IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

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

USCA Dkt. No. 24-0106/AF

Crim. App. Dkt. No. ACM 40310

SUPPLEMENT TO THE PETITION FOR GRANT OF REVIEW

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES,	)	**SUPPLEMENT TO THE**
Appellee	)	**PETITION FOR GRANT**
v.	)	**OF REVIEW**
	)	
DEQUAYJAN D. JACKSON	)	
Senior Airman (E-4),	)	Crim. App. Dkt. No. ACM 40310
United States Air Force,	)	
Appellant	)	USCA Dkt. No. 24-0106/AF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

ISSUES PRESENTED

I.

WHETHER THIS COURT SHOULD ABOLISH THE JUDICIALLY CREATED "CONTINUOUS COURSE OF CONDUCT" DOCTRINE IN *UNITED STATES V. MULLENS*, 29 M.J. 398 (C.M.A. 1990) BECAUSE IT IS A VIOLATION OF ARTICLE 56, UCMJ, 10 U.S.C. § 856, AND R.C.M. 1001(B)(4).

II.

AS APPLIED TO SENIOR AIRMAN JACKSON, WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN SHE WAS NOT CONVICTED OF A VIOLENT OFFENSE.

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

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (Air Force Court) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).[2] This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On April 18, 2022, consistent with her pleas, a Military Judge in a General Court-Martial at Tinker Air Force Base, Oklahoma, convicted SrA Jackson of one charge with five specifications of wrongful distribution, manufacturing, and aiding in distribution of a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a; and one charge with one specification of wrongfully failing to reject active participation in criminal gangs, in violation of Article 92, UCMJ, 10 U.S.C. § 856. *United States v. Jackson*, No. ACM 40310, slip op., at 2 (A.F. Ct. Crim. App. Jan. 11, 2024) [hereinafter Appendix]. The Military Judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for 350 days, and to be discharged from the service with a bad conduct discharge. *Id*. The Convening Authority took no action on the findings or sentence. *Convening Authority Decision on Action*.

[2] All references to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) unless otherwise noted.

STATEMENT OF FACTS

1. SrA Jackson Pled Guilty to a Non-diverse Occasion Specification

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

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

Charge Sheet. During her *Care* inquiry, SrA Jackson explained why she was guilty of Specification 6:

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

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

2. The Government Conceded, "We do Believe this is Uncharged Misconduct."

During presentencing, over Defense Counsel objection, the Military Judge admitted a portion of SrA Jackson's interview with the Air Force Office of Special Investigations (OSI). R. at 148, 158. During the OSI clip, SrA Jackson admitted that she sold two Xanax pills to a man named "Dan." R. at 149-50. SrA Jackson said this happened around "late August, July" at "15th and High" in Oklahoma City. R. at 150, 153. The Government did not provide evidence on who "Dan" was. SrA Jackson only knew him as an Uber driver. R. at 149.

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

The Government cited *United States v. Turner*, 62 M.J. 504 (A.F. Ct. Crim. App. 2005), saying, "[T]hat's where it states that the uncharged misconduct was a part of a continuous course of conduct involved in similar crimes. So we believe this is a similar crime that she is selling these Xanax pills to one 1 member and she is doing the same to another member within the same time frame." R. at 154-55.

3. The Defense Argued that the Government's Uncharged Evidence is "Being Offered Solely for Propensity Purposes"

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

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

R. at 156.

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

[3] Meaning, Xanax. R. at 150.
[4] At best this is a slip of the tongue, but at worst this is a Freudian slip.

participation in a criminal gang. And this is another way in which she actively participated in the criminal gang." *Id.*

REASONS TO GRANT REVIEW

Issue I

This Court should grant review because the Air Force Court "decided the validity of a provision of the UCMJ[,] . . . the Manual for Courts-Martial[, and] . . . a rule of court . . . the validity of which was directly drawn into question in that court." C.A.A.F. R. 21(b)(5)(D). At the Air Force Court, SrA Jackson questioned the validity of "a rule of court"—the continuous course of conduct doctrine—that this Court created, essentially, *ex nihilo*. This Court should grant review because the continuous course of conduct doctrine: 1) has been questioned by this Court since its creation; 2) has not been cited by this Court since 2007; 3) is an atextual aberration in violation of Article 56, UCMJ; and 4) results in criminal defendants receiving additional punishment for crimes the Government did not charge them with—as this case demonstrates. This Court should grant review, abolish the continuous course of conduct doctrine, and instruct practitioners to adhere to the plain language of Article 56, UCMJ, 10 U.S.C. § 856 and R.C.M. 1001(b)(4) when deciding what constitutes a matter in aggravation.

Issue II

The Second Amendment states that "the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. Amend. II. Yet, this is exactly what the Government did when it annotated a firearms ban on SrA Jackson—via the Entry of Judgment—without "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24.

SrA Jackson faces a *lifetime* firearms ban for a non-violent crime. That punishment is greatly disproportionate to the offense; is not aligned with the text, history, or tradition of firearms regulation; and has no temporal limitations. This Court has granted review on this issue in other cases and should do so for this case as well.

ARGUMENT

I.

