**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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**UNITED STATES**,

*Appellee*,

v.

**CARSON C. CONWAY**
Captain (O-3),
United States Air Force,
*Appellant*.

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USCA Dkt. No. 24-XXXX/AF

Crim. App. Dkt. No. ACM 40372 (f rev)

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# SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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## Issues Presented

**I.**

**WHETHER A PLEA AGREEMENT REQUIRING A DISMISSAL RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.**

**II.**

**WHETHER THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE ARGUED DISMISSED OFFENSES TO INCREASE CAPTAIN CONWAY'S SENTENCE.**

**III.**

**WHETHER 18 U.S.C. § 922 CAN CONSTITUTIONALLY APPLY TO CAPTAIN CONWAY, WHO STANDS CONVICTED OF A NONVIOLENT OFFENSE, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION" UNDER *N.Y. STATE RIFLE & PISTOL ASS'N V. BRUEN*, 597 U.S. 1 (2022).**

## Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ),

10 U.S.C. § 866(d).[1] 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 February 22, 2022, at a general court-martial at Laughlin Air Force Base (AFB), Texas, a military judge convicted Appellant, Captain (Capt) Carson C. Conway, consistent with his pleas, of one specification of wrongful distribution of intimate visual images in violation of Article 117a, UCMJ, 10 U.S.C. § 917a (2018), and one specification of recklessly filling out a form in connection with the acquisition of a firearm in violation of Article 134, UCMJ, 10 U.S.C. § 934 (2018). (Entry of Judgment (EOJ).) The military judge sentenced Capt Conway to a dismissal, five months' confinement, and a reprimand. (*Id.*) The convening authority took no action on the findings or sentence. (Convening Authority Decision on Action.)

## Statement of Facts

Capt Conway, who grew up in the shadow of Robins AFB, completed the Air Force Reserve Officer Training Corps (ROTC) program at Georgia Tech and entered active duty in 2012. (Def. Ex. B; Pros. Ex. 3.) He

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

graduated pilot training and served five combat deployments across the globe as a U-28 pilot. (Def. Ex. B.) He volunteered to become an instructor pilot at Laughlin AFB to help the next generation of aviators. (Def. Ex. B at 2.) There, he met MV, another instructor pilot, in March 2020. (Pros. Ex. 1.) They became close, and Capt Conway admitted feelings for MV. (Def. Ex. B at 1.)

***Wrongful Distribution of Intimate Visual Images***

In December 2020, after MV told Capt Conway she no longer wanted to have personal communications, Capt Conway complained to a mutual friend that MV had led him on. (Pros. Ex. 1 at 2.) He sent the mutual friend two nude pictures of MV and stated that MV sent him the pictures. (*Id.*) At approximately the same time, Capt Conway sent the same two photographs to another mutual friend. (Def. Ex. B at 3.) The Air Force Office of Special Investigations (OSI) interviewed Capt Conway and showed him four pictures of MV; he asserted that she sent each to him over Snapchat in July 2020. (Pros. Ex. 1 at 3.) OSI conducted forensic analysis, which showed the photographs appeared on Capt Conway's phone on September 9 and November 7, 2020, both dates

when MV was out of town. (*Id.* at 4.) Capt Conway had access to MV's home, as he cared for her cats. (*Id.*)

Capt Conway pleaded guilty to one specification of wrongful distribution of intimate visual images under Article 117a, UCMJ. At no point did he admit how he obtained the photographs. As part of a plea agreement, the convening authority withdrew and dismissed specifications under Article 133, UMCJ, 10 U.S.C. § 933, which addressed the circumstances of obtaining and possessing the photographs. (EOJ; App. Ex. IX at 2.)

***Reckless Completion of ATF Form 4473***

By August 17, 2021, the convening authority had already referred three charges against Capt Conway. (Pros. Ex. 1 at 5; Charge Sheet.) On September 6, 2021, Capt Conway purchased a lower receiver for an AR-15. (Pros. Ex. 1 at 5.) When he did so, he responded "no" on the ATF Form 4473, which asked if he was a military member with a violation of the UCMJ that was referred to court-martial. (*Id.*) The Government charged Capt Conway with a violation of federal law (18 U.S.C. § 922(a)(6), which forbids knowing false statements in connection with firearms purchases) through clause 3 of Article 134, UCMJ. (Charge

Sheet.) However, he only pleaded guilty to recklessly filling out the ATF Form 4473 and that such conduct tended to discredit the armed forces. (EOJ; R. at 44–51.)

