMJ review. (EOJ, ROT, Vol 1.) That attorney concluded that (1) Appellant's court-martial had jurisdiction over Appellant and the offenses, (2) the charge and specifications stated offenses, (3) the sentence was legal, and (4) the findings and sentence were correct in law and fact. (*See* id.; *see also* Article 65(d)(2)(B), UCMJ (listing reviewing criteria for cases not eligible for direct appeal to the Air Force Court of Criminal Appeals).)

On 6 June 2023, a paralegal from 19 AF/JA notified Appellant of the right to file a direct appeal. (Attachment to ROT, Vol. 1.)

On 11 August 2023, Appellant filed with this Court a Notice of Direct Appeal Pursuant to Article 66(b)(1)(A). (Notice of Appeal, dated 11 August 2023.) On 29 August 2023, this Court issued a Notice of Docketing and ordered that Appellant's case be "referred to Panel 3" for appellate review. (Notice of Docketing, dated 29 August 2023.)

LAW AND ARGUMENT

Standard of Review

This Court and its sister courts of criminal appeals are Article I "courts of limited jurisdiction, defined entirely by statute." United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Thus, without an express statutory grant of jurisdiction, the Court "cannot proceed at all," because jurisdiction is the prerequisite to its "power to declare the law…." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex Parte McCardle, 74 U.S. 506 (1869)). As a court of limited jurisdiction, this Court "must exercise [its] jurisdiction in strict compliance with [its] operating statutes." Ctr. for Constitutional Rights v. United States, 72 M.J. 126, 128 (C.A.A.F. 2013). If this Court determines that it lacks jurisdiction, its "only function remaining … is that of announcing the fact and dismissing the cause." Steel Co., 523 U.S. at 94.

This Court reviews questions related to its own jurisdiction *de novo*. *See* United States v. Brubaker-Escobar, 81 M.J. 471, 474 (C.A.A.F. 2021).

Law

The UCMJ Before and After the 2023 NDAA Amendments

Article 66(b) – Review by the Court of Criminal Appeals

Effective 23 December 2022, Congress amended subsections (b) and (c) of Article 66, UCMJ. *See* Section 544 of the FY 2023 NDAA. **Article 66 (b)** was modified as follows:

Before FY 2023 NDAA	After FY 2023 NDAA
(b) Review. (1) Appeals by Accused.—A Court of Criminal Appeals shall have jurisdiction over a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c) [10 U.S.C. § 860c], as follows: (A) On appeal by the accused in a case in which the sentence extends to confinement for more than six months and the case is not subject to automatic review under paragraph (3). (B) On appeal by the accused in a case in which the Government previously filed an appeal under section 862 of this title (article 62) [10 U.S.C. § 862]. (C) On appeal by the accused in a case that the Judge Advocate General has sent to the Court of Criminal Appeals for review of the sentence under section 856(d) of this title (article 56(d)) [10 U.S.C. § 856(d)]. (D) In a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B)) [10 U.S.C. § 869(d)(1)(B)] and the application has been granted by the Court. …. 10 U.S.C. § 866(b) (2021).	(b) Review. (1) Appeals by Accused—A Court of Criminal Appeals shall have jurisdiction over— (A) a timely appeal **from the judgment of a court-martial, entered into the record under section 860c(a)** of this title (article 60c(a)) [10 U.S.C. § 860c(a)], **that includes a finding of guilty**; and (B) a summary court-martial case in which the accused filed an application for review with the Court under section 869(d)(1) of this title (article 69(d)) [10 U.S.C. § 869(d)(1)] and for which the application has been granted by the Court. …. 10 U.S.C. § 866(b) (2023).

After the amendment, **Article 66(c)(1)** now reads that an appeal from the entry of judgment of a court-martial with a finding of guilty (an appeal under Article 66(b)(1)(A)) is "timely" if it is filed before the later of (A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under Article 65(c); or (B) the date set by the Court of Criminal Appeals (CCA) by rule or order.

With regard to the application of the amendments to Articles 61, 66, and 69, Section 544 of the FY 2023 NDAA states that the "amendments made by this section shall not apply to—(1) any matter that was submitted before the date of the enactment of [the NDAA] to a Court of Criminal Appeals established under section 866 of title 10 . . . or (2) any matter that was submitted before the date of the enactment of this Act to a Judge Advocate General under section 869 of such title." *See* 136 Stat. 2395.

Article 65 – Transmittal and Review of Records

Congress did not amend Article 65, UCMJ, "Transmittal and review of records." Both before and after the FY 2023 NDAA, **Article 65(b)(1)** states that for cases entitled to automatic review, where the judgment includes a sentence of death, a punitive discharge or confinement for more than 2 years, the Judge Advocate General shall forward the record of trial to the CCA. Under **Article 65(b)(2)**, for cases eligible for direct review under Article 66(b)(1), the Judge Advocate General shall forward a copy of the record to appellate defense counsel. Before the 2023 NDAA, this referred to any case not eligible for automatic review, but with a sentence to more than six months of confinement. After the 2023 NDAA, it refers to any case with an EOJ with a finding of guilty.

Article 65(c)(1) continues to require that the Judge Advocate General provide notice to the accused of the right to file an appeal under Article 66(b)(1).

Article 65(d)(1) addresses "Review by a Judge Advocate General," which may be conducted by "another attorney designated under regulations prescribed by the Secretary concerned." **Article 65(d)(2)** continues to provide procedures for "Review of cases *not eligible for direct appeal*." (emphasis added). **Article 65(d)(2)(A)** clarifies that a review under the rule "shall be completed in each general or special court-martial that *is not eligible for direct appeal* under paragraph (1) or (3)" of Article 66(b)." (emphasis added.) If the attorney conducting the review under Article 65(d) believes corrective action may be required, the record shall be forwarded to the Judge Advocate General, in accordance with **Article 65(e)(1)**, who may set aside the findings or sentence, in whole or part.

Article 69 – Review by the Judge Advocate General

In contrast to Article 65, Congress did significantly alter Article 69 in the 2023 NDAA. Prior to the 2023 NDAA, under **Article 69(a)**, an accused with a sub-jurisdictional sentence from a general or special court-martial could apply to the Judge Advocate General for review under certain circumstances. **Article 69(c)(1)(A)** and **(2)** described the scope of the actions the Judge Advocate General could take for special and general courts-martial.[3] Based on **Article 69(b)**, the accused was required to submit his application for Article 69 review within a year of the date of completion of his Article 65 review. Under this prior version of Article 69, a case reviewed by TJAG under the statute could then make it to a Court of Criminal Appeals (CCA) in two ways: under **Article 69(d)(1)(A)**, if TJAG sent it there, or, under **Article 69(d)(1)(B)**, if the accused

[3] The scope of TJAG's authority to review certain cases under the pre-FY 2023 NDAA version of Article 69, UCMJ is currently under review at the Court of Appeals for the Armed Forces (CAAF) in United States v. Parino-Ramcharan, ___ M.J. ___, 2023 CAAF LEXIS 773(C.A.A.F. 2023). CAAF's ultimate decision could mean that Appellant had no right to relief from TJAG under the old version of Article 69. *See* United States v. Parino-Ramcharan, 2023 CCA LEXIS 314 (A.F. Ct. Crim. App. 2023).

submitted an application for review, that was granted by the Court. When such a case arrived at the CCA, based on **Article 69(e)**, the Court could only act with respect to matters of law.

