November 13, 2024

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DONTAVIUS A. BATES,
Senior Airman (E-4), USAF,
Appellant.

Crim. App. No. S32752

USCA Dkt. No. 25-0006/AF

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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ISSUES PRESENTED

I.

Whether the lower court erred by holding that Senior Airman Bates had waived admission of his drug rehabilitation records when the military judge failed to comply with the confidentiality requirements and consent procedures mandated by 42 U.S.C. § 290dd-2 and Department of Defense Instruction 1010.01.

II.

Whether, in light of *United States v. Williams*, ___ M.J. ___, CAAF LEXIS 501 (C.A.A.F. 2024), the Air Force Court of Criminal Appeals had jurisdiction under Article 66(d)(2), Uniform Code of Military Justice, to provide appropriate relief for the erroneous firearm prohibition on the indorsement to the entry of judgement.

III.

Whether the United States Court of Appeals for the Armed Forces has jurisdiction and authority to direct the modification of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment.

IV.

Whether review by the United States Court of Appeals for the Armed Forces of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment would satisfy this Court's prudential case or controversy doctrines.

V.

Whether the Government can prove that 18 U.S.C. § 922 is constitutional as applied to Senior Airman Bates.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals ("AFCCA") had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866. This Honorable Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On January 12, 2023, Senior Airman (SrA) Dontavius A. Bates was tried by a special court-martial composed of a military judge alone at Minot Air Force Base (AFB), North Dakota. Consistent with his pleas, the military judge found SrA Bates guilty of one charge and two specifications of unlawful drug use in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a, for use of marijuana and cocaine, respectively. (R. at 71.) The military judge sentenced SrA Bates to 90 days of confinement, reduction to the grade of E-1, a reprimand, and a bad-conduct discharge. (R. at 175.) The convening authority took no action on the findings. As to the sentence, the convening authority waived automatic forfeitures for period of six

months, or upon release from confinement, or expiration of the Appellant's term of service, whichever was sooner. (ROT, Vol 1, Convening Authority Decision on Action – *United States v. SrA Dontavius A. Bates*, January 27, 2023.) On August 13, 2024, the Air Force Court of Criminal Appeals (AFCCA) affirmed the findings and sentence. *United States v. Bates*, No. ACM S32752, slip. op. at 10 (A.F. Ct. Crim. App. Aug. 13, 2024) (Appendix).

STATEMENT OF FACTS

SrA Bates was medically-diagnosed with an addiction to cocaine. (R. at 107; Pros. Ex. 1 at 3.) His unit recognized him as someone who had a problem with addiction, rather than a criminally-minded individual. (R. at 111.) SrA Bates struggled to get clean and enrolled into recovery treatment. (R. at 103.) SrA Bates was later admitted into the Air Force Alcohol and Drug Abuse Treatment Program (ADAPT). (Pros. Ex. 1.) He was removed from the program after relapsing. (R. at 103.)

During his court-martial, the Government introduced a record from SrA Bates's participation in ADAPT as a sentencing exhibit. (R. at 79; Pros. Ex. 11.) The exhibit consisted of a memorandum detailing SrA Bates's failure during the program. (Pros. Ex. 11.) It began by declaring

"[t]his report contains sensitive information," and later explained "[c]ommanders shall protect the privacy of information as they would any other health information." (*Id.*) The memorandum contained derogatory information about SrA Bates's time in ADAPT, including allegations that he was dishonest, that he had tested positive for cocaine while enrolled, and that he was ultimately removed for failing to comply with treatment recommendations. (*Id.*) It concluded by recommending that SrA Bates be separated from the Air Force. (*Id.*)

The military judge addressed the record by merely asking trial defense counsel if there was any objection. (R. at 79.) Trial defense counsel made no objection. (*Id.*) The military judge did not explain to SrA Bates that he had a right to maintain the privacy of his ADAPT records. Nor did the military judge ask SrA Bates if he was voluntarily waiving that right or if he personally consented to admission.

During sentencing arguments, the Government relied heavily on the sensitive record for aggravation. The Government argued for a heightened sentence based on his failure from ADAPT, his alleged dishonesty, and relapse. (R. at 157-58.) The Government also referenced

the memorandum's recommendation for SrA Bates to be separated from the Air Force. (R. at 157-58.)

SrA Bates challenged the admission of his ADAPT record before the AFCCA. (Appendix at 4.) This challenge was based on the military judge's failure to comply with the protections and waiver provisions for admission of drug rehabilitation records under 42 U.S.C. § 290dd-2. SrA Bates argued that admission was improper due to the federal statute's prohibition against the use of such records during a criminal proceeding. However, the AFCCA concluded that trial defense counsel's lack of objection was sufficient to constitute waiver, and did not give the issue any further consideration. (Appendix at 5.)