THIS COURT SHOULD ABOLISH THE JUDICIALLY CREATED "CONTINUOUS COURSE OF CONDUCT" DOCTRINE IN *UNITED STATES V. MULLENS*, 29 M.J. 398 (C.M.A. 1990) BECAUSE IT IS A VIOLATION OF ARTICLE 56, UCMJ, 10 U.S.C. § 856, AND R.C.M. 1001(B)(4).

Standard of Review

This Court reviews the interpretation of statutes and Rules for Courts-Martial de novo. *United States v. Kohlbek*, 78 M.J. 326, 330 (C.A.A.F. 2019); *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). This Court reviews a military judge's

decision to admit or exclude evidence for an abuse of discretion. *United States v. Erikson*, 76 M.J. 231, 234 (C.A.A.F. 2017) (citation omitted). A military judge abuses his or her discretion when the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. White*, 80 M.J. 322, 327 (C.A.A.F. 2020) (citation omitted).

Law and Analysis

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

> (1) IN GENERAL.—In sentencing an accused under section 853 of this title (article 53), a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—
>
> (A) the nature and circumstances *of the offense* and the history and characteristics of the accused;
>
> (B) the impact *of the offense* on—
>
> (i) the financial, social, psychological, or medical wellbeing of any victim *of the offense*; and
>
> (ii) the mission, discipline, or efficiency of the command of the accused and any victim *of the offense*;
>
> (C) the need for the sentence—
>
> (i) to reflect the seriousness *of the offense*;
>
> (ii) to promote respect for the law;
>
> (iii) to provide just punishment for *the offense*;
>
> (iv) to promote adequate deterrence of misconduct;
>
> (v) to protect others from further crimes by the accused;
>
> (vi) to rehabilitate the accused; and
>
> (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service;

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

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

(bold added; italics in original).

1. This Court's Judges Questioned The "Continuous Course of Conduct" Doctrine From its Inception

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

This Court's predecessor, the Court of Military Appeals (CMA) held that it could consider the earlier, uncharged misconduct under R.C.M. 1001. It reasoned that "[t]he stipulation evidenced a *continuous course of conduct* involving the same or similar crimes, the same victims, and a similar situs within the military community, *i.e.*, the servicemember's home." *Id.* at 400 (emphasis added). The CMA explained that "[t]hese incidents demonstrate not only the depth of appellant's

sexual problems, but also the true impact of the charged offenses on the members of his family." *Id.* As such, these were "appropriate sentence considerations under the above Manual rule." *Id.*

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

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

additional misconduct. If additional, uncharged misconduct were considered—which the CMA did—the statement does not make sense because the "true impact" now includes *both* charged misconduct *and* uncharged misconduct.

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

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

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

2. This Court Embraced the Continuous Course of Conduct Doctrine and Then Began to Abandon it

This Court embraced the continuous course of conduct doctrine in two more cases: *United States v. Shupe*, 36 M.J. 431 (C.A.A.F. 1993) and *United States v. Nourse*, 55 M.J. 229 (C.A.A.F. 2001). In *Shupe*, the appellant pled guilty to conspiring to distribute LSD. 36 M.J. at 436. However, the uncharged misconduct involved "five additional transactions" described by a witness. *Id.* This Court held that the witness testimony established that the additional transactions were not "an isolated transaction but [] part of an extensive and continuing scheme to introduce and sell LSD to numerous buyers assigned to the naval base." *Id*. Therefore, the witness testimony was proper under R.C.M. 1001(b)(4) "because it showed the continuous nature of the charged conduct and its full impact on the military community." *Id.* (quotations and citations omitted). This Court in *Nourse* continued to uphold the doctrine for prior, uncharged larcenies, stating that "*Mullens, Ross*, and *Shupe* explain that when uncharged misconduct is part of a continuous course of conduct involving *similar crimes and the same victims*, it is encompassed within the language 'directly relating to or resulting from the offenses of which the accused has been found guilty.'" 55 M.J. at 232 (emphasis added).

In 2007, in *United States v. Hardison*, this Court quoted the continuous course of conduct doctrine, but did not apply it to the appellant's uncharged, pre-service drug use. 64 M.J. 279, 280 (C.A.A.F. 2007). Instead, this Court found that the

military judge plainly erred when he allowed into evidence the pre-service drug use (and accompanying waiver documents) and that this admission prejudiced the appellant. *Id.*

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

This Court went on to explain that "directly related" is a "function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *Id.* This Court explained that the "strength of the connection" between aggravation evidence and the charged conduct "must be direct as the rule states, and closely related in time, type, and/or often outcome, to the convicted crime." *Id.* at 282. While it is true that this Court then discussed *Ross*, *Mullens*, and *Shupe*, it did not adopt their continuous course of conduct rationale or use their language. Rather, this Court focused on the plain text of R.C.M. 1001(b)(4), explaining that "[t]he correct standard for

admission is not whether some prior instance is or is not isolated from a subsequent incident, but whether the former is *directly related to the crime for which Appellant was convicted*." *Id.* at 282-83.