Under the **new Article 69(a)**, if an accused with a general or special court-martial conviction applies for review under the statute, TJAG's only option for action is to "order such court-martial be reviewed under" Article 66. Under the **new Article 69(b)(1)(B)**, an accused with a general or special court-martial conviction must apply for TJAG Article 69 review not later than "one year after the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under" Article 65(c) – or if the accused waived or withdrew from appellate review before notification of appellate rights, not later than one year after the Entry of Judgment. The new **Article 69(c)(2)** explains that "in a case reviewed under" Article 65(b), which means cases that were eligible for direct review, but appeal was waived or was withdrawn, TJAG may only review "the issue of whether the waiver or withdrawal of an appeal was invalid under the law." If it was invalid, TJAG must send the case to the CCA. Id.

On 28 July 2023, the President signed Executive Order 14103, effective that day, updating the Rules for Courts-Martial. **R.C.M. 1201(a)(1) (2023, 2024 ed.)** did not change and continues to provide that an attorney designated by TJAG will review "[e]ach general and special court-martial case that is *not eligible for appellate review* by a Court of Criminal Appeals under Article 66(b)(1) or (3)". (emphasis added). The title to **R.C.M. 1201(h) (2023, 2024 ed.)**, "Application for relief to the Judge Advocate General *after final review*," did not change, but the substance of the subsection did. (emphasis added). **R.C.M. 1201(h)(1)(B) (2019 ed.)** previously allowed TJAG to "modify or set aside the findings or sentence, in whole or in part" of a general or special court martial previously reviewed under paragraph (a)(1) – i.e. cases not eligible for appellate review by a CCA. Under the revised **R.C.M. 1201(h)(1)(B) (2023, 2024 ed.)**, for general or

special courts-martial previously reviewed under paragraph (a)(1) – again cases that were *not eligible* for review by a CCA and received only Article 65 review– TJAG now only has the authority to order the court-martial be reviewed by a CCA, rather than being able to act on the findings or sentence.

Articles 57 and 76 – Finality of Judgments

Article 57(c) remained unchanged after the FY 2023 NDAA. Article **57(c)(1)(A)** reads, "Completion of appellate review. Appellate review is completed under this section when a review under section 865 of this title (article 65) [10 USCS § 865] is completed." Article **57(c)(2)** then provides: "Completion as a final judgment of legality of proceedings. The completion of appellate review shall constitute a final judgment as to the legality of the proceedings." In turn, **Article 76** states that the appellate review of records of trial provided for by the UCMJ and the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by the UCMJ "are final and conclusive."

R.C.M. 1209 (2019, 2023, 2024 eds.) is entitled "Finality of courts-martial," and reiterates that for a general or special court-martial, a conviction is final when review is completed under "R.C.M. 1201(a) (Article 65)." *See* **R.C.M. 1209(a)(1)(A) (2019, 2023, 2024 eds.)**. R.C.M. **1209(b) (2019, 2023, 2024 eds.)**, "Effect of finality," states:

> The judgment of a court-martial and orders publishing the proceedings of a court-martial and all action take pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the United States, subject only to action upon petition for a new trial under Article 73, to action under Article 69, to action by the Secretary concerned as provided in Article 74, and the authority of the President.

(emphasis added).

The Manual for Courts Martial has consistently maintained that TJAG's Article 69 review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201(b)(3)(A) Discussion (2016 ed.); R.C.M. 1201(h)(4)(B) Discussion (2019 ed.); 1201(h)(4)(B) Discussion (2024 ed.).

Law on Retroactivity of Statutory Amendments

"[T]he general rule [is] that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment." Johnson v. United States, 529 U.S. 694, 702 (2000); *see also* United States v. Pritt, 54 M.J. 47 (C.A.A.F. 2000) (discussing an amendment to Article 95, UCMJ, which took effect the day the President signed the legislation).

The Supreme Court recognizes a general presumption *against* statutory retroactivity, even toward cases that are pending on appeal. Landgraf v. USI Film Prods., 511 U.S. 244, 265-66 (1994). If a new statute would "impose new duties with respect to transactions already completed," it does not apply retroactively "absent clear congressional intent favoring such a result." Id. at 280. But courts need not even resort to this presumption if the statute otherwise makes clear it does not apply retroactively, because "[w]here congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 838 (1990) (declining to apply statutory amendments retroactively where the plain language of the statute "evidenced clear congressional intent" that the amendments did not apply to judgments entered before its effective date).

Analysis

To begin, since the NDAA contains no express effective date or language indicating retroactive application, the modifications to Article 66, UCMJ, impacting this Court's jurisdiction over courts-martial took effect on the date of the NDAA's enactment, which was 23 December 2022. *See* Johnson, 529 U.S. at 702. The dispositive question for this Court is whether these

amendments to Article 66 apply to convictions like Appellant's that were already "final" on 23 December 2022. The answer is no.

a. Per Article 57(c)(2), Appellant's conviction was final after he received Article 65 review; the potential availability of Article 69 review does not affect finality.

Having finished Article 65 review on 6 January 2022, appellate review of Appellant's court-martial conviction was already final under Article 57(c) when the 2023 NDAA amendments went into effect almost a year later, in December 2022. Article 57(c)(1)(A) establishes that "appellate review" is complete when Article 65 review has been completed. And, under Article 57(c)(2), the completion of appellate review constitutes "a final judgment as to the legality of the proceedings." The fact that Appellant still could have applied for Article 69 review[4] as of 23 December 2022 does not affect the finality of his conviction. "Finality of a legal judgment is determined by statute," Plaut, 514 U.S. at 227, and, here, the statute does nothing to tie finality to Article 69 review. Since appellate review was over after completion of Article 65 review, under the UCMJ, there was a final judgment as to the legality of Appellant's conviction – regardless of whether Article 69 review might still have been an option. The Manual states outright what is implicit in Articles 57 and 76: Article 69 review "is not part of appellate review within the meaning of Article 76 or R.C.M. 1209." R.C.M. 1201(h)(4)(B) Discussion (2019). *See also* 53 Am Jur 2d Military and Civil Defense § 30.8 ("The procedure by which a case may be considered by the Judge Advocate General [under Article 69] is not part of the appellate review considered final within the meaning of Article 76 of the Uniform Code of Military Justice.").