ARGUMENT

I.

The lower court erred by holding that Senior Airman Bates had waived admission of his drug rehabilitation records when the military judge failed to comply with the confidentiality requirements and consent procedures mandated by 42 U.S.C. § 290dd-2 and Department of Defense Instruction 1010.01.

Standard of Review

This Court reviews issues of statutory interpretation de novo. *United States v. Vargas*, 74 M.J. 1, 5 (C.A.A.F. 2014).

Law & Analysis

This Court should grant review because it presents a question of law that has not been, but should be, settled by this Court. C.A.A.F. R. 21(B)(5)(a). This question is the applicability of 42 U.S.C. § 290dd-2 in military courts-martial in light of the Secretary of Defense's mandate, echoed by the Secretary of the Air Force, that its protections against the admission of drug rehabilitation records apply to service members. Department of Defense Instruction (DoDI) 1010.01, *Military Personnel Drug Abuse Testing Program (MPDATP)*, at ¶ 2; 3.c (September 13, 2012); Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, at ¶ 12.17 (January 18, 2019).[1] Chief among these protection is the requirement that such records be inadmissible without written consent from the patient.

The service court erred by finding that SrA Bates had waived the admission of his ADAPT records without the military judge following the requirements of 42 U.S.C. § 290dd-2. This resulted in prejudice to SrA

[1] The provisions of AFI 51-201 that were in effect at the time of SrA Bates's court-martial remain in effect under the current version of the regulation.

Bates given the that the Government heavily relied on his ADAPT records during sentencing.

The Secretary of Defense has acknowledged this statute as binding upon courts-martial despite the statute's internal exemption for "interchange of records within the Uniformed Services." DoDI 1010.01, at ¶ 2; 3.c. The statute and DoDI require confidentiality and limited disclosure of all "[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance use disorder . . . by any department or agency of the United States." 42 U.S.C. § 290dd-2(a); DoDI 1010.01, at ¶ 2. These records "may not be disclosed or used in any civil, criminal, administrative, or legislative proceedings conducted by any Federal, State or local authority, against a patient." 42 U.S.C. § 290dd-2(c). This prohibition extends to criminal prosecutions before a Federal or State Court. 42 U.S.C. § 290dd-2(c)(1).

Admission of these records is only permissible under the limited exceptions and procedures articulated in the statute. DoDI 1010.01, at ¶ 2. The two principal exceptions are by consent of the patient or through court order. The Seventh Circuit has interpreted this statutory language

to require "an express and knowledgeable waiver" from the patient before admission. *United States v. Banks*, 520 F.2d 627, 631 (7th Cir. 1975).[2] The statute echoes this by requiring "prior written consent" from the patient. 42 U.S.C. § 290dd-2(b)(1)(A). The Air Force regulation in effect at the time affirms the requirement for written consent. AFI 51-201, at ¶ 12.17.

The service court's finding that SrA Bates had waived the objection to his drug rehabilitation records is contrary to the requirements of 42 U.S.C. § 290dd-2. Trial defense counsel's declination to object was insufficient to constitute waiver, and the military judge erred by not employing a more in-depth inquiry. SrA Bates could only waive admission if he did so knowingly and intelligently. *Banks*, 520 F.2d at 631. For this type of waiver to be effected, the military judge had to ensure that SrA Bates understood the right, and that he waived that right with full understanding what it meant. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Harwood*, 46 M.J. 26, 28 (C.A.A.F. 1997). The military judge therefore had a *sua sponte* duty to ensure that

[2] At the time of the Seventh Circuit's decision, the provisions of 42 U.S.C. § 290dd-2 were listed under 21 U.S.C. § 1175 (Suppl. 3 1970).

appropriate procedures were followed to protect SrA Bates's rights and ensure a fair proceeding. *United States v. Andrews*, 77 M.J. 393, 403 (C.A.A.F. 2018) (citing *United States v. Watt*, 50 M.J. 102, 105 (C.A.A.F. 1999) for the proposition that military judges have a *sua sponte* duty to ensure that the accused has a fair trial when faced with prosecutorial misconduct.) Additionally, SrA Bates acquiesce to the admission had to be in writing.

The military judge did not exercise this duty when faced with the admission of SrA Bates's confidential records. Rather, the military judge only asked trial defense counsel if there was an objection. Similarly, the AFCCA erroneously determined that this was sufficient to constitute waiver. However, the military judge did not comply with the consent procedures dictated by 42 U.S.C. § 290dd-2. Therefore, the AFCCA erred by determining that SrA Bates had waived the issue.