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

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

The continuous course of conduct doctrine is not found in, nor does it align with, the plain language of Article 56, UCMJ, 10 U.S.C. § 856 or R.C.M. 1001(b)(4). Article 56, UCMJ, states that a court-martial "shall" punish an accused, "taking into consideration" enumerated factors. In those factors, the phrase "of the offense" or "the offense" is used six times to underscore the fact that an accused is to be sentenced only for "the offense" he or she was convicted of committing. Nowhere

in Article 56 is the phrase "uncharged misconduct" or a proposition that an accused can receive a greater punishment because uncharged misconduct is contained in the record.

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

In practical terms, the issue at hand is whether this Court will "elect[] to disregard the plain text of" Article 56 by engaging in an analysis that is not rooted in the plain text. *United States v. Edwards*, 82 M.J. 239, 244 (C.A.A.F. 2022) (explaining that the Air Force Court relied on what was "not 'obviously unreasonable'" to interpret R.C.M. 1001A(e) instead of the plain language). "Any suggestion" that this Court "should interpose additional language into a rule that is anything but ambiguous is the antithesis of textualism." *United States v. Bergdahl*, 80 M.J. 230, 235 (C.A.A.F. 2020). To resolve this issue, this Court must "adhere to the plain meaning of any text—statutory, regulatory, or otherwise." *Id.* Indeed, "[t]he

controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Star Athletica, L.L.C. v. Varsity Brands*, *Inc.*, 580 U.S. 405, 414 (2017).

Despite the plain language of Article 56, UCMJ, and R.C.M. 1001(b)(4), the continuous course of conduct doctrine has been permitted. This is true even though courts could have used the "directly relating to" or "resulting from" language in its place. Additionally, the continuous course of conduct doctrine led to the introduction of other atextual phrases that allowed courts to shoehorn in additional uncharged misconduct. These phrases include: "the full impact on the military community," "full impact of appellant's crimes," and "depth of appellant's sexual problems." *Ross*, 34 M.J. at 187; *Shupe*, 36 M.J. at 436; *Mullens*, 29 M.J. at 400. Notably, none of these phrases are contained in, or allowed as avenues for aggravation under, Article 56, UCMJ, or R.C.M. 1001(b)(4). The continuous course of conduct doctrine is problematic because it is three steps[5] removed from Article 56, UCMJ; these phrases are a fourth step removed and are additional justifications for allowing uncharged misconduct into evidence. In other words, the judicially created continuous course of conduct doctrine is out of step with Article 56, UCMJ, and R.C.M. 1001(b)(4).

[5] First, it is not in the plain text of Article 56, UCMJ; second, it is not in the text of R.C.M. 1001(b)(4); and third, it is judicially created.

4. This Case Highlights the Problems with the Continuous Course of Conduct Doctrine

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

Second, the uncharged misconduct had a different alleged buyer, Dan, vice A1C Jenkins for the charged misconduct. Additionally, the uncharged misconduct was distant in time to the charged misconduct and, arguably, outside of the charged timeframe since SrA Jackson said the uncharged misconduct happened in "late August, July." R. at 153. If the uncharged misconduct happened in late July, it would fall outside of the charged timeframe. Regardless, since the charged conduct happened on 29 September, it is at least one full month removed—possibly two—from the charged misconduct. As such, without the continuous course of conduct

doctrine, it is hard to understand how this misconduct at an earlier time, with a different person who is not a servicemember, is "*directly related to the crime for which Appellant was convicted*." *Hardison*, 64 M.J. at 283 (emphasis in original).

Third, and finally, these facts reveal that this uncharged misconduct had no tie to the offenses to which SrA Jackson pled guilty. The Government could have charged SrA Jackson with this entirely separate and distinct transaction but failed to do so. What appears to have happened, however, is that in reviewing the OSI interview before trial, the Government noticed that it forgot to charge this misconduct, so it sought to admit this evidence via the continuous course of conduct doctrine as an aggravating piece of evidence. *See generally United States v. Simmons*, 82 M.J. 134, 141 (C.A.A.F. 2022) ("[I]t is the government that controls the charge sheet from the inception of the charges through the court-martial itself."); *United States v. Mader*, 81 M.J. 105, 108 (C.A.A.F. 2021) ("The Government had complete discretion over how to charge Appellant and it elected to charge his acts as assault consummated by a battery in violation of Article 128(a), UCMJ. . . . Although the Government might have charged Appellant with hazing or aggravated assault, which would have eliminated the opportunity to raise a consent defense, it elected not to do so.").

There is no doubt that admitting the uncharged misconduct under the continuous course of conduct doctrine was much easier than trying to explain how

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

WHEREFORE, SrA Jackson respectfully requests that this Honorable Court grant her petition for review.

II.

AS APPLIED TO SENIOR AIRMAN JACKSON, THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY "DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[6] WHEN SHE WAS NOT CONVICTED OF A VIOLENT OFFENSE.

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 and Analysis

This Court should grant review for four reasons. First, this Court has granted review on this issue in, *inter alia*, *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. Jan. 24, 2024), *United States v. Maymi*, No. 24-0049/AF, 2024 CAAF LEXIS 91 (C.A.A.F. Feb. 16, 2024), and *United States v. Lampkins*, No. 24-0069/AF, 2023 CAAF LEXIS 902 (C.A.A.F. Dec. 29, 2023). This Court should grant review as a trailer to *Williams.*

Second, given the updates to the *MCM* and the realities of trial and appellate practice, the conclusion that a firearms prohibition is a "collateral consequence" is now a legal fiction.