***The AFCCA Affirmed the Findings and Sentence***

Before the AFCCA, Capt Conway challenged, among other things, the validity of his mandatory dismissal provision, improper argument from the trial counsel, and whether his firearms restrictions pass constitutional muster. Appendix A at 2–3. The AFCCA affirmed the findings and sentence. Appendix A at 15.

**Reasons to Grant Review**

This case presents three compelling bases to grant review: mandatory dismissal provisions in plea agreements, improper argument where trial counsel uses a dismissed offense to argue greater punishment for the remaining offenses, and automatic lifetime firearms restrictions resulting from such nonviolent offenses as Capt Conway's.

First, this case offers the opportunity to address an ongoing plea agreement practice that limits appellants' rights: mandatory dismissals not otherwise required by statute. This novel provision runs afoul of the principle that a plea agreement may not violate public policy or strip the

accused of the right to complete sentencing proceedings. Where a plea agreement eliminates discretion on a critical aspect of the sentence—the dismissal—the process becomes an "empty ritual" that this Court warned about in *United States v. Davis*, 50 M.J. 426 (C.A.A.F. 1999). The AFCCA has repeatedly blessed the practice of accepting plea agreements which include a mandatory dismissal when the offense itself does not require a mandatory dismissal. Appendix A at 6 (collecting cases); *see, e.g.*, *United States v. Geier*, No. ACM S32679 (f rev), 2022 CCA LEXIS 468, at *13 (A.F. Ct. Crim. App. Aug. 2, 2022), *rev denied*, 83 M.J. 86 (C.A.A.F. 2022) (Appendix B). Only this Court can corral this detrimental practice. *See* C.A.A.F. R. 21(b)(5)(A).

Second, the trial counsel, during sentencing argument, leaned heavily into dismissed offenses relating to *how* Capt Conway obtained the images in question. In so doing, the trial counsel violated two key principles. The first is that an accused is sentenced for the offenses of which they are convicted, not other acts that were once on the charge sheet. It also devalues the purpose of a plea agreement if the Government can simply argue for a sentence based on the dismissed offenses. In its opinion, the AFCCA found that reasonable inferences

supported the argument. This Court should grant review to clarify that "reasonable inferences" cannot circumvent the guardrails on sentencing argument that this Court has established.

Finally, Capt Conway is one of many cases raising the important issue of automatic firearms restrictions based only on the maximum punishment of the offenses. 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 here the Government decided that a lifetime firearms ban applies to Capt Conway without "demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 579 U.S. at 24. Capt Conway stands convicted of wrongful distribution of intimate digital images and recklessly filling out a form. But now must face the same lifetime firearms ban as violent criminals. This is impermissible under *Bruen*. And while this Court in *United States v. Williams*, ___ MJ ___, 2024 CAAF LEXIS 501, at *14–15 (C.A.A.F. Sep. 5, 2024), held that a CCA cannot modify a Statement of Trial Results (STR) in similar circumstances, the question remains open whether this Court may do so under Article 67, UMCJ.

## Argument

### I.

### A PLEA AGREEMENT REQUIRING A DISMISSAL RENDERS THE SENTENCING PROCEEDING AN "EMPTY RITUAL" AND THUS VIOLATES PUBLIC POLICY.

### Additional Facts

The plea agreement required the military judge to adjudge a dismissal. (App. Ex. IX at 2, ¶ 4.) She discussed the provision at some length, including asking Capt Conway directly if he agreed to the provision. (R. at 60–62.) The other terms required the military judge to issue a sentence to confinement between two and six months, with each specification served concurrently. (App. Ex. IX at 2, ¶ 4.)

### Standard of Review

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

### Law and Analysis

#### *1. Legal framework for assessing plea agreements.*

A plea agreement may require either an accused or the convening authority to fulfill promises or conditions unless barred by relevant legal

provisions. R.C.M. 705(a)-(c). The agreement may contain a minimum punishment, maximum punishment, or both. R.C.M. 705(d). Yet the terms cannot be contrary to law or public policy, R.C.M. 705(e)(1), such as those that "interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." *United States v. Cassity*, 36 M.J. 759, 762 (N.M.C.M.R. 1992) (citations omitted).