Some federal circuits have thus aptly characterized Article 69 review by the Judge Advocate General as "a collateral proceeding akin to coram nobis" that is "an ancillary review

[4] CAAF could find in Parino-Ramcharan that servicemembers in Appellant's position could *not* have received Article 69 review under pre-FY 2023 NDAA version of the rule.

procedure" and "not part of a direct appellate procedure." Curci v. United States, 577 F.2d 815 (2d Cir. 1978); McKinney v. White, 291 F.3d 851, 855 (D.C. Cir. 2002) (same). As the Court of Federal Claims has explained, the statutory framework that provides for finality in the court-martial process "is not affected by the subsequent filing of a writ of error coram nobis." MacLean v. United States, 67 Fed. Cl. 14, 21 (2005). Likewise, the availability of a collateral attack through Article 69 review does not affect the finality of courts-martial convictions.[5]

b. To avoid constitutional concerns, this Court should not read the FY 2023 NDAA amendments to reopen Appellant's already-final court-martial conviction.

That direct appellate review of Appellant's conviction had reached finality raises constitutional concerns about whether Congress, through the FY 2023 NDAA amendments to Article 66, could retroactively reopen the case and subject it to new direct appellate review.[6] In Plaut, the Supreme Court held that Congress could not, through new legislation, retroactively command the federal courts to reopen final judgments without violating the constitutional doctrine of separation of powers. 514 U.S. at 219. The Court observed that the Founders recognized "a sharp necessity to separate legislative and judicial power." Id. at 221. As the Court characterized it, "[w]hen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" Id. at 225 (citing The Federalist No. 81, p. 545 (J. Cooke ed. 1961)). For Congress to "annual a final judgment" would be a "an assumption of Judicial power," which is forbidden. Id. at 224 (internal citations omitted). *See also* Hayburn's case, 2 U.S. 409, 2 Dall. 409, 411 (1792) (opinion of Iredell,

[5] In retroactivity analyses, the concept of finality is typically tied to completion of *direct* appellate review. *Cf.* Beard v. Banks, 542 U.S. 406, 412 (2004).

[6] This Court should not forget that the FY 2023 NDAA itself says nothing about applying retroactively to already-final court-martial convictions. So interpreting the NDAA to resurrect "final" cases, such as Appellant's, already requires this Court to read retroactivity language into the law that is not there.

J., and Sitgreaves, D. J.) ("No decision of any court of the United States can, under any circumstances, . . . be liable to a revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested").

True, Plaut dealt with the final judgments of Article III courts, and the military justice system is located within the Executive Branch of the federal government. *See* United States v. Brown, ___ M.J. ____, 2024 CAAF LEXIS 18, at *26 (C.A.A.F. Jan. 10, 2024) (Hardy, concurring in part and dissenting in part) ("all the actors in the military justice system are members of the executive branch"). But separation of powers concerns remain. The Supreme Court recently reiterated that the "military justice system's essential character" is "judicial," and that "courts-martial have long been understood to exercise judicial power of the same kind wielded by civilian courts." United States v. Ortiz, 138 S.Ct. 2165, 2174-75 (2018) (internal citations omitted). As Justice Thomas explained in his Ortiz concurrence, because the Constitution gives the political branches expansive power over the military, the Constitution allows the military to have an entity within the Executive Branch that exercises judicial power. Id. at 2186; 2188-89 (Thomas, J. concurring). Congress's annulment of the final judicial decision of an Executive Branch entity (in this case, the completion of an Article 65 review) would also be an unconstitutional assumption of judicial power condemned in Plaut. And even putting aside the Executive Branch's authority to exercise judicial power through the military justice system, Congress reopening final judgments declared by the Executive Branch still represents one branch of government interfering with the functioning of another. *See* Benjamin v. Jacobson, 172 F.3d 144, 159 (2d Cir. 1999) ("The Constitutional principle of separation of powers protects each of the three Branches of the federal government from encroachment by either of the other Branches.")[7]

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[7] The fact that Congress, through the UCMJ, created the military justice system that exercises judicial power does not change the analysis. In Plaut, the Supreme Court recognized that

In sum, following the logic of Plaut, once the Executive Branch has issued a final judgment as to the legality of a court-martial proceeding through completion of Article 65 review, the Legislative Branch (Congress) cannot reopen that judgment without violating the separation of powers doctrine. Interpreting the FY 2023 NDAA to reopen final judgments of courts-martial – especially where nothing in the plain language of the NDAA purports to do so – raises serious constitutional concerns under Plaut. Following the canon of constitutional avoidance, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." Jones v. United States, 526 U.S. 227, 239 (1999) (citing United States ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1909)). In this case, this Court can avoid the constitutional quandary altogether by simply refusing to read retroactivity language into the FY 2023 NDAA that is not there. *Cf.* QUALCOMM Inc. v. FCC, 181 F.3d 1370, 1380, n.8 (D.C. Cir. 1999) (in light of historical practice and constitutional concerns, "the court will not read a statute retroactively to alter a final judgement absent an express statement of intent").

c. Constitutional implications aside, historical legal practice, inside and outside the military, does not support applying new statutory legislation to already-final judgments, especially without congressional direction.

Even if the constitutional considerations of Plaut do not apply to final judgments of Executive Branch entities, Plaut at least establishes that there is no legal norm for applying new statutory amendments to cases that are already final on appeal. Indeed, while Landgraf discusses the ins and outs of when statutes can be applied retroactively, it focuses on the retroactive application of statutes to pending – not final – cases. 511 U.S. at 249-50. And reopening final

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Congress had constitutional authority to create inferior Article III courts. 514 U.S. at 221. Nonetheless, Plaut's holding appears to prohibit Congress from overturning the final judgment of *any* Article III court. Id. at 225-26.

judgments would certainly be an instance of "impos[ing] new duties with respect to transactions already completed," that, under Landgraf retroactivity principles, should not be undertaken without a statement of clear congressional intent. *Cf.* Hernandez-Rodriguez v. Pasquarell, 118 F.3d 1034; 1042 (5th Cir. 1997) (citing Landgraf, 511 U.S. at 280).

Other federal and state courts have consistently refused to apply statutory or regulatory changes to cases that had already reached finality. *See e.g.* Hernandez-Rodriguez, 118 F.3d at 1043-44 (refusing to apply newly instituted regulations to an already final decision of the Board of Immigration Appeals, an Executive Branch entity,[8]especially since the regulations did not purport to apply retroactively); Georgia Ass'n of Retarded Citizens v. McDaniel, 855 F.2d 805, 810 (11th Cir. 1988) (declining to apply a new statute retroactively to judgments that had become final and unappealable before the statute's effective date); People v. Padilla, 50 Cal. App. 5th 244, 251, 263 Cal. Rptr. 3d 784, 789 (2020) ("A retroactive ameliorative statute applies in a given case if it becomes effective *prior to* the date the judgment of conviction becomes final … .") (emphasis added) (internal citations omitted). As a result, this Court has scant precedent – if any at all – to support applying the FY 2023 NDAA amendments retroactively to already-final cases, particularly where the amendments did not even purport to apply retroactively.