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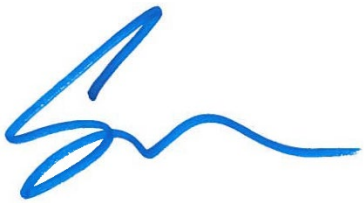
[6] *Bruen*, 597 U.S. at 24.

Third, this Court has identified and ordered that promulgating orders be corrected when said documents included erroneous collateral consequences. *United States v. Lemire*, 82 M.J. 263, at n.* (C.A.A.F. 2022) (unpub. op.).

Fourth, SrA Jackson faces undue prejudice: A lifetime firearms ban for a crime that was committed *without* a firearm. This disability goes against the text, history, and tradition of firearm regulation in this country.

WHEREFORE, SrA Jackson respectfully requests that this Court grant her petition for review.



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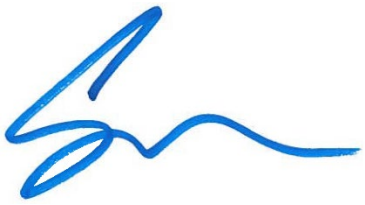
CERTIFICATE OF FILING AND SERVICE

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on April 16, 2024 and that a copy was also electronically served on the Government Trial and Appellate Operations Division on the same date.



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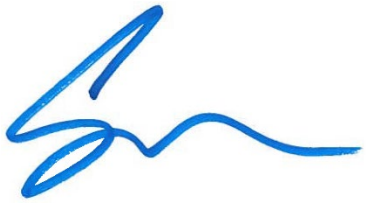
CERTIFICATE OF COMPLIANCE WITH RULES 21(b), 24(b) & 37

This supplement complies with the type-volume limitation of Rules 21(b) and 24(b) of no more than 9,000 words because it contains 4,760 words.

This brief complies with the typeface and type-style requirements of Rule 37 because it has been prepared in a proportional typeface using Microsoft Word with Times New Roman 14-point typeface.



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APPENDIX

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40310

UNITED STATES
Appellee

v.

DeQuayjan D. JACKSON
Senior Airman (E-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 11 January 2024

Military Judge: Shad R. Kidd.

Sentence: Sentence adjudged 15 March 2022 by GCM convened at Tinker Air Force Base, Oklahoma. Sentence entered by military judge on 18 April 2022: Bad-conduct discharge, confinement for 350 days, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

*For Appellan*t: Major Spencer R. Nelson, USAF.

For Appellee: Colonel Naomi P. Dennis, USAF; Lieutenant Colonel Thomas J. Alford, USAF; Captain Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, CADOTTE, and MERRIAM, *Appellate Military Judges*.

Judge MERRIAM delivered the opinion of the court, in which Senior Judge RICHARDSON and Senior Judge CADOTTE joined.

MERRIAM, Judge:

A general court-martial composed of a military judge sitting alone convicted Appellant, in accordance with her pleas and pursuant to a plea agreement,[1] of one specification of failing to obey a lawful general regulation, in violation of Article 92, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 892,[2] and one specification of wrongful distribution of marijuana, one specification of wrongful distribution of cocaine, one specification of wrongful distribution of alprazolam (a Schedule IV controlled substance), one specification of wrongfully aiding others' manufacture of cocaine, and one specification of wrongfully aiding others' distribution of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence was a bad-conduct discharge, confinement for 350 days,[3] forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand.

Appellant raises three issues on appeal: (1) whether the military judge erred when he admitted uncharged misconduct under the "continuous course of conduct doctrine" during the pre-sentencing hearing; (2) whether the firearms prohibition in 18 U.S.C. § 922 referenced in the staff judge advocate's indorsement to the Statement of Trial Results is constitutional when Appellant was convicted of non-violent offenses; and (3) whether Appellant's sentence is inappropriately severe.[4]

Finding no error materially prejudicial to Appellant's substantial rights, we affirm the findings and sentence.

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[1] Among other provisions in her plea agreement, Appellant agreed that a bad-conduct discharge "must" be adjudged, that a minimum total of 205 days and maximum total of 490 days of confinement for all specifications of which she was convicted "must" be adjudged, and that a reprimand, rank reduction, and forfeiture of all pay allowances "may" be adjudged. Additionally, the plea agreement stated that a dishonorable discharge "may not" be adjudged and further required that five additional specifications to which Appellant pleaded not guilty be dismissed with prejudice after announcement of sentence.

[2] All references in this opinion to the UCMJ, the Military Rules of Evidence, and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant received 10 days for violation of the Article 92, UCMJ, specification, and 45 days, 75 days, 50 days, 90 days, and 80 days, respectively, for violation of the five Article 112a, UCMJ, specifications, with each period of confinement to run consecutively.

[4] Appellant raises this third issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

I. BACKGROUND

Over a few months in the summer and fall of 2021, Appellant distributed cocaine, alprazolam (commonly known by the brand name Xanax), and marijuana. Most, if not all, of this illegal distribution of controlled substances was on behalf of, or in association with, members of the criminal gang known as the Crips.