It is the military judge's "responsibility to police the terms of pretrial agreements to insure compliance with statutory and decisional law as well as adherence to basic notions of fundamental fairness." *United States v. Partin*, 7 M.J. 409, 412 (C.M.A. 1979) (citation omitted). "To the extent that a term in a pretrial agreement violates public policy, it will be stricken from the pretrial agreement and not enforced." *United States v. Edwards*, 58 M.J. 49, 52 (C.A.A.F. 2003) (citing *United States v. Clark*, 53 M.J. 280, 283 (C.A.A.F. 2000); R.C.M. 705(c)(1)(B)).

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

The mandatory dismissal provision of the agreement is contrary to public policy and requires severance from the plea agreement. "A fundamental principle underlying this Court's jurisprudence on pretrial

agreements is that 'the agreement cannot transform the trial into an empty ritual.'" *Davis*, 50 M.J. at 429 (citing *United States v. Allen*, 25 C.M.R. 8, 11 (C.M.A. 1957)).

The mandatory dismissal term hollowed out the presentencing proceeding and deprived Capt Conway of his opportunity to secure a fair and just sentence. While addressing a different issue, *United States v. Libecap* provides helpful insight for this case. There, the Coast Guard Court of Criminal Appeals (CGCCA) addressed a pretrial agreement that required the accused to request a punitive discharge. 57 M.J. 611, 615 (C.G. Ct. Crim. App. 2002). The court wrote that "whether or not to impose a punitive discharge as a part of the sentence in a court-martial is always a significant sentencing issue, and often is the most strenuously contested sentencing issue." *Id.* at 616. While the provision at issue still allowed the presentation of a complete presentencing case, the CGCCA believed the request for a bad-conduct discharge undercut any presentation. The court wrote:

> [W]e are convinced that although such a sentencing proceeding might in some sense be viewed as complete, the requirement to request a bad conduct discharge would, in too many instances, largely negate the value of putting on a defense sentencing case, and create the impression, if not the reality, of a proceeding that was little more than an

> empty ritual, at least with respect to the question of whether a punitive discharge should be imposed. Therefore, we conclude that such a requirement may, as a practical matter, deprive the accused of a complete sentencing proceeding.

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

Requiring the request for a punitive discharge, like the *mandatory* dismissal here, "create[s] the impression, if not the reality, of a proceeding that was little more than an empty ritual." *Id.* at 616. This presentencing session was, for all intents and purposes, the "empty ritual"—where the result is a foregone conclusion—prohibited by *Allen*, *Davis*, and their progeny. *Davis*, 50 M.J. at 429; *Allen*, 25 C.M.R. at 11. If it violates public policy to require a *request* for a punitive discharge, it violates public policy to mandate the result.

***3. A mandatory dismissal obstructs individualized sentencing.***

Court-martial sentences must be individualized; they must be appropriate to the offender and the offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). "[A] court-martial shall impose punishment

that is sufficient, *but not greater than necessary*, to promote justice and to maintain good order and discipline in the armed forces." Article 56(c)(1), UCMJ (emphasis added); R.C.M. 1002(f). Because the statute sets forth this mandate, and because Art. 53a(b)(4), UCMJ, bars plea agreement terms that are "prohibited by law," the mandatory dismissal term is unenforceable because it prevents individualized sentencing.[2] If Congress wanted to strip discretion from the sentencing authority and make such an offense bear a mandatory minimum sentence, it could have. But it did not for these Article 117a and Article 134, UCMJ, offenses. Article 56(b), UCMJ. And its choice to leave discretion to the sentencing authority means the convening authority cannot usurp that role by mandating a certain result.