Finally, declining to apply the 2023 NDAA to cases that were already final under Articles 57(c) and 76 would be consistent not only with other federal and state holdings, but also with prior military court decisions. After CAAF's predecessor, the Court of Military Appeals (CMA) was created under the Uniform Code of Military Code, CMA repeatedly "held that whenever court-martial proceedings are completed prior to the effective date of the Uniform Code . . . this Court has no jurisdiction to review them." United States v. Homcy, 50 C.M.R. 227 (C.M.A. 1969)

[8] https://www.justice.gov/eoir/board-of-immigration-appeals.

(citing United States v. Sonnenschein, 1 U.S.C.M.A. 64 (C.M.A. 1951) and United States v. Musick, 3 U.S.C.M.A 440 (C.M.A. 1953)). Likewise, here, Appellant's court-martial and appellate review were completed prior to the effective date of the FY 2023 NDAA. In keeping with prior military decisions, this Court should determine it has no jurisdiction to review cases like Appellant's that already reached finality prior to the changes to Article 66, UCMJ.

d. The plain language of the post-23 December 2022 UCMJ does not support application of the FY 2023 NDAA Article 66 amendments to cases like Appellant's.

This Court need not rely only on constitutional avoidance principals to resolve the jurisdictional question in this case. Congress has already telegraphed through Article 65 that it did not intend the FY 2023 NDAA amendments to resurrect Appellant's already-final court-martial – or to apply to any other case with an entry of judgment dated before 23 December 2022.

Congress elected to make no changes to Article 65 in the FY 2023 NDAA. Article 65(d)(2)(A) still states that a review by a judge advocate general "shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]." Thus, Congress obviously contemplated that there would still be some category of cases existing after 23 December 2022 that would not be "eligible for direct appeal" and would receive only an Article 65 review by a judge advocate. If this were not Congress's intent, there would be no reason for Congress to maintain Article 65(d)(2)(A) in its preexisting form. To disregard Article 65(d)(2)(A) "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." United States v. Nordic Vill. Inc., 503 U.S. 30, 36 (1992). The unchanged Article 65(d)(2)(A) thus refutes any notion that Congress intended the changes to Article 66 to apply retroactively. If the new Article 66 applied retroactively to all general and special courts-martial, irrespective of when they occurred, then there would no longer be any such cases "not eligible for direct

appeal." Instead, Article 65(d)(2)(A) reveals that Congress must have intended the FY 2023 NDAA amendments only to apply to entries of judgment dated after the NDAA's effective date.[9] In such a scenario, after 23 December 2022, there would still be some cases "ineligible for review" that needed Article 65(d) review.

The language "each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of [Article 66(b)]" cannot be understood to refer to any other category of cases.

- It does not apply to servicemembers who already submitted matters under Article 66, UCMJ before 23 December 2022, because those appellants were, by definition, eligible for direct appeal under Article 66(b)(1) or (3).

- It does not apply to servicemembers who waived or failed to timely file a direct appeal because those appellants are already addressed in Article 65(d)(3), and such an interpretation would render Article 65(d)(2) superfluous.

- While it might apply to cases where a servicemember already applied for review under Article 69 before 23 December 2022 or whose one-year timeframe for seeking Article 69 review had already expired, it cannot apply *only* to those cases, for the reasons described in the next paragraph.

Article 65(d)(2)(A)-(B) require that cases "not eligible for direct review" under Article 66 receive an Article 65 review. By definition, a general or special court-martial being reviewed under Article 69 (or whose time for seeking review under Article 69 has expired) has

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[9] Congress's tying of application of the FY 2023 Article 66 amendments to the date of entry of judgment, which according to R.C.M. 1111(a)(2) "initiates the appellate process," makes sense on every level. Not only does it comport with the plain language of Articles 65 and 66, but it reflects the general rule in other jurisdictions that a "statute creating a right of appeal where one did not exist before does not apply to judgments entered before its enactment." 4 C.J.S. *Appeal and Error* § 3 (2023); *see also, e.g.*, State v. Boldon, 954 N.W.2d 62, 68 (Iowa 2021) (the statutory right to direct appeal is determined by those laws "in effect at the time the judgment or order appealed from was rendered"); Murphy v. Murphy, 295 Ga. 376, 378, 761 S.E.2d 53 (Ga. 2014) (right to appeal did not arise until judgment was entered—the law regarding appellate procedure in effect at the time of the judgment was the governing law); In re Farmers & Traders Bank of Wrightstown, 244 Wis. 576, 12 N.W.2d 925 (1944) (same).

already received Article 65 review. *See e.g.* Article 69(b) (2021) (to be eligible for Article 69 review, a servicemember must submit his application within a year of Article 65 review). If Article 65(d)(2)(A) only applies to such cases, and every other non-waived case is now "eligible for direct review," then there would be no reason for Article 65(d)(2)(A) to direct new Article 65 reviews. Yet Article 65(d)(2) still directs that Article 65 review will occur in some non-waived cases.

Simply put, in its interpretation of the UCMJ after the FY 2023 NDAA amendments, this Court must account for the continuing existence of Article 65(d)(2)(A) and (B) and must interpret them a way that does not render them surplusage. To do so, this Court must again conclude that Congress contemplated that after 23 December 2022, there would still be a category of cases ineligible for Article 66 direct review that needed future Article 65 review. Cases with entries of judgment rendered before 23 December 2022 fit that bill,[10] and therefore this Court must conclude that Congress intended the FY 2023 NDAA amendments to Article 66 to apply only to cases with entries of judgment after 23 December 2022. Appellant, who has an entry of judgment dated 4 November 2021 is therefore ineligible for Article 66 review.

The President's implementation of Article 65 in R.C.M. 1201 in the new 2023 and 2024 Manuals For Courts-Martial reinforces this conclusion. R.C.M. 1201(a)(1) (2023, 2024 eds.) still directs Article 65 review for to general and special courts-martial "not eligible for appellate review by a Court of Criminal Appeals under Article 66(b)(1) or (3)." Again, there would have been no need for the President to maintain this language in the 2023 and 2024

[10] For example, a general court-martial with an entry of judgment of 21 December 2022 would not be eligible for Article 66 review and would have still needed to receive Article 65 review at the time the FY 2023 NDAA went into effect on 23 December 2022. Congress's maintenance of Article 65(d)(A)-(B) in its current form accounts for such a scenario.

Manuals if there were not some cases remaining after the FY 2023 NDAA amendments that were still ineligible for CCA review.