Appellant's distribution of marijuana was to another active duty Airman, Airman First Class (A1C) JJ. This "hand to hand" transaction occurred in the public parking lot of an off-base hospital while A1C JJ was in uniform standing outside Appellant's car. On another occasion Appellant sold 40 tablets of alprazolam to A1C JJ.

On approximately 25 occasions, Appellant drove gang members in her car to various locations for the purpose of selling cocaine. Appellant also aided gang members' manufacture of their cocaine product by permitting gang members to "cook" the cocaine in her off-base residence, using her microwave, kitchen utensils, and water.

Though Appellant was not a member of the Crips, she associated with several members on a regular basis, allowed them to use her home, frequently "threw" (displayed with her hands) gang signs associated with the Crips as a "sign of respect" to the gang members, assisted their criminal drug-selling enterprise on dozens of occasions, and on at least one occasion suggested to gang members that they make the aforementioned sale of alprazolam to A1C JJ.

II. DISCUSSION

A. Continuous Course of Conduct

1. Additional Background

During the pre-sentencing hearing following acceptance of Appellant's guilty pleas, trial counsel moved to admit Prosecution Exhibit 4, a disc containing two video clips from law enforcement's interview of Appellant as matters in aggravation.

One of the video clips (Clip One) was two minutes and thirty-one seconds in length. The military judge admitted Clip One over trial defense counsel's objection, but Appellant does not now assert this was error and Clip One is not addressed further here. The second video clip (Clip Two) was four minutes and forty-six seconds long. In Clip Two, Appellant described to law enforcement agents how she was the "middle man" for a sale of alprazolam "bars" to Mr. D at the intersection of "15th Street and High Avenue." Appellant told law enforcement that Mr. D had asked her for "pain pills," that she did not have any, and that she then approached a gang member to provide some that she could

sell to Mr. D. Appellant continued to tell law enforcement that Mr. D called a gang member, who then provided two alprazolam tablets to Appellant, which she then sold to Mr. D for $20.00 and gave the money to the gang member. She told law enforcement she made the transaction in August or late July of 2021.

Trial defense counsel objected to Clip Two on Mil. R. Evid. 403 grounds, and further argued that the uncharged sale of alprazolam to which Appellant confessed in Clip Two was not proper evidence in aggravation because the misconduct discussed was not directly resulting from or directly related to the offenses of which Appellant had been convicted, but was rather improper propensity evidence. Trial counsel agreed Clip Two was uncharged misconduct, but argued it was a "continuous course of conduct from [Appellant]" with regard to selling alprazolam. Trial counsel argued that it was close in time to the wrongful distribution of approximately 40 tablets of alprazolam of which Appellant had just been convicted and was part of a continuous course of conduct in selling illegal drugs. Trial counsel stated the evidence was not offered under Mil. R. Evid. 404(b), but strictly as aggravating evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4).

The military judge determined Clip Two was admissible aggravation evidence under R.C.M. 1001(b)(4). The military judge noted Appellant had pleaded guilty to distribution of cocaine to Mr. D and of distribution of alprazolam to A1C JJ and that the uncharged misconduct referenced in Clip Two was "in the charged time frame." The military judge found that this case was similar to "a number of cases" where an accused pleaded guilty to some instances of misconduct and additional instances of the same or similar type of misconduct were held to be admissible under R.C.M. 1001(b)(4) because the aggravation evidence was part of a continuous course of conduct. The military judge determined that Clip Two provided "context to understand the overall course of conduct," and that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Regarding this Mil. R. Evid. 403 analysis, the military judge found that the danger of unfair prejudice was significantly mitigated by the fact that it was a judge-alone case, that he was aware Appellant could "only be sentenced for the crimes for which she has been accused," and that he would not consider the evidence for propensity purposes.

2. Law

This court reviews a military judge's admission or exclusion of evidence, including sentencing evidence, for an abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015) (citation omitted); *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009) (citations omitted). A military judge abuses their discretion when their legal findings are erroneous or when they make a clearly erroneous finding of fact. *Id.* (citations omitted). To be

overturned on appeal, the military judge's ruling must be "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Taylor*, 53 M.J. 195, 199 (C.A.A.F. 2000) (internal quotation marks omitted) (citing *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987)). For a ruling to be an abuse of discretion, it must be more than a mere difference of opinion. *United States v. Brown*, 72 M.J. 359, 362 (C.A.A.F. 2013) (citing *United States v. Collier*, 67 M.J. 347, 353 (C.A.A.F. 2009)).

"[A]dmission of aggravation evidence necessarily involves a contextual judgment." *United States v. Moore*, 68 M.J. 491 (C.A.A.F. 2010) (mem.) (citations omitted); *see also United States v. McCrary*, 2013 CCA LEXIS 387, *12 (A.F. Ct. Crim. App. 7 May 2013) (unpub. op.) (uncharged misconduct can be admitted as aggravation evidence, which may be used to "inform the sentencing authority's judgment regarding the charged offense and put[ ] that offense in context").