The *Manual for Courts-Martial* has, for generations, cherished the concept of individualized sentencing. *Snelling*, 14 M.J. at 268. If a court-martial *shall* impose punishment that is sufficient, but not greater than

[2] This argument is premised on what the statute dictates. But even if one considers R.C.M. 705, it was not until the 2024 version of the *MCM* that the Rule explicitly allowed for a specific sentence. *Compare* R.C.M. 705(c)(2)(F) (2019 *MCM*) *with* R.C.M. 705(d)(1)(D) (2024 *MCM*) (allowing a plea agreement to contain "a specified sentence or portion of a sentence that shall be imposed by the court-martial). Thus, under the applicable version of R.C.M. 705, the provision is impermissible.

necessary, a mandatory dismissal provision impermissibly precludes the sentencing authority from determining what is sufficient, but not greater than necessary, to achieve the principles of sentencing. No one in this case knows if the military judge believed a dismissal was "not greater than necessary." All anyone knows is she was bound by the term mandating it. (R. at 61.) This Court should clarify for the field that a term that prevents the sentencing authority from adjudging a punishment that is sufficient, but not greater than necessary, violates public policy, and is inconsistent with the mandate of Article 56(c)(1), UCMJ.

***4. Conclusion***

The AFCCA has repeatedly blessed this type of provision. *See, e.g.*, *Geier*, 2022 CCA LEXIS 468, at *13. But mandatory dismissals circumscribe the sentencing process and invade the province of the court-martial. This Court should halt the practice and preserve the importance of the sentencing proceedings.

WHEREFORE, Appellant respectfully requests this Honorable Court grant his petition for grant of review.

## II.

## THE TRIAL COUNSEL COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE ARGUED DISMISSED OFFENSES TO INCREASE CAPTAIN CONWAY'S SENTENCE.

### Additional Facts

The trial counsel (TC) began his argument by telling the military judge that "[t]his case is about the accused trying to destroy [MV's] reputation." (R. at 110.) When discussing the Article 117a, UCMJ, offense, the TC asked the military judge to closely inspect photographs in Prosecution Exhibit 1 and conclude they were taken directly from MV's computer. (R. at 112.)

The TC continued to argue the circumstances of acquiring the photos, including asking the military judge to consider the other images Capt Conway potentially reviewed on MV's computer before he "st[ole]" the photograph at issue. (*Id*.) The TC speculated that Capt Conway also had to review iMessages between MV and her boyfriend to retrieve the images at issue. (R. at 113–14.) He argued there was a "huge violation of her trust and privacy" based on his own suppositions about how long Capt Conway was allegedly at MV's home. (R. at 114.) The TC then dwelled on how Capt Conway "gas light[ed]" MV when he seemed unsure

of why she decided she did not want to talk to him personally anymore. (R. at 115.) This included Capt Conway's threats to send a list to her then-boyfriend about Capt Conway's interactions with her. (R. at 116.)

The TC asked for "severe punishment" because of Capt Conway's "intent" in distributing the images, and the "vindictiveness with which he acted," which was "incredibly important." (R. at 117.) He asked the military judge to consider the threat to "ruin her relationship with her boyfriend" and "other lies he told in this continuing course of conduct to disparage her name." (*Id.*) In reviewing the aggravating facts, the TC again dwelled on "stealing the photos without her consent" and "continuing to claim things that are not true about her and him." (R. at 118.)

Defense counsel did not object to these arguments.

**Standard of Review**

Where the defense fails to object, this Court reviews for plain error. *United States v. Andrews*, 77 M.J. 393, 398 (C.A.A.F. 2018). "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 *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)).

## Law and Analysis

Despite the dismissal of numerous specifications as part of the plea agreement, the TC chose to ignore this action and invoke the conduct in the dismissed specifications to amplify punishment. This was improper.

### *1. Trial counsel improperly harnessed dismissed charges to increase Capt Conway's sentence.*

Improper argument, a facet of prosecutorial misconduct, "occurs when trial counsel oversteps the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (cleaned up). This Court's predecessor "consistently cautioned counsel to 'limit' arguments on findings or sentencing 'to evidence in the record and to such fair inferences as may be drawn therefrom.'" *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239–40 (C.M.A. 1975)).

Here, the TC focused on the facts and circumstances of dismissed offenses—those involving the manner of obtaining the pictures and the possession of those pictures—as a reason to punish Capt Conway more

severely. But it is "axiomatic that an accused must be sentenced only for the offense or offenses of which he has been found guilty." *United States v. Cantrell*, 44 M.J. 711, 714 (A.F. Ct. Crim. App. 1996). The TC asked the military judge to join in speculation about the manner that Capt Conway obtained the pictures, how many other pictures he looked at, whether he looked through iMessages, and how long he spent in the home (adding the assumption that was how they were obtained). (R. at 112–15, 117.) The TC argued that these unproven allegations represented a "huge violation of her trust and privacy." (R. at 114.)