Despite the gravity of the error, this Court has not yet had the opportunity to clarify 42 U.S.C. § 290dd-2's application in a military context. Nor has it had the opportunity to provide guidance to the service courts concerning the appropriate procedures for admitting drug rehabilitation records. This is especially important considering the

Seventh Circuit's interpretation that admission must be predicated on an express and knowledgeable waiver. Accordingly, this Court should grant review to resolve these issues.

Additionally, the AFCCA's decision in this case puts it in disagreement with its own prior treatment of the issue. This Court should grant review in order to the resolve this conflict. C.A.A.F. R. 21(5)(B). The AFCCA previously acknowledged 42 U.S.C. § 290dd-2's application to Air Force courts-martial. *United States v. Roberson*, No. ACM 38257, 2014 CCA LEXIS 320, at *8 (A.F. Ct. Crim. App. May 19, 2014). Similarly, the AFCCA widely recognized the prohibition on using drug rehabilitation records outlined in the earlier version of the statute. *United States v. Hardy*, 12 M.J. 883, 885 (A.F.C.M.R. 1981); *United States v. Schmenk*, 11 M.J. 803, 803-04 (A.F.C.M.R. 1981); *United States v. Fenyo*, 6 M.J. 933, 934 (A.F.C.M.R. 1979); *United States v. Cruzado-Rodriguez*, 9 M.J. 908, 909 (A.F.C.M.R. 1980). The Air Force Court previously understood the statutory provision to employ "an extraordinarily broad evidentiary exclusionary privilege that is automatically invoked on behalf of the accused, unless he specifically directs otherwise." *United States v. Cottle*, 11 M.J. 572, 574 (A.F.C.M.R.

1981). This Court should grant review to resolve the conflict in the AFCCA's treatment of the issue.

II.

The lower court erred by affirming that Senior Airman Bates's conviction for non-violent offenses triggered the firearms prohibition under 18 U.S.C. § 922 as executed after the entry of judgment.

Additional Facts

The first indorsement to the Entry of Judgement states that SrA Bates is subject to a "Firearm Prohibition Triggered under 18 U.S.C. § 922. (Entry of Judgment, First Indorsement.) SrA Bates challenged the firearms prohibition before the Air Force Court, but they declined to grant relief after "carefully considering [the issue]" and concluded that "it warrants neither discussion nor relief." (Appendix at 2.)

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law & Analysis

a. The AFCCA had authority to grant appropriate relief for any demonstrated error in post-trial processing occurring after the entry of judgment.

The AFCCA did not explain its rejection of SrA Bates's error. (Appendix at 2). Rather, it cited a case that indicates correcting a firearms prohibition is a collateral matter outside the court's review authority because it falls outside the "findings and sentence" entered into the record. *Id.* (citing *United States v. Vanzant*, 84 M.J. 671, 680–81 (A.F. Ct. Crim. App. 2024)). The language in the cited opinion indicates that the lower court only assessed its authority to review and act under Article 66(d)(1), UCMJ. Article 66(d)(1), UCMJ, provides, "In any case before the Court of Criminal Appeals under subsection (b), the Court may act only with respect to the findings and sentence as entered into the record under section 860c of this title ([A]rticle 60c)." 10 U.S.C. § 866(d)(1) (emphasis added). The citation to *Vanzant* highlights that the AFCCA did not consider any other basis for jurisdiction in SrA Bates's case, such as Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). But Article 66(d)(2), UCMJ, applied at the time the firearm bar was noted in Air Force post-trial processing, as supported by this Court's analysis in *Williams*.

By order of the Secretary of the Air Force, the Judge Advocate General of the Air Force published Department of the Air Force Instruction (DAFI) 51-201, Administration of Military Justice (April 14, 2022), which outlines the applicable procedures for Air Force post-trial processing, including the timing of the creation of the EOJ and the indorsement at issue. In the Air Force, "after the [EOJ] is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." DAFI 51-201, at ¶ 20.41 (emphasis added). Section 20I of DAFI 51-201 distinguishes the EOJ from the indorsement. Compare DAFI 51-201, at ¶ 20.40, with DAFI 51-201, at ¶ 20.41.

While the EOJ must include the statement of trial results (STR) and any "other information" required by the Secretary of the Air Force (R.C.M. 1111(b)), the operative firearm notification is not in the EOJ when it is signed by the military judge. *Compare Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *6, with DAFI 51-201, at ¶¶ 20.40.1, 29.33. Rather, the Secretary of the Air Force directs the Staff Judge Advocate to separately complete the indorsement with the 18 U.S.C. § 922

notification, which gets incorporated into the EOJ for "final disposition" after Article 60c, UCMJ, action. DAFI 51-201, at ¶¶ 20.41, 29.32, 29.33. The indorsement becomes a part of the EOJ, but it chronologically occurs after the military judge enters the judgment into the record. Even then, it is still a separate document appended to the EOJ.