Article 56(c)(1), UCMJ, 10 U.S.C. § 856(c)(1), states:

> In sentencing an accused under [Article 53, UCMJ, 10 U.S.C. § 853], a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces, taking into consideration—(A) the nature and circumstances of the offense and the history and characteristics of the accused; (B) the impact of the offense on—(i) the financial, social, psychological, or medical well-being of any victim of the offense; and (ii) the mission, discipline, or efficiency of the command of the accused and any victim of the offense; [and] (C) the need for the sentence—(i) to reflect the seriousness of the offense; (ii) to promote respect for the law; (iii) to provide just punishment for the offense; (iv) to promote adequate deterrence of misconduct; (v) to protect others from further crimes by the accused; (vi) to rehabilitate the accused; and (vii) to provide, in appropriate cases, the opportunity for retraining and return to duty to meet the needs of the service[.]

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

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

> discipline, or efficiency of the command directly and immediately resulting from the accused's offense.

"The meaning of 'directly related' under R.C.M. 1001(b)(4) is a function of both what evidence can be considered and how strong a connection that evidence must have to the offenses of which the accused has been convicted." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Uncharged misconduct may be directly related to the charged misconduct when part of a "continuous course of conduct." *See, e.g.*, *United States v. Shupe*, 36 M.J. 431, 436 (C.M.A. 1993) (holding testimony about uncharged misconduct was proper aggravation under R.C.M. 1001(b)(4), because it showed "'the continuous nature of the charged conduct'" (quoting *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992))); *Ross*, 34 M.J. at 187 (stating "the continuous nature of the charged conduct and its full impact on the military community are proper aggravating circumstances"); *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990) (holding admissible uncharged misconduct that consisted of "a continuous course of conduct involving the same or similar crimes, the same victims, and a similar situs"); *United States v. Silva*, 21 M.J. 336, 337 (C.M.A. 1986) (uncharged misconduct was admissible when it was an "integral part of [the accused's] criminal course of conduct").

Aggravation evidence admitted under R.C.M. 1001(b)(4) must also satisfy Mil. R. Evid. 403. *Hardison*, 64 M.J. at 281. Under that rule, a military judge may exclude evidence if its probative value is substantially outweighed by such considerations as its tendency to result in unfair prejudice, confuse the issues, or mislead the members. A military judge has "wide discretion" in applying Mil. R. Evid. 403, and we exercise "great restraint" in reviewing such applications when the military judge articulates his or her reasoning on the record. *United States v. Humpherys*, 57 M.J. 83, 91 (C.A.A.F. 2002) (citation omitted). On the other hand, appellate courts "give[ ] military judges less deference if they fail to articulate their [Mil. R. Evid. 403] balancing analysis on the record, and no deference if they fail to conduct the [Mil. R. Evid.] 403 balancing." *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted).

A military judge is assumed "to be able to appropriately consider only relevant material in assessing sentencing." *Hardison*, 64 M.J. at 284 (citation omitted).

3. Analysis

Appellant contends the military judge improperly admitted aggravation evidence through what Appellant calls the "continuous course of conduct doctrine," under which uncharged misconduct may be admitted during presentencing as evidence in aggravation when the charged and uncharged misconduct are part of a continuing course of conduct. Appellant's argument in

support of this assignment of error asserts several theories in the alternative: (1) the United States Court of Appeals for the Armed Forces (CAAF) implicitly overruled the continuous course of conduct doctrine *sub silentio* in *United States v. Hardison*; (2) the continuous course of conduct doctrine conflicts with Article 56(c), UCMJ, 10 U.S.C. § 856(c), and/or R.C.M. 1001(b)(4); and (3) under the circumstances of this case, the military judge improperly applied the doctrine when he admitted uncharged misconduct under R.C.M. 1001(b)(4) during the pre-sentencing hearing.

We reject Appellant's characterization of the CAAF's decision in *Hardison*, 64 M.J. at 281–83, as constituting a *sub silentio* overturning of its prior decisions that a continuous course of conduct can demonstrate uncharged misconduct is "directly related" to the charged offenses under R.C.M. 1001(b)(4). In *Hardison*, the CAAF did not implicitly overturn its prior precedent; it explicitly embraced it.[5] In determining that pre-service drug use was not "directly related" to the charged misconduct, the CAAF cited positively two prior cases—*Shupe*, 36 M.J. 431, and *Mullens*, 29 M.J. 398—in which the CAAF and its predecessor, the Court of Military Appeals (CMA), found that a continuous course of conduct meant the uncharged misconduct was directly related to the charged offenses and thus admissible under R.C.M. 1001(b)(4). *Hardison*, 64 M.J. at 282. In *Shupe*, the appellant had confessed during the plea providence inquiry to one wrongful distribution of ten doses of LSD. 36 M.J. at 436. The CMA upheld admission of aggravation evidence that the appellant had engaged in five additional transactions totaling 180–200 doses of LSD to "numerous buyers" over several months because the five uncharged instances of drug distribution were "not isolated" from the single distribution to which the appellant had pleaded guilty, but rather were part of a single "extensive and continuing scheme to introduce and sell [drugs]." 36 M.J. at 436. And in *Hardison*, the CAAF explicitly observed that "[t]he 'continuous nature of the charged conduct' was *important to our conclusion*" in *Shupe*. 64 M.J. at 282 (emphasis added) (quoting *Shupe*, 36 M.J. at 436). Appellant further contends the CAAF did not apply the continuous course of conduct doctrine in *Hardison*. In fact, the CAAF did evaluate whether there was a continuous course of conduct similar to *Shupe* and *Mullens* and simply concluded "[t]here was no similar connection here." 64 M.J. at 282.