Furthermore, the TC repeatedly focused on Capt Conway's "vindictiveness," including an unrelated threat to tell her then-boyfriend about Capt Conway's relationship with MV. (R. at 111, 115–116.) He asked for "severe punishment" because of his "intent" when distributing the images, and his "vindictiveness," which was "incredibly important." (R. at 117.) This included a threat to "ruin her relationship with her boyfriend" and "other lies he told in this continuing course of conduct to disparage her name." (*Id.*)

All of this goes beyond matters directly related to the offenses to which Capt Conway pleaded guilty; instead, it invokes the dismissed

offenses as well as uncharged conduct to magnify the gravity of the remaining offenses. The landscape for sentencing argument is based on the offenses before the court at that moment, not the offenses the trial counsel wished were still at issue.

***2. The improper argument prejudiced Capt Conway.***

Improper argument will yield relief only if the misconduct "actually impacted on a substantial right of an accused (*i.e.*, resulted in prejudice)." *Fletcher,* 62 M.J. at 178 (quoting *United States v. Meek*, 44 M.J. 1, 5 (C.A.A.F. 1996)). This Court outlined a balancing approach of three factors for assessing prosecutorial misconduct's prejudicial effect: "(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction." *Id.* at 184. When applying *Fletcher* to improper sentencing argument, this Court considers whether "trial counsel's comments, taken as a whole, were so damaging that we cannot be confident that the appellant was sentenced on the basis of the evidence alone." *United States v. Halpin*, 71 M.J. 477, 480 (C.A.A.F. 2013) (cleaned up).

The TC's misconduct was severe. His argument, from start to finish, focused heavily on matters other than the convicted offenses. The

military judge took no measures to correct the errors. And the weight of the evidence does not support the sentence adjudged—confinement of five months out of a six-month maximum and the mandatory dismissal. Taken together, the *Fletcher* factors reinforce the conclusion that that this Court "cannot be confident that the appellant was sentenced on the basis of the evidence alone." *Id.* at 480.

***3. Conclusion***

Trial counsel must argue the case before them, not the case that might have been. Argument is not a time to speculate on what might have happened to increase the gravity of the misconduct. But that is exactly what happened here. This Court should grant review to ensure that trial counsel understand the important limitation on argument. And so that the Courts of Criminal Appeals (CCAs) understand their responsibility to hold this line.

WHEREFORE, Capt Conway respectfully requests this Court grant his petition for grant of review.

## III.

## 18 U.S.C. § 922 CANNOT CONSTITUTIONALLY APPLY TO CAPTAIN CONWAY, WHO STANDS CONVICTED OF A NONVIOLENT OFFENSE, WHERE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION."

### Additional Facts

After his conviction, the Government determined that Capt Conway's case qualified for a firearms prohibition under 18 U.S.C. § 922. (EOJ.) The EOJ does not indicate which subsection applies to Capt Conway's conduct.

### 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

***1. Section 922's firearms ban cannot constitutionally apply to Capt Conway.***

Capt Conway faces a lifetime firearms ban—despite a constitutional right to keep and bear arms—for wrongful distribution of intimate images and recklessly filling out an ATF form. The Government

cannot demonstrate that such a ban, even if it were limited temporally, is "consistent with the nation's historical tradition of firearm regulation." *Bruen*, 579 U.S. at 24.

The test for applying the Second Amendment is as follows:

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

*Id.* (quoting *United States v. Konigsberg*, 366 U.S. 36, 50 n.10 (1961)).

Section 922(g)(1) bars the possession of firearms for those convicted "in any court, of a crime punishable by imprisonment for a term exceeding one year." Under *Bruen*, subsection (g)(1) cannot constitutionally apply to Capt Conway, who stands convicted of a nonviolent offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). 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. For example, under the 1926 Uniform Firearms Act, 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 (cleaned up) (citing Uniform Act to Regulate the Sale & Possession of Firearms (Second Tentative Draft 1926)). Capt Conway's conduct falls completely outside these categories. It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that Section 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was

punishable by five years confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *vacated* (U.S. Jul. 2, 2024) (remanding for further consideration in light of *United States v. Rahimi*, 602 U.S. ___, 2024 U.S. LEXIS 2714 (June 21, 2024)). Evaluating Section 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In light of *Bruen*, Section 922 is unconstitutional as applied to Capt Conway.