In *Williams*, this Court considered the Army's post-trial processing procedure where the STR, containing the only firearm bar, was completed by the military judge and incorporated into the entry of judgment before the military judge signed the judgment. *Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *6. Under those circumstances, this Court held that the plain language of Article 66(d)(2), UCMJ, prohibited the Army Court of Criminal Appeals from changing the STR firearm bar notation—since that notation came before action under Article 60c, UCMJ. *Id.* at *14. However, the situation here is different. In the Air Force, the controlling firearm disposition notice occurs "after the judgment was entered into the record," in accordance with the plain language of Article 66(d)(2), UCMJ. Consequently, based on the Air Force's unique post-trial processing, the AFCCA has authority to review

this post-trial processing error under Article 66(d)(2), UCMJ, if the error is demonstrated by the accused.

b. Unlike the appellant in *Williams*, Senior Airman Bates meets the factual predicate to trigger the AFCCA's review under Article 66(d)(2), UCMJ.

When analyzing whether Article 66(d)(2), UCMJ, authorized the Army Court of Criminal Appeals to modify the STR firearm notation in *Williams*, this Court relied on the plain language of the statute. *Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *13-14. Using the same analysis, here, SrA Bates's erroneous and unconstitutional firearm prohibition falls squarely within the AFCCA's review authority under Article 66(d)(2), UCMJ.

First, "the accused demonstrated error." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). In his brief to the AFCCA, SrA Bates demonstrated he was erroneously deprived of his right to bear arms pursuant to *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Br. on Behalf of Appellant, May 9, 2024, at 21–25. Unlike in *Williams*, where no such error was raised, SrA Bates directly challenged the firearm prohibition, and the CCA could have resolved the error by analyzing whether 18 U.S.C. § 922 applied to SrA Bates. *Id.*

In raising this error, SrA Bates broadly framed the CCA's jurisdiction under Article 66, UCMJ, and sought relief through correction of the STR, similar to the approach in *Williams*. *Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *11. However, throughout his briefing, SrA Bates made references to the EOJ, which included the indorsement containing the firearms prohibition. Br. on Behalf of Appellant at 21, 23–25. While the AFCCA could not correct the erroneous firearms bar associated with STR, it could have corrected the erroneous firearm notation on the indorsement to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *14-15. In fact, SrA Bates also presented this issue as an error on the First Indorsement to the EOJ, and part of his requested relief was to correct the EOJ. Br. on Behalf of Appellant at 21, 25. The issue of jurisdiction has now been clarified, and unlike the appellant in *Williams*, SrA Bates demonstrated an error that the AFCCA had authority to consider under Article 66(d)(2), UCMJ. See *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) ("An appellant gets the benefit of changes to the law . . . .").

Second, the error on the indorsement that deprived SrA Bates of his constitutional right to bear arms occurred in the "processing of the court-martial after the judgment was entered into the record under section 860c . . . ([A]rticle 60c)." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). Here, the First Indorsement was completed after the military judge signed the EOJ, i.e., after the military judge entered the judgment into the record under Article 60c, UCMJ. DAFI 51-201, at ¶ 20.41.

Nothing in the record proves otherwise, and there is no indication that the Government violated its own regulations. Therefore—unlike how the issue was factually raised in *Williams*, i.e., prior to the entry of judgment—here, the error raised occurred after the entry of judgment, satisfying the final triggering criterion under Article 66(d)(2), UCMJ. Consequently, the CCA had jurisdiction under Article 66(d)(2), UCMJ, to decide whether SrA Bates was deprived of his constitutional right to bear arms by virtue of the Air Force's post-trial processing.

III.

The United States Court of Appeals for the Armed Forces has jurisdiction and authority to direct the modification of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law & Analysis

The AFCCA effectively affirmed the error in the EOJ by concluding this issue "warrant[s] neither discussion nor relief." (Appendix A at 2.) Therefore, this Court has jurisdiction to review and act upon the error in the EOJ under Article 67(c)(1)(B), UCMJ, 10 U.S.C. § 867(c)(1)(B) (authorizing this Court to act on a judgment by a military judge affirmed by the AFCCA).

The Court has granted review of this question in *Johnson*, 2024 CAAF LEXIS 561. As in that case, resolution of this predicate issue is necessary to reach the ultimate issue of whether the firearms prohibition under 18 U.S.C. § 922 is constitutional as applied to SrA Bates. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

IV.

Review by the United States Court of Appeals for the Armed Forces of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment would satisfy this Court's prudential case or controversy doctrines.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law & Analysis

The Court has granted review of this question in *Johnson*, 2024 CAAF LEXIS 561. As in that case, resolution of this predicate issue is necessary to reach the ultimate issue of whether the firearms prohibition under 18 U.S.C. § 922 is constitutional as applied to SrA Bates. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

V.