Since the plain language of the UCMJ reveals that the Article 66 amendments do not apply retroactively to provide Article 66 review to all special and general court-martial convictions, this Court need not even apply the general presumption against retroactivity described in Landgraf, 511 U.S. at 280. In determining retroactivity, "[w]here congressional intent is clear, it governs." Kaiser Aluminum & Chem. Corp., 494 U.S. at 838. Congressional election to maintain Article 65(d)(2)(A) in existing form evidences "clear congressional intent" that some general and special courts-martial – those like Appellant's with entries of judgments before 23 December 2022 – remain ineligible for direct appeal. Congressional intent governs, and this Court has no jurisdiction to review Appellant's case

e. According to the new R.C.M. 1201, Appellant was entitled to Article 69 review under the new version of the rule after the FY 2023 NDAA.[11]

The FY 2023 NDAA raises questions about to what extent and under what rules a servicemember with an entry of judgment before 23 December 2022 (who has not previously applied) is entitled to Article 69 review. Although R.C.M. 1201(a)(1) (2023, 2024 ed.) confirms that such servicemembers are still not entitled to Article 66 review and receive Article 65 review instead, Article R.C.M. 1201(h)(1)(B) contemplates TJAG Article 69 review of these cases under the post-FY 2023 NDAA Article 69 rules. R.C.M. 1201(h)(1)(B) and (h)(4)(A) allow TJAG to send these cases to the CCA for review "on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." These provisions cannot apply to servicemember who already applied for Article 69 review before 23 December 2022 and are

[11] CAAF's ultimate decision in Parino-Ramcharan could affect this analysis.

grandfathered in under the prior version of Article 69, *see* FY 2023 NDAA, Section 544(d)(1) and (2), because under the old rule, TJAG could have "set aside the findings or sentence in whole or in part." Nor can the provisions apply to servicemembers who waived Article 66 review, because those individuals are covered by R.C.M. 1201(h)(4)(B). These provisions can only apply to servicemember who remained ineligible for Article 66 review after 23 December 2022 and chose to exercise their Article 69 right after that date.

If R.C.M. 1201(h) accurately captures Congress's intent, the unchanged Article 65 and old 66 rules apply to cases with EOJs before 23 December 2022, but now the new Article 69 rules apply to such cases. Such a delineation makes sense and is in keeping with the Supreme Court's retroactivity principles. Since the EOJ "initiates the appellate process," *see* R.C.M. 1111(a)(2), cases with EOJs before 23 December 2022 had already begun the appellate process when the FY 2023 NDAA went into effect. Congress likely wanted those cases to continue appellate review under the same rules until they reached finality, which Congress reflected by keeping Article 65 in its preexisting form.

In contrast, as already explained, Article 69 is a collateral, ancillary review outside of direct appellate review. If servicemembers with pre-23 December 2022 EOJs who finished direct appellate review were still prospectively eligible for collateral Article 69 review, Congress likely thought the new version of Article 69 should apply. *See* Landgraf, 511 U.S. at 273 ("When the intervening statute authorizes or affects the propriety of *prospective* relief, application of the new provision is not retroactive") (emphasis added). In other words, the FY 2023 NDAA amendments to Article 66 do not apply retroactively to cases with EOJs before 23 December 2022 because Congress indicated otherwise through Article 65, and retroactivity principles say congressional

intent governs.[12] Kaiser Aluminum & Chem. Corp., 494 U.S. at 838. But the amendments to Article 69 *do* apply to such cases because Congress was silent their applicability, and changing a servicemember's ability to seek prospective relief is not a retroactive application of a new law.

f. The two exceptions to application of the FY 2023 NDAA amendments in Section 544(d) of the Act do not imply that Congress intended the amendments to apply to all situations not expressly excluded.

Section 544(d)(1) and (2) of the FY 2023 NDAA contain two caveats about how the amendments to Articles 61, 66, and 69 will be applied: those amendments do not apply (1) to matters already submitted to a CCA before the enactment of the NDAA or (2) to matters already submitted to the Judge Advocate General under Article 69, UCMJ before the enactment of the NDAA. One might question what purpose the 544(d)(1) caveat serves if, as the United States argues, the FY 2023 NDAA amendments to Article 66 already do not apply to cases with EOJs before 23 December 2022. After all, any case that falls into that category would have an EOJ dated before 23 December 2022. But these caveats are not mere surplusage. As discussed above, since courts have often applied statutory changes to "pending" cases, *see* Landgraf, 511 U.S. at 264, Congress may have found it necessary to specify that the FY 2023 NDAA amendments do not apply to cases already pending at the CCA.[13] Because no similar general rule applies to cases

[12] Not to mention that Congress could not have retroactively reopened cases that had completed final review under Article 65 before 23 December 2022 because that would have raised constitutional concerns. *See* Section b. above.

[13] The Section 544(d)(1) caveat confirms that for cases already sent to a CCA for review under Article 69(d), the CCA may still only act with respect to matters of law, and those servicemembers continue not to be entitled to military appellate defense counsel. *See* 10 U.S.C. § 869(d)-(e)(2021). Under the new amendments, all servicemember with an EOJ with a finding of guilty who apply for direct review would be entitled to both factual and legal sufficiency review and military appellate defense counsel. 10 U.S.C. § 865(b)(2)(A)(i)(2023); 10 U.S.C. §66(b)(1),(d)(1)(2023). Per Section 544(d)(2), servicemembers whose cases reached the CCA through Article 69(d) before 23 December 2022 are not entitled to these new rules.

like Appellant's where an appeal is already "final" and not "pending," Congress likewise may have found it unnecessary or redundant to state that the amendments did not apply to those cases. In other words, Congress may have thought it already obvious that the amendments would not apply to cases that had already reached "finality."

Further, as recognized by the President in R.C.M. 1201, the new Article 69 rules apply to servicemembers who were eligible, but had not yet applied for Article 69 review before 23 December 2022. Congress therefore needed to memorialize its intention for the old Article 69 rules to apply to cases pending Article 69 review at the time of the FY 2023 NDAA's enactment.

Since there are other plausible reasons for Congress to have highlighted those caveats in the NDAA, this Court should not jump to the unsupported conclusion that the caveats were intended to reflect the amendments' retroactive application to *all* cases not expressly excluded. Such reasoning fails to account for Congress's indication, through maintaining Article 65, that the amendments also do not apply to some other category of non-waived general and special courts-martial. (*See* Section d. above). And such a conclusion would require this Court to read retroactivity language into the NDAA that simply is not there. Other federal courts have declined to use a negative inference to find clear congressional intent to apply a statute retroactively. Mathews v. Kidder, Peabody & Co., 161 F.3d 156, 167 (3d Cir. 1998); Scott v. Boos, 215 F.3d 940, 948 (9th Cir. 2000). As these courts observed, given the strong presumption against retroactivity, "it would be strange indeed if Congress had used a silent negative inference to indicate that the [] amendments should be applied retrospectively." Mathews, 161 F.3d at 168-69; Scott, 215 F.3d at 948. This Court should similarly find that any negative inference drawn from the caveats from Section 544(d) is insufficient to conclude that Congress meant the 2023 NDAA amendments apply retroactively to Appellant's case.

For all of the above reasons, the FY 2023 NDAA amendments to Article 66, UCMJ do not govern Appellant's court-martial. Under the prior version of Article 66, this Court has no jurisdiction to review Appellant's direct appeal.