***2. This Court has the power to act with respect to a "judgment" by a military judge.***

This Court in *Williams* held that it was ultra vires for a CCA to modify the statement of trial results to change sex offender registry using its power under Article 66, UCMJ, 10 U.S.C. § 866 (Supp. III 2019–2022). 2024 CAAF LEXIS 501, at *14–15.[3] But this Court's authority under

[3] Capt Conway acknowledges this Court's holding in *Williams*, but nevertheless maintains his argument, for the purpose of preserving the

Article 67, UCMJ, is different, as this Court recognized. *Id.* at *10. Because this Court may act with regard to a "judgment" by a military judge, it may act to correct an entry of judgment where a CCA cannot. *See* Article 67(c)(1)(B), UCMJ (Supp. III 2019–2022). This Court left open this possibility when it wrote that, "at a minimum," it has the power under Article 67(c)(1)(B) to vacate a CCAs decision modifying an STR. *Williams*, 2024 CAAF LEXIS 501, at * 10. This case presents the vehicle to answer that question.

WHEREFORE, Appellant respectfully requests this Honorable Court grant his petition for grant of review.

Respectfully submitted,

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issue, that a CCA can modify the STR and EOJ to correct errors in applying 18 U.S.C. § 922.

# Appendix A

# UNITED STATES AIR FORCE
# COURT OF CRIMINAL APPEALS

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**No. ACM 40372 (f rev)**

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**UNITED STATES**
*Appellee*

**v.**

**Carson C. CONWAY**
Captain (O-3), U.S. Air Force, *Appellant*

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Appeal from the United States Air Force Trial Judiciary

*Upon Further Review*

Decided 19 July 2024

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*Military Judge*: Julie L. Pitvorec.

*Sentence*: Sentence adjudged 22 February 2022 by GCM convened at Laughlin Air Force Base, Texas. Sentence entered by military judge on 18 October 2022: Dismissal, confinement for 5 months, and a reprimand.

*For Appellant*: Major Matthew L. Blyth, USAF; Major David L. Bosner, USAF.

*For Appellee*: Lieutenant Colonel James Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, RAMÍREZ, and KEARLEY, *Appellate Military Judges*.

Judge RAMÍREZ delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge KEARLEY joined.

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RAMÍREZ, Judge:

In accordance with Appellant's pleas, and pursuant to a plea agreement, a general court-martial comprised of a military judge sitting alone convicted Appellant of one specification of distribution of intimate visual images, in violation of Article 117a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 917a,[1] and one specification of knowingly making a false written statement in connection with the acquisition of a firearm, in violation of Article 134, UCMJ, 10 U.S.C. § 934. Three specifications alleging conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, 10 U.S.C. § 933, were dismissed with prejudice consistent with the terms of Appellant's plea agreement. The military judge sentenced Appellant to a dismissal, confinement for five months, and a reprimand. The convening authority took no action on the findings or sentence.

Appellant raises five issues on appeal, which we reword: (1) whether omissions from the record of trial require sentencing relief or remand for correction; (2) whether a plea agreement requiring dismissal renders the sentencing procedure an "empty ritual" and violates public policy; (3) whether trial counsel committed prosecutorial misconduct during the sentencing argument; (4) whether Appellant's sentence is inappropriately severe; and (5) whether 18 U.S.C. § 922 is unconstitutional as applied to Appellant.

This case is before us a second time. In response to issue (1), on 5 December 2023 we returned the record of trial to the military judge pursuant to Rule for Courts-Martial (R.C.M.) 1112(d) to address omissions or deficiencies in the record. *United States v. Conway*, No. ACM 40372, 2023 CCA LEXIS 501, at *4 (A.F. Ct. Crim. App. 5 Dec. 2023) (unpub. op.).