In light of our superior court's explicit approval in *Hardison* and prior cases of the continuous course of conduct doctrine under R.C.M. 1001(b)(4), we decline to find the doctrine conflicts with R.C.M. 1001(b)(4).

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[5] We also note the CAAF has instructed that "'overruling by implication is disfavored.'" *United States v. Tovarchavez*, 78 M.J. 459, 465 (C.A.A.F. 2019) (quoting *United States v. Pack*, 65 M.J. 381, 383 (C.A.A.F. 2007)) (additional citation omitted).

Appellant also argues that admitting uncharged misconduct under the continuous course of conduct doctrine is an "[a]textual [a]berration" that conflicts with the plain language of Article 56(c), UCMJ. Specifically, Appellant observes that Article 56(c), UCMJ, repeatedly commands an accused be sentenced for "the offense" and that admission of uncharged misconduct violates that command. Appellant acknowledges that "R.C.M. 1001(b)(4) tracks closely with the language of Article 56, [UCMJ]" but contends the language in R.C.M. 1001(b)(4) departs from Article 56, UCMJ, where it allows that aggravation evidence may be "directly relating to or resulting from the offense . . . ." The implication of Appellant's argument is that this language in R.C.M. 1001(b)(4) conflicts with the plain language of Article 56, UCMJ. We disagree. Article 56, UCMJ, does indeed direct that an accused be sentenced for their offenses, but the R.C.M. 1001(b)(4) command that aggravation evidence be directly related to or resulting from the offenses of which the accused is convicted is consistent with the language in Article 56, UCMJ, specifically that the accused be punished based on "the nature and circumstances of the offense and the history and characteristics of the accused" and the "seriousness of the offense."[6] Likewise, admitting uncharged misconduct that is directly related to the offense when the charged and uncharged misconduct are part of a continuing course of conduct is consistent with the Article 56, UCMJ, command that punishment be based on "the nature and circumstances of the offense."

Appellant further contends that even if the continuous course of conduct doctrine is not inconsistent with Article 56, UCMJ, or R.C.M. 1001(b)(4), and has not been overruled by the CAAF, the military judge improperly applied the doctrine to admit uncharged misconduct under the circumstances of this case. Appellant contends it was error to admit the uncharged misconduct because (1) the uncharged misconduct was remote in time to the charged conduct; (2) the uncharged misconduct involved a different person; and (3) the uncharged misconduct exceeded the plain language of the charge. We are unpersuaded.

First, we find the uncharged misconduct detailed in Clip Two was not remote in time to the charged misconduct. It occurred within, or very near, the charged timeframe of "between on or about 1 August 2021 and on or about 5 October 2021." In Clip Two, Appellant asserted she sold the alprazolam to Mr.

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[6] We also note the inclusion in R.C.M. 1001(b)(4) of this type of aggravation evidence was in effect when Congress recently enacted the current version of Article 56, UCMJ, as part of the Military Justice Act of 2016. *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5301, 130 Stat. 2000, 2919–21 (2016). The "new" Article 56 did not circumscribe aggravation evidence as an appropriate sentencing consideration. *See United States v. Tyler*, 81 M.J. 108, 113 (C.A.A.F. 2021) (citations omitted) ("We assume that Congress is aware of existing law when it passes legislation.").

D in "August, late July." That transaction was somewhat removed from the late September alprazolam distribution that Appellant detailed during her guilty-plea inquiry, but no more remote than the instances of uncharged misconduct upheld in *Shupe* (where uncharged misconduct occurred weeks to months apart from the charged misconduct), and nowhere near as remote as the uncharged misconduct rejected in *Hardison* (where uncharged misconduct occurred three years earlier than charged misconduct).

Appellant also contends admission of the uncharged misconduct in this case was inappropriate because it involved a different recipient of the illicit drugs than the charged misconduct. Our superior court has, in some cases, observed that the "victims" of the charged and uncharged misconduct were the same. *See, e.g.*, *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001); *Mullens*, 29 M.J. at 400. But the CAAF has not *required* that aggravation evidence of uncharged misconduct involve precisely the same persons as the charged misconduct to be admissible under R.C.M. 1001(b)(4). In fact, as the CMA expressly noted in *Shupe*, the aggravation evidence of additional misconduct involved sales of lysergic acid diethylamide (LSD) to "numerous buyers." 36 M.J. at 436. In *Ross*, the CMA upheld admission of aggravation evidence showing the appellant altered dozens of enlistment aptitude tests (*i.e.*, different persons' tests) even though he pleaded guilty to altering only four. 34 M.J. at 187. Here, the uncharged misconduct involved sale of two tablets of alprazolam, the same drug Appellant had just pleaded guilty to selling. The uncharged sale was not to the same buyer of the charged alprazolam distribution, but was to Mr. D, to whom Appellant had just admitted selling a different drug, and the sale occurred at the same location where the charged sale of cocaine to Mr. D took place. Under the circumstances of this case, the fact that the buyer of the uncharged distribution of alprazolam was different than the buyer in the charged distribution of alprazolam does not remove the uncharged distribution from the scope of a "directly related" offense.