CONCLUSION

WHEREFORE, the United States respectfully requests that this Court dismiss Appellant's direct appeal.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 22 January 2024.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Operations Division
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Staff Sergeant (E-5) **TAYARI S. VANZANT,** United States Air Force *Appellant*	))))))))))	**RESPONSE TO GOVERNMENT MOTION FOR LEAVE TO FILE MOTION TO DISMISS AND MOTION TO DISMISS** Before Panel 3 No. ACM 22004 29 January 2024

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

Pursuant to Rule 23.2 of this Honorable Court's Rules of Practice and Procedure, Appellant, Staff Sergeant (SSgt) Tayari S. Vanzant, responds to the Government's Motion for Leave to File Motion to Dismiss and Motion to Dismiss (Motion), filed on 22 January 2024. SSgt Vanzant does not oppose the Motion for Leave to File Motion to Dismiss on procedural grounds but requests this Honorable Court deny the Motion to Dismiss on the merits.

STATEMENT OF THE CASE

For the purpose of this response, SSgt Vanzant accepts the Government's statement of the case in part. Motion for Leave to File and Motion to Dismiss (MTD) at 3-4, dated 22 January 2024. However, several pertinent dates are missing, and are provided here.

On 16 August 2023, the Associate Chief, Government Trial and Appellate Operations Division requested the Trial Judiciary prepare a verbatim transcript for this case, and did not assert any jurisdictional defects

at that time. Appendix, Motion to Attach and Suspend, 30 August 2023. On 5 September 2023, the Government did not oppose the Motion to Attach and Suspend Rule 18 and asserted no jurisdictional defects in this case. United States Response to Appellant's Motion to Attached and Suspend Rule 18, dated 5 September 2023. That same day, the Court issued an order that a verbatim transcript would be produced by the Government by 7 November 2023. Order, dated September 5, 2023. This Court analyzed similar arguments presented by the Government in this motion and issued an Order denying the Government's request to dismiss for lack of jurisdiction in another direct appeal case on 7 September 2023. Order, *United States v. Boren*, No. ACM 40296, dated 7 September 2023.

On 7 November 2023, the Government complied with this Court's order in this case and produced the transcript. Motion to Attach Documents, dated 7 November 2023, corrected copy. Again, no jurisdictional defects were raised. *Id.* The first notice of any jurisdictional defect was asserted on 22 January 2024, with this motion and the Government's Answer.

The Government's motion asserted reliance on Executive Order 14,103, dated 28 July 2023, to revisit this jurisdictional issue. Specifically, it claims that the President did not make any changes to Article 65, UCMJ, as evidence that this Court lacks jurisdiction in this case. (MTD at n. 1). Annex 1, where the changes to the Rules for Courts Martial are incorporated into the Manual for Courts Martial, was effective on 28 July 2023, although already legislated with the National Defense Authorization Act (NDAA) in

December of 2022. Exec. Order 14,103, 88 Fed. Reg. 50,535 (28 July 2023). Additionally, Executive Order 14,103 specifically provides that nothing in Annex 1 "shall be construed to invalidate any....trial in which arraignment occurred, or other action begun prior to the date of this order.....and....other action may proceed in the same manner and with the same effect as if the Annex 1 amendments had not been prescribed." *Id.*

LAW AND ARGUMENT

1. *The 2023 NDAA does not bar this Court from hearing SSgt Vanzant's appeal despite the completion of an Article 65(d) review of his case.*

To summarize the Government's argument, the 2023 NDAA's jurisdictional changes apply only to cases that are not administratively final, and the Government's decision to review SSgt Vanzant's case under Article 65(d) cuts off the broad jurisdiction granted under the 2023 NDAA. (MTD at 11-12). Specifically, that because the Government sought to review SSgt Vanzant's case under Article 65 in January of 2022, the obvious broadening of those cases eligible for direct appeal under the 2023 NDAA could not apply to his case because of that prior action by the Government. However, as this Court outlined in the Order for *United States v. Boren*, the trigger for jurisdiction *is not* based on action or inaction by the Government, but is set forth within the NDAA itself. Order at 8. Section 544 of the NDAA, states that the jurisdictional amendments shall not apply to:

> (1) any matter that was submitted before the date of the enactment of [the NDAA] to a Court of Criminal Appeals [(CCA)] . . . ; or
>
> (2) any matter that was submitted before the date of the

> enactment of this Act to a Judge Advocate General [(TJAG)] under [Article 69, UCMJ].

136 Stat. 2583-84. Neither of these provisions apply to SSgt Vanzant. As of the date of the enactment of the NDAA, he had neither submitted an appeal to a Court of Criminal Appeals, nor had he submitted any matter to TJAG under Article 69, UCMJ. Those facts cannot be challenged, nor are they by the Government.

As to the finality of SSgt Vanzant's case given the prior Article 65(d) review, this Court has already reviewed that issue in *United States v. Boren*, No. ACM 40296, and rejected the finality argument as it relates to the Article 65(d) review. Order at 8-9. This Court found there, as outlined above, that the two scenarios that Congress excluded from the broadened jurisdiction of this Court do not hinge on prior appellate review under Article 65(d). *Id.* at 6, 9. Rather, the provisions to exclude cases from review from this expanded jurisdiction are explicitly stated in the statute and do not apply in this case.

2. *Interpreting the 2023 NDAA to include cases where an Accused has not exhausted their expanded appellate rights does not render Article 65(d) review "of cases not eligible for direct appeal" as surplusage.*

The Government's focus in this motion is on the Presidential implementation of these legislative changes by Executive Order in July of 2023. Notably, changes to the Executive Order in Annex 1 were effective only as of July 2023 and the provision at issue, Article 65, did not change. Further, nothing in those changes invalidate any

proceedings which were then already begun. Exec. Order 14,103, 88 Fed. Reg. 50,535 (28 July 2023).

The Government is wrong when it argues the lack of any changes to Article 65 must mean, in cases where such review is complete, that review is precluded by this Court. MTD at 2. They are also wrong that SSgt Vanzant's case and others like him, who had either an EOJ prior to the 2023 NDAA date or prior Article 65(d) review are those cases contemplated by Article 65 as "cases which are not eligible for direct appeal." MTD at 16. Applying the Government's logic—to exclude cases that were not final and/or that had an EOJ prior to the enactment of the 2023 NDAA because "Congress intended these cases to be those to which are ineligible for direct appeal," MTD at 16—would also make Article 65(d) review superfluous just with the passage of time. If those were the only category of cases that were still contemplated, soon no cases would get Article 65(d) review. However, a class of cases remains even with the application of this expanded jurisdiction to cases like SSgt Vanzant's.

Article 65(d) review still covers cases not eligible under Article 66(b)(1) or (b)(3): when the Accused waives, withdraws, does not file, or files an untimely direct appeal. Stated otherwise, should the Accused not exercise their right under Article 66(b)(1) in cases where the sentence does not meet the jurisdictional requirements for automatic review under Article 66(b)(3), the service's court of criminal appeals would lack jurisdiction to hear those cases and an Article 65(d) review would be

required.