The Government cannot prove that 18 U.S.C. § 922 is constitutional as applied to Senior Airman Bates.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law &Analysis

Recent Supreme Court precedent changed the framework for analyzing restrictions on a person's right to bear firearms. *See New York State Rifle & Pistol Association, Inc.*, 597 U.S. at 22 (assessing lawfulness of handgun ban "by scrutinizing whether it comported with history and tradition"). This new precedent calls into question the constitutionality of firearms bans for those, like SrA Bates, who have been convicted of non-violent offenses. The historical tradition took a narrower view of firearms regulation for criminal acts than that reflected in Section 922:

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

C. Kevin Marshall, Why Can't Martha Stewart Have a Gun, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under

his control, a pistol or revolver.'" *Id.* at 701, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). 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 (quoting 1926 Uniform Firearms Act § 1).

The offense of which SrA Bates was convicted—indecent recording—falls short of these "crimes of violence." 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.

In the midst of these questions, this Court has recently granted review of the constitutionality of firearms prohibitions as applied to at least two other appellants. *United States v. Johnson*, 2024 CAAF LEXIS 561; *United States v. Donley*, 2024 CAAF LEXIS 674 (C.A.A.F. Oct. 29, 2024). This positions the Court to potentially resolve questions about the application of 18 U.S.C. § 922, and the fate of SrA Bates's rights to bear

firearms should be decided in accordance with the Court's forthcoming opinion.

SrA Bates faces undue prejudice: a lifetime firearms ban for a nonviolent crime. This disability goes against the history and tradition of firearm regulation in this country. See *Bruen*, 597 U.S. at 24. SrA Bates's petition should be granted to review the constitutionality of this prohibition because, with this Court's review of the issue outstanding, it is impossible to fairly resolve SrA Bates's challenge.

CONCLUSION

Appellant requests that this Court grant his petition for grant of review.

Respectfully submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 4,972 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on November 13, 2024.

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APPENDIX

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32752

UNITED STATES
Appellee

v.

Dontavius A. BATES
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 13 August 2024

Military Judge: Bradley J. Palmer.

Sentence: Sentence adjudged 12 January 2023 by SpCM convened at Minot Air Force Base, North Dakota. Sentence entered by military judge on 15 February 2023: Bad-conduct discharge, confinement for 90 days, reduction to E-1, and a reprimand.

For Appellant: Major David L. Bosner, USAF; Captain Michael J. Bruzik, USAF.

For Appellee: Lieutenant Colonel J. Pete Ferrell, USAF; Major Olivia B. Hoff, USAF; First Lieutenant Deyana F. Unis, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY joined.

MASON, Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongfully using cocaine on divers occasions and one specification of wrongfully using marijuana on divers occasions, in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a.[1] Appellant was sentenced to a bad-conduct discharge, confinement for 90 days, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings or sentence. Appellant did not request a waiver of the automatic forfeitures; however, the convening authority waived all automatic forfeitures for six months, release from confinement, or expiration of Appellant's term of service, whichever came soonest. He directed $1,278.00 in waived forfeitures be paid to Appellant's spouse for the benefit of Appellant's dependent child.

Appellant raises four issues on appeal: (1) whether trial counsel engaged in prosecutorial misconduct by introducing records from Appellant's participation in a substance abuse rehabilitation program in violation of Air Force regulations; (2) whether trial counsel committed prosecutorial misconduct by engaging in improper argument; (3) whether Appellant's sentence is inappropriately severe; and (4) whether the Government can prove that 18 U.S.C. § 922 is constitutional because it cannot demonstrate that here, where Appellant was not convicted of a violent offense, the statute is consistent with the nation's historical tradition of firearm regulation.

We have carefully considered issue (4) and find Appellant is not entitled to relief. As we recognized in *United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *22–25 (A.F. Ct. Crim. App. 28 May 2024), and *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks authority to provide the requested relief regarding the 18 U.S.C. § 922 prohibition notation on the staff judge advocate's indorsement to the entry of judgment or Statement of Trial Results. As to the remaining issues, we find no error materially prejudicial to Appellant's substantial rights and affirm the findings and sentence.

I. BACKGROUND

Appellant entered active duty on 5 March 2019, and in the summer of 2022 he was stationed at Minot Air Force Base, North Dakota. On 4 July 2022, Appellant attended a party at an off-base residence. While there, he consumed

[1] Unless otherwise noted, all references in this opinion to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

alcohol and was invited to use cocaine. Appellant accepted the offer. Three days later, Appellant was selected for a random urinalysis inspection. His urine sample tested positive for metabolites of cocaine. Pursuant to the unit's re-inspection policy, Appellant provided another urine sample on 18 July 2022. Appellant's urine sample tested positive for cocaine metabolites and tetrahydrocannabinol (THC), a metabolite of marijuana.