Finally, Appellant asserts "any uncharged misconduct relating to selling additional [alprazolam] pills was not 'resulting from' or 'directly relating' to 'the offense' because it goes above and beyond the charge itself." Appellant's contention that the uncharged misconduct "exceeded the plain language of the charge" amounts to a redundant assertion that the uncharged misconduct is, in fact, uncharged misconduct. The Government does not argue to the contrary and we find this assertion requires no further analysis.

The military judge's findings of fact are supported by the evidence and his application of the correct legal principles was not clearly unreasonable. Though the military judge did not cite specific cases by name when he ruled in favor of admitting Clip Two under R.C.M. 1001(b)(4), he described our superior court's precedent regarding a "continuous course of conduct" in *Ross*, 34 M.J. at 187,

described *supra*, and *Shupe,* 36 M.J. at 436. In *Shupe*, the CMA noted the aggravation evidence established the conduct to which the appellant pleaded guilty was not isolated but part of "an extensive and continuing scheme" to sell illegal drugs. 36 M.J. at 436. The same can be said of the uncharged misconduct in this case. We conclude the military judge did not abuse his discretion in admitting Clip Two as uncharged misconduct under R.C.M. 1001(b)(4) or in determining the evidence satisfied Mil. R. Evid. 403.

B. Firearms Prohibition

The staff judge advocate's indorsement to the Statement of Trial Results indicates Appellant's conviction triggered a "[f]irearm [p]rohibition" under 18 U.S.C. § 922. Appellant asks this court to assess whether 18 U.S.C. § 922 is constitutional when the triggering offenses were non-violent. We decline to undertake such an assessment in this case. In reviewing appeals under Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3), this court "may act only with respect to the findings and sentence as entered into the record." Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1). This court held in *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), the 18 U.S.C. § 922 firearm prohibition was not a finding or part of the sentence; accordingly this court lacks authority under Article 66, UCMJ, to direct modification of that portion of the staff judge advocate's indorsement to the Statement of Trial Results. We do not read *United States v. Lemire,* 82 M.J. 263 n* (C.A.A.F. 2022) (unpub. op.), to provide a basis to consider Appellant's claim, as Appellant suggests, when in that case the CAAF merely directed the court-martial promulgating order "be corrected."

C. Sentence Severity

1. Law

We review issues of sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006) (footnote omitted).

This court "may affirm only . . . the sentence or such part or amount of the sentence, as [it] finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(d)(1), UCMJ. Courts "assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Sauk*, 74 M.J. 594, 606 (A.F. Ct. Crim. App. 2015) (en banc) (per curiam) (alteration in original) (citation omitted). Although this court has broad discretion in determining whether a particular sentence is appropriate, and Article 66, UCMJ, empowers us to "do justice," we have no authority to "grant mercy" by engaging in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010) (citation omitted).

A plea agreement with the convening authority is "some indication of the fairness and appropriateness of [an appellant's] sentence." *United States v. Perez*, No. ACM S32637 (f rev), 2021 CCA LEXIS 501, at *7 (A.F. Ct. Crim. App. 28 Sep. 2021) (unpub. op.) (footnote omitted); *see also United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (an "accused's own sentence proposal is a reasonable indication of its probable fairness to him" (citations omitted)).

2. Analysis

Appellant's claim that her sentence is inappropriately severe rests primarily on her assertion of prior traumas in her life and the fact that she deployed to the Middle East. Appellant does not detail which aspect(s) of her sentence are inappropriately severe, but instead suggests that based on this "strong evidence in mitigation and extenuation," this court should "reduce her sentence." Under the specific facts of this case, Appellant's arguments for a reduced sentence are more a request for clemency than an appeal of sentence severity.

In her plea agreement, Appellant agreed that a bad-conduct discharge "must" be adjudged, that a minimum of 205 days and maximum of 490 days of confinement "must" be adjudged, and that a reprimand, rank reduction, and forfeiture of all pay allowances "may" be adjudged. Having enjoyed the benefits of her plea agreement, including a cap on confinement and the withdrawal and dismissal with prejudice of multiple specifications, Appellant now seeks to convince us the punishment she received, which is well within the range of punishment to which she agreed in her plea agreement, is "inappropriately severe." We are not convinced.

Appellant was convicted of committing numerous drug crimes on behalf of, and in active participation with, a criminal gang. Two of these drug distributions were to an active-duty Air Force member, and one occurred in public view while that Airman was in uniform. After carefully considering Appellant, the nature and seriousness of the offenses, the particularized extenuating and mitigating evidence, and all the other matters in the record of trial, we conclude Appellant's sentence is not inappropriately severe.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and 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 the sentence are **AFFIRMED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court