3. *The "retroactive" effect in this case does not raise traditional concerns about retroactivity.*

There is a "general rule that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment." (MTD at 10 (alterations removed) (quoting *Johnson v. United States,* 529 U.S. 694, 702 (2000)).) This rule is certainly true, but here Congress has provided two classes of cases to which the statute does not apply, taking the statute outside the reach of the default rule. Moreover, the retroactive application of statutes is nuanced. "While statutory retroactivity has long been disfavored, deciding when a statute operates 'retroactively' is not always a simple or mechanical task." *Landgraf v. USI Film Products,* 511 U.S. 244, 268 (1994).

"Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Id.* at 273. As an example, *Landgraf* points out that the Supreme Court has "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. This cuts both ways. Where a statute removes jurisdiction, this strips jurisdiction even for a cause of action that was once properly filed. *Id.* (citing *Bruner v. United States,* 343 U.S. 112, 116-17 (1952)). Conversely, where a statute removes an obstacle to appeal, that action inures to the benefit of pending appeals. *Id.*

(citing *Andres v. Charlestone Stone Prods. Co,* 436 U.S. 604, 607-08, n.6 (1978) (where a case pending appeal received the benefit of a statutory change that removed the amount-in-controversy requirement that otherwise would have barred jurisdiction)).) In sum, for statutes altering jurisdiction, the general rule is that they apply to pending cases, and this rule "does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication.) *Republic Nat'l Bank of Miami v. United States,* 506 U.S. 80, 100-01 (1992) (Thomas, J., concurring) (citing *Bruner,* 343 U.S. at 116-17).

Here, Congress sought to expand the jurisdiction of the service courts of criminal appeals, thus removing obstacles to a class of individuals who could previously not seek review by an appellate court—those whose cases did not meet the requirements of Article 66(b)(1)(A)-(D). 10 U.S.C. § 866(b) (2021). This expansion should apply to the benefit of those whose cases are still pending. As outlined above in section (1), and articulated by this Court in the *Boren* Order, there is not "finality" in the sense that Article 65(d) review did not exhaust SSgt Vanzant's appellate rights. Given his case was still pending at the implementation of the 2023 NDAA, there is no final exhaustion of these expanded rights by SSgt Vanzant, and the precedence to allow for the 'retroactive' application of jurisdictional changes to those cases still pending, the Court has jurisdiction to hear SSgt Vanzant's appeal.

4. SSgt Vanzant's notice of appeal was timely.

SSgt Vanzant received notice of his right to appeal on 6 June 2023 and filed his Notice of Direct Appeal timely, within the 90-day period set forth in Article 66(c)(1)(A), on 11 August 2023 (Notice of Appeal, dated 11 August 2023). These facts are undisputed.

This Court docketed the case on 29 August 2023. (Notice of Docketing, dated 29 August 2023.) Article 66(c)(l), UCMJ, 10 U.S.C. § 866(c)(l) (2022), provides that an appeal is timely filed if:

> [F]iled before the later of-
>
> (A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under [Article 65(c), UCMJ, 10 U.S.C. § 865(c)]; or
>
> (B) the date set by the Court of Criminal Appeals by rule or order[.]

SSgt Vanzant can satisfy either provision. First, he received a notice of his appellate rights after the change in jurisdiction, in June 2023. Second, the date can be set by rule or order of this Court. While this Court has not updated its Rules in light of the recent statutory change, it has decided to docket this case by means of a docketing order, thus satisfying the second provision for timeliness.

The sudden expansion of jurisdiction has unsettled expectations for appellate proceedings and may result in fewer cases not eligible for direct appeal that are reviewed under Article 65(d). However, the expansion of Article 66 for direct appeals by an accused does not otherwise render Article

65(d) surplusage.

To resolve this jurisdictional issue, there are three potential courses of action, two proposed by the Government and one undertaken by this Court already. First, as the Government now advocates, the Government would be able to curtail this Court's jurisdiction by completion of the appellate review process under Article 65(d) without any corresponding section in the NDAA to support such a limit to the Congressional expansion of the service courts of criminal appeal's jurisdiction. As this Court noted in the *Boren* Order, the service's court of criminal appeals jurisdiction is not controlled by the Government's action or inaction on a case (as it applies to the Notice of right to direct appeal nor by completing Article 65(d) review).

The second course of action is to draw a firm line based on the EOJ date and bar all pending cases from appellate review, presumably with the option of reaching this Court through TJAG review. This approach is inconsistent with the language Congress used in the 2023 NDAA to exclude certain cases, and violates the general rule on retroactive application of statutes that alter jurisdiction.

This Court should (and already has in docketing this case), adopt the third option and allow cases still in the potential appellate pipeline on 23 December 2022 to take advantage of the statutory expansion of jurisdiction. Such a course of action harmonizes with case law, the language of the 2023 NDAA, and the reason why Congress made the change in the first place: to expand the reach of this Court's appellate jurisdiction.

WHEREFORE, SSgt Vanzant respectfully requests this Honorable Court deny the Government's motion to dismiss.

Respectfully submitted,

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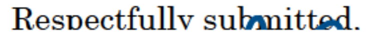
CERTIFICATE OF FILING AND SERVICE

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 29 January 2024.

Respectfully submitted,



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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 3
Staff Sergeant (E-5) **TAYARI S. VANZANT,** United States Air Force *Appellant*	)	No. ACM 22004
	)	29 January 2024

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

Staff Sergeant Tayari S. Vanzant, (Appellant), by and through his 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 filed 22 January 2024 [hereinafter Answer]. Appellant stands on the arguments in his initial brief, filed on 22 December 2023 [hereinafter AOE], and in reply to the Answer submits additional arguments for the issue listed below.

AS APPLIED TO APPELLANT, 18 U.S.C. § 922 IS UNCONSTITUTIONAL. THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING POSSESSION OF FIREARMS FOR THE CONVICTION OF A NONVIOLENT DRUG OFFENSE IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARMS REGULATION."

1. *This Court has jurisdiction to correct errors or excessive delay in the processing of the court-martial after the judgement was entered in the record under section 860c of Title 10 (the Entry of Judgment) in accordance with 10 USC § 866(d)(2).*

This Court has express authority under Article 66(d)(2) to correct *errors* or excessive delay in the processing of the court-martial after the judgment was entered. Because the error here arises from the Entry of Judgment (EOJ) and Statement of Trial Results (STR), which contain matters prescribed by the President in the service regulations—i.e., whether the firearms prohibition is triggered—this Court can, consistent with *Lemire*, grant appropriate relief by returning this case to the trial judiciary to correct these errors in the processing of the court-martial. 10 U.S.C. § 866(d)(2) (2023) (emphasis added); *United States v. Lemire*, 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpublished).