After his initial cocaine use, Appellant developed a physical and psychological craving for cocaine and began seeking out more cocaine from his civilian friend. They would ingest cocaine and marijuana in social settings.

On 19 July 2022, Appellant was command-referred to the Alcohol and Drug Abuse Prevention and Treatment Program (ADAPT) on base for substance abuse treatment.

On 15 August 2022, again pursuant to the unit's re-inspection policy, Appellant provided another urine sample. That sample tested positive for cocaine and marijuana metabolites. Appellant was subsequently recommended by ADAPT officials to receive a "higher level of care." Appellant began that treatment on 30 August 2022 in Colorado. On 27 September 2022, Appellant successfully completed the treatment. However, he did not successfully complete the ADAPT program.

Following his discharge from treatment, Appellant resumed reaching out to his civilian friend and resumed using cocaine. He continued to be tested and continued to have urine samples reported as positive for drug metabolites. As a result, Appellant was ordered to be restricted to base. No longer able to access cocaine, somehow Appellant was able to buy marijuana from an on-base drug dealer. Appellant used the marijuana on multiple occasions. His urine samples tested positive for THC five more times in the next six weeks. Appellant was then ordered into pretrial confinement.

Appellant's trial defense counsel negotiated a plea agreement with the convening authority in this case. As part of that agreement, Appellant agreed to stipulate to the facts of the case. The parties stipulated that Appellant "received substance abuse treatment" from ADAPT; ADAPT notified Appellant's commander that Appellant "failed the ADAPT treatment program;" and "[w]hile under treatment by ADAPT, [Appellant] tested positive for illicit substances, to include cocaine, multiple times."

During the presentencing proceedings in this case, trial counsel sought to admit a memorandum regarding a "Recommendation of Treatment Failure for [Appellant]." Upon presentation of the proposed exhibit, the military judge asked, "Defense [c]ounsel, any objection to Prosecution Exhibit 11 for identification?" Trial defense counsel responded, "No, Your Honor."

Trial counsel called Appellant's commander, Lieutenant Colonel (Lt Col) JA, to testify about Appellant's ADAPT treatment and his belief that Appellant was not honest throughout his treatment process. Trial defense counsel did not object to any of this testimony.

II. DISCUSSION

A. ADAPT Memorandum

1. Additional Background

As part of the sentencing phase of Appellant's court-martial, trial counsel offered for admission a memorandum from the ADAPT program that contained what Appellant considers "sensitive information" and privacy information that commanders are required to protect per regulations. In his brief, Appellant explains that the memorandum "contained derogatory information about [his] time in ADAPT, including allegations that he was dishonest, that he had tested positive for cocaine after being tested within the command-referred program, and that he was ultimately removed for failing to comply with treatment recommendations." The memorandum further recommended Appellant "be administratively separated from the Air Force."

Before admitting the memorandum as an exhibit, the military judge asked trial defense counsel if she had any objections. She responded, "No, Your Honor." Trial counsel then referred to the memorandum as evidence in aggravation as identified in Section II.B.1, *supra*.

2. Law

"Whether an appellant has waived an issue is a legal question that this [c]ourt reviews de novo." *United States v. Cunningham*, 83 M.J. 367, 374 (C.A.A.F. 2023) (quoting *United States v. Davis*, 79 M.J. 329, 332 (C.A.A.F. 2020)), *cert. denied*, 144 S. Ct. 1096 (2024).

"Under the ordinary rules of waiver, Appellant's affirmative statements that he had no objection to the admission of the contested evidence also operate to extinguish his right to complain on appeal." *Davis*, 79 M.J. at 331 (alterations, omission, and citation omitted). Where an appellant has affirmatively waived any objection to the admission of evidence, there is nothing left for us to correct on appeal. *See id.* (citation omitted).

3. Analysis

Appellant alleges that trial counsel engaged in prosecutorial misconduct by offering an exhibit that would not be admissible under applicable regulations. For the reasons set forth below, we need not address whether merely offering

the exhibit was prosecutorial misconduct as any objection to the admission of the exhibit was waived.[2]

Before admitting the exhibit, the military judge asked trial defense counsel if she had any objections. She responded, "No, Your Honor." By doing so, she did not just fail to object, but affirmatively declined to object. *See Cunningham*, 83 M.J. at 374 (finding express waiver to trial counsel's sentencing argument where trial defense counsel affirmatively declined to object by answering "no" to the military judge's question). We find Appellant waived any objection to the admission of this exhibit.

B. Trial Counsel Sentencing Argument

Appellant alleges that trial counsel made several improper arguments during sentencing argument and as a result, urges this court to set aside the adjudged bad-conduct discharge and approve only 60 days of confinement.