Appellant urges this Court to consider the dichotomy in Appellee's argument: this Court is empowered to correct minor errors in the Statement of Trial Results—ones without Constitutional implications—but is left powerless to correct errors in the processing of the court-martial, documented here in both the STR and EOJ, despite the express grant in Article 66(d)(2). *Compare United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), *with United States v. Pennington*, No. ARMY 20190605, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. Mar. 2, 2021) (unpub. op.). Purportedly, this is because R.C.M. 1111(c)(2) limits such authority of this Court to modify errors in the performance of its duties and responsibilities. Answer at 4-6. But, as outlined above, the specific text of the duties of the service courts of criminal

appeals under Article 66(d)(2) include the ability to grant appropriate relief for errors or excessive delays in the processing of the court-martial after the judgment was entered under Article 60c. 10 U.S.C. § 866(d)(2) (2023). Article 60c lays out what is required for the EOJ, which includes the STR. 10 U.S.C. §860c(a)(1)(A). The STR must include "other such information as the President may prescribe by regulation." 10 U.S.C. § 860(a)(1)(C). Rules for Court-Martial 1111, *Entry of Judgement*, also sets forth these statutory provisions, specifically, that the EOJ must contain "other information," that is, any additional information that the Secretary concerned may require by regulation. R.C.M. 1111 (b)(3)(F).

Consistent with Article 60(a) and R.C.M. 1111(b)(3)(F), a Department of the Air Force instruction directs the inclusion of whether the federal firearm prohibition is triggered on the documents effectuating the judgment of the Court in both the EOJ and STR. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, dated 14 April 2022, Chapter 20, STR through EOJ (Post-trial Process). Thus, this Court has jurisdiction to correct this error in the post-trial process by directing the federal firearm prohibition be removed from the STR and EOJ in this case, consistent with the duties of this Court outlined in Article 66(d)(2).

2. *The Government asserts it applied § 922(g)(1) to Appellant's case – which is expressly prohibited by the service regulation.*

Appellant was tried at a special court-martial at Holloman AFB, NM. STR, EOJ. DAFI 51-201, paragraph 29.30.1.1. specifically notes that § 922(g)(1) would not apply to convictions at a special court-martial because confinement of more than 1

year cannot be adjudged, thus Appellant's conviction does not trigger the 'felony' firearms prohibition. To the extent that the Government asserts that is what it has done, relief is warranted. Answer at 6.

The Government's argument as to the applicability of § 922 (g)(1) embraces a legal theory that its own regulation disclaims, specifically, that the maximum punishment authorized controls whether this firearms prohibition would be applicable. Answer at 6 *as compared to* DAFI 51-201, para. 29.30.1.1. (2022). Indeed, the Government's assertion of the applicability of this provision calls into question whether the Staff Judge Advocate was under a similar misapprehension of the applicability of § 922(g)(1) given there is no notation of which exact provision of § 922(g) applies to Appellant. *See,* STR and EOJ. Such a misapplication of the firearms prohibition, as effectuated through DAFI 51-201, restricts a citizen's right to bear arms guaranteed by the Second Amendment to the U.S. Constitution, and warrants remedy by this Court.

3. *Section 922(g)(3) is unconstitutional as applied to Appellant, given the record shows a one-time, past use of cocaine, which does not meet the statutory threshold for a "unlawful user" or "person addicted" to a controlled substance.*

While *Daniels* may have a limited application, it can help resolve the issue before this Court—whether § 922(g)(3) is constitutional as applied to Appellant. The Government highlights there is a limited use to *Daniels*, but incorrectly asserts it is inapplicable to Appellant's case. Answer at 10 (highlighting that the issue *Daniels*

narrowly addressed was whether the Government had sufficient evidence that *Daniels* was an 'unlawful user' to trigger § 922(g)(3)).

Just as *Daniels* looked into whether that appellant was an unlawful drug user, this Court should do the same. Here, as in *Daniels*, the record is wanting, and to a greater degree. In Daniels, the court considered admissions that the appellant smoked marijuana multiple days each month, and evidence the appellant was found in possession of marijuana, yet that evidence was insufficient to meet the definition of "unlawful user" under § 922 (g)(3). *United States v. Daniels*, 77 F.4th 337, 339-40 (5th Cir. 2023). The record here shows a one-time use of cocaine at a house party, without any evidence of ongoing use or dependence. R. at 59-75. This Court should reach the same conclusion as the court in *Daniels* – that a one-time past use of drugs does not trigger § 922(g)(3) because it does not establish Appellant is an "unlawful user." Therefore, should the Government assert § 922(g)(3) was triggered by Appellant's conviction, it is unconstitutional as applied to Appellant.

4. *The discussion of the historical context of regulating/restricting a citizen's access to firearms—that being violent felons—demonstrates that a non-violent offense of a one-time use of cocaine is not in keeping with the historical tradition of firearm regulation.*

Appellant stands on the original argument in the AOE about the historical context of firearm prohibition. The focus of the AOE is not on § 922(g)(1) because it is inapplicable to Appellant. Thus, the Government highlighting Appellant's failure to discuss caselaw where § 922(g)(1) was constitutional for non-violent felony offenses

were not pursued further by Appellant, given the lack of application of that provision to Appellant. Answer at 12.

Additionally, the non-violent nature of Appellant's offense is not a matter of opinion. Answer at 2. The Record of Trial makes it clear Appellant's use of cocaine was non-violent; the description of his use was uncontroverted by the Government at trial. R. at 59-74, 79-84. The historical context of firearm prohibition outlined in the AOE demonstrates that in cases like Appellant's, involving a non-violent, non-felony offense, the application of the firearm prohibition should be strictly construed.

In sum, for non-violent, non-felony offenders who use a controlled substance on one occasion, §922(g) provisions are unconstitutional as applied to them. Appellant's conviction at a Special Court Martial is not a felony conviction as set forth in the service regulations. Thus § 922(g)(1) cannot apply to Appellant. The one-time use of cocaine at a house party where there is no record of violence or violent acts associated with that use should not trigger any federal firearm prohibition under § 922(g)(3) because not only is it not in keeping with the historical tradition of regulating violent felon's access to firearms, neither is there evidence to support Appellant is an "unlawful user" of or addicted to controlled substances. The finding in the STR and the EOJ that the firearms prohibitions of 10 U.S.C. § 922 are applicable to Appellant's conviction are unconstitutional as applied to Appellant given there are no applicable provisions which apply to Appellant.

WHEREFORE, Appellant respectfully requests that this Honorable Court craft appropriate relief for the error in the court-martial processing by returning this

case to the Trial Judiciary for correction of the STR and EOJ to reflect no firearm prohibition applies.

Respectfully submitted,

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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 29 January 2024.

Respectfully submitted

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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 22004**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF PANEL CHANGE**
Tayari S. VANZANT	)	
Staff Sergeant (E-5)	)	
U.S. Air Force	)	
Appellant	)	

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

ORDERED:

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

JOHNSON, JOHN C., Colonel, Chief Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Senior Appellate Military Judge
MASON, BRIAN C., Lieutenant Colonel, Appellate Military Judge

FOR THE COURT

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