1. Additional Background

Appellant's brief alleges seven portions of trial counsel's sentencing argument were improper. Specifically, the following allegedly were improper because they were unsupported by the record: (1) the statement that Appellant "actively contributed to and facilitated the illicit drug enterprise on [the] installation" (alteration in original); (2) trial counsel's characterization of matters contained in Appellant's letters of reprimand as a "snap shot" of how Appellant's unit had "to deal with him over the last [four] to [six] months;" (3) the statement that "to add insult to injury, throughout this entire time, we know [Appellant] was definitely using drugs on base" (alteration omitted); and (4) trial counsel's claim that Appellant's leadership "thought oh, he's out getting high." He asserts trial counsel improperly argued matters in the ADAPT memorandum as evidence in aggravation by stating,

> [(5)] [Appellant] does cocaine again. He fails ADAPT which recommends his discharge from the Air Force. But this wasn't a one off. It was the last straw for ADAPT, and that's reflected in the

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[2] Merely offering an exhibit in an Article 39a, UCMJ, 10 U.S.C. § 839(a), session or before a court-martial consisting of a military judge sitting alone would not yield prejudicial error, even if the exhibit was not admissible, unless the exhibit was actually admitted. *See United States v. Hays*, 62 M.J. 158, 166 (C.A.A.F. 2005) (explaining even in a plain error analysis, when the alleged error involves a judge-alone trial, an appellant faces a particularly high hurdle and is "rare indeed"). In a circumstance where the exhibit is admitted, the analysis would not focus on whether the *offering* was improper, but whether the *admission* was erroneous. Appellant's creative framing of the issue notwithstanding, Appellant waived objection to the admission of this exhibit.

> ADAPT memo[randum] that the [G]overnment offered as a sentencing exhibit. And also what that memo[randum] reflects is that [Appellant] is dishonest throughout [his time at ADAPT].

Next, Appellant claims the statement that: (6) "[t]he longer he is sober, albeit forced to be sober, the greater chance that he has to ultimately be rehabilitated," was an improper comment on a collateral matter. According to Appellant, trial counsel concluded their argument with an improper personal attack against him—in that Appellant:

> [(7)] would rather do drugs than be a positive role model in his son's life, so that his son never has to lead the life that he had led over the last [six] months. And [Appellant has] demonstrated time and time again[ ] that he would rather do drugs than be a husband who is there to take [care] of his wife and support her with their young child.

Trial counsel recommended that Appellant be sentenced to a bad-conduct discharge, 120 days of confinement, with 60 days of credit for time served, reduction to the grade of E-1, and two-thirds forfeiture of pay per month for four months. Trial defense counsel did not object to any of trial counsel's seven sentencing arguments detailed above, or any other portion of the sentencing argument.

2. Law

"Prosecutorial misconduct can be generally defined as action or inaction by a prosecutor in violation of some legal norm or standard, *e.g.*, a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996) (citation omitted). A prosecutor's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (quoting *United States v. Berger*, 295 U.S. 78, 88 (1935)).

"We review prosecutorial misconduct and improper argument de novo . . . ." *United States v. Voorhees*, 79 M.J. 5, 9 (C.A.A.F. 2019) (citations omitted). When no objection is made at trial, we review for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018) (citations omitted). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *Id.* at 401 (quoting *Fletcher*, 62 M.J. at 179). We do not review counsel's words in isolation; we review the argument within "context of the entire court-martial." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (citations omitted).

"Trial counsel may argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence . . . ." *United States v. Hasan*, 84 M.J. 181, 220 (C.A.A.F. 2024) (internal quotations and citation omitted).

"Appellate judges must exercise care in determining whether a trial counsel's statement is improper or has improper connotations." *United States v. Palacios Cueto*, 82 M.J. 323, 333 (C.A.A.F. 2022). "The [United States] Supreme Court has emphasized that 'a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.'" *Id.* (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 647 (1974)). "A statement that might appear improper if viewed in isolation may not be improper when viewed in context." *Id.* (citing *Donnelly*, 497 U.S. at 645).

If we find a prosecutor's argument "amounted to clear, obvious error," we then determine "whether there was a reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Voorhees*, 79 M.J. at 9 (internal quotations marks and citations omitted). In analyzing prejudice from a prosecutor's improper sentencing argument, we consider: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (quoting *Fletcher*, 62 M.J. at 184) (applying the factors in *Fletcher* relating to findings argument to sentencing argument).

"[T]he lack of a defense objection is 'some measure of the minimal impact of a prosecutor's improper comment.'" *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

Military judges are presumed to know the law and follow it absent clear evidence to the contrary, and to distinguish between proper and improper arguments. *United States v. Leipart*, __ M.J. __, No. 23-0163, 2024 CAAF LEXIS 439, at *33 (C.A.A.F. 1 Aug. 2024).

In a plain error analysis, the most straightforward way of resolving an allegation of prosecutorial misconduct may be to do so based on prejudice. *Palacios Cueto,* 82 M.J. at 335 (citation omitted).

3. Analysis

Arguments as referenced in (1), (3), (6), and (7) are supported by the evidence. That Appellant used drugs on base after being restricted to base was properly before the military judge per Appellant's admissions during the

guilty-plea inquiry. Moreover, Lt Col JA's testimony revealed Appellant's drug use ceased once he was ordered into pretrial confinement. Thus, trial counsel's comment that Appellant's sobriety through confinement would increase the chance of rehabilitation is fair argument in this case. Further, in addition to evidence of numerous incidents of drug use, the record demonstrates that Appellant had a spouse and child. Trial counsel's argument that Appellant chose to use drugs rather than being "a husband who is there to take care of his wife and support her with their young child" was fair comment based on the evidence.

Regarding the remaining arguments, we need not determine whether they amount to plain or obvious error. Rather, we resolve this issue by assuming error and evaluating prejudice. *See Palacios Cueto,* 82 M.J. at 335. We note first that the sentencing authority was the military judge sitting alone. Here, the military judge made no comments on the record ratifying the putatively improper sentencing arguments; thus, there is no evidence to overcome the presumption that the military judge distinguished between proper and improper arguments at trial. *See Leipart*, 2024 CAAF LEXIS 439, at *33. There is nothing about this case that dissuades us from presuming as much here.

Second, application of the prejudice analysis confirms Appellant is not entitled to relief. The arguments at issue were not particularly severe, even if erroneous. The military judge did not expressly disregard any of the alleged erroneous comments; but as there were no objections raised as to any of them, the military judge may have simply disregarded the improper comments and permitted counsel to continue without interruption. *See id.* Furthermore, the weight of the evidence supported Appellant's adjudged sentence. Under these circumstances, trial counsel's argument, viewing each portion individually and in the aggregate in context, did not result in material prejudice to a substantial right and we are confident that Appellant was properly sentenced based on the evidence alone.

C. Sentence Appropriateness

1. Law

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 n.8 (C.A.A.F. 2006). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record . . . ." *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (citations omitted). We must also be sensitive to "considerations of uniformity and even-handedness." *United States v. Sothen*, 54. M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). While we have significant discretion in determining whether a

particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *See United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010).

When conducting our review, we not only consider the appropriateness of the entire sentence, but also "must consider the appropriateness of each segment of a segmented sentence." *United States v. Flores*, 84 M.J. 277, 282 (C.A.A.F. 2024) (citation omitted).

"Absent evidence to the contrary, [an] accused's own sentence proposal is a reasonable indication of its probable fairness to him." *United States v. Cron*, 73 M.J. 718, 736 n.9 (A.F. Ct. Crim. App. 2014) (citation omitted). Thus, when considering the appropriateness of a sentence, we may consider that a plea agreement to which Appellant agreed placed upper limits on the sentence that could be imposed. *See Fields*, 74 M.J. at 625–26.

2. Analysis

Appellant argues that his sentence is inappropriately severe and requests that we set aside the adjudged bad-conduct discharge and reduce the total confinement to 60 days. We decline to do so.

Considering Appellant, the nature and seriousness of the offenses, Appellant's record of service, and all matters contained in the record, Appellant's sentence is not inappropriately severe. His matters in mitigation and extenuation, including his purported reason for turning to drug use (a traumatic family event) as well as his subsequent development of a substance abuse disorder, and the other matters he submitted for consideration do not undermine the appropriateness of his sentence.

We recognize this case involves two drugs, each used on divers occasions off base with civilians. When Appellant's command intervened and ordered him restricted to base, he found a way to get marijuana on base for his repeated use. Only when he was finally ordered into pretrial confinement did his misconduct cease.

Of note, the confinement term adjudged for the repeated marijuana use (76 days) was the minimum term permitted in the plea agreement and the confinement term adjudged for the repeated cocaine use (90 days) was only 14 days more than the minimum term permitted. The confinement term was also somewhat lower than the 120-day maximum that the military judge could have adjudged consistent with the agreement. Furthermore, it was only 10 days more than the 80 days trial defense counsel argued was appropriate. Appellant's plea agreement set no limitation on a sentence to a bad-conduct discharge. These provisions are some indications of the adjudged sentence's probable fairness to Appellant. *Cron*, 73 M.J. at 736 n.9. Evaluating Appellant's

sentence, both with regard to each segment as well as in the aggregate, it is not inappropriately severe.

III. CONCLUSION

The findings as entered are correct in law and the sentence as entered is correct in law and fact. No error materially prejudicial to the substantial rights of Appellant occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court