The record of trial is now complete. A corrected record was re-docketed with this court on 1 March 2024. After the case was re-docketed, Appellant submitted a brief where he provided an additional issue, relating to his first issue: (6) whether the numerous omissions and delay in the Government completing the corrected record warrants sentencing relief. Appellant does not point to any prejudice for us to consider, acknowledges that the errors have been corrected, that he "has already served his confinement[,] and recognizes this [c]ourt will not erase his dismissal through *Tardif* relief." *See generally United States v. Tardif*, 57 M.J. 219(C.A.A.F. 2002). As to this additional issue, we have carefully considered whether relief for excessive post-trial delay is appropriate in the absence of a due process violation. *See id.* at 224–25. After considering the factors enumerated in *United States v. Gay*¸ 74 M.J. 736, 744

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

(A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016), we conclude it is not. We now turn our attention to Appellant's remaining issues.

We have also carefully considered issue (5). As recognized in *United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc), this court lacks the authority to direct modification of the 18 U.S.C. § 922(g) prohibition noted on the staff judge advocate's indorsement. *See also United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) (concluding that "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review").

As to the remaining issues, we find no error materially prejudicial to Appellant's substantial rights, and we affirm the findings and sentence.

## I. BACKGROUND[2]

### A. Wrongful Broadcast of Intimate Visual Images

Appellant and MV met in March 2020 at Laughlin Air Force Base (AFB), Texas, where they both served as instructor pilots. Aside from working together, they became friends and remained so until early December 2020.

At some point during their friendship, Appellant acquired nude photographs of MV without her permission. In early December 2020, he distributed the nude photos to two coworkers. On the first occasion, Appellant complained to KB, a mutual friend and instructor in the same squadron, that MV led him on. In an effort to prove his claim, Appellant sent two nude photos of MV to KB claiming that MV sent those to him. On a separate occasion, Appellant distributed nude images of MV to CL, another fellow instructor pilot from the squadron. In a Snapchat conversation where CL was attempting to dissuade Appellant from seeking a relationship with MV because MV was already in another relationship, Appellant sent two nude photographs of MV via Snapchat, implying that MV sent the photographs to Appellant because she was interested in Appellant and not in her boyfriend.

MV found out from friends that Appellant was sending them her nude photos. MV then confronted Appellant by text message and told him that he was no longer allowed to communicate with her on a personal level because on multiple occasions he had crossed the boundaries she established. Appellant responded claiming that he did not know what she was referring to, that it was MV who was trying to cover up that she had feelings for Appellant, that he would be telling MV's boyfriend about them, that she "essentially" cheated on

[2] The following facts in this section are derived from the stipulation of fact and Appellant's guilty plea inquiry.

her boyfriend, that it was Appellant who asked for space from MV, and that she made "stuff up in [her] head" as to what he had done. During his unsworn statement, Appellant admitted that it was he who developed "emotional feelings" for MV.

During the criminal investigation into Appellant's actions, the Government obtained search authorization for Appellant's phone, which contained the two photographs he sent via Snapchat along with seven more photographs of MV and photos of her lingerie and other intimate items. According to MV, she kept the intimate items at home, either hidden in a closet behind the door frame or in a closed box under her bed. MV never consented to Appellant having the photos and she did not know how Appellant obtained them. According to MV, she had only shared her nude photos with her boyfriend.

Although the trial transcript and the stipulation of fact do not expressly describe how Appellant acquired the nude photos, we note that the record is clear on the following four points: (1) Appellant had access to MV's home because he looked after her cats while she was away; (2) MV kept the nude photos on her laptop, which was in her home and not password protected; (3) the dates when the nude photos appeared on Appellant's phone coincided with dates when MV was out of town; and (4) Appellant possessed these photographs on his phone without MV's permission and distributed those photographs without her consent.

**B. Reckless Completion of Firearms Transaction Record**

After Appellant was charged with specifications related to unlawful broadcasting, and the charges were referred to a general court-martial, he requested permission from his unit to retrieve his voluntarily surrendered personal firearms from the armory. The request was denied. Appellant then attempted to purchase a firearm. As part of the process of filling out the firearms transaction record form, Appellant was asked: "Are you under indictment or information in any court for a felony, or any other crime for which the judge could imprison you for more than one year, or are you a current member of the military who has been charged with violation(s) of the Uniform Code of Military Justice and whose charge(s) have been referred to a general court-martial?" Appellant responded, "No."

After providing his answers on the form in connection with acquiring a firearm, Appellant was required to read a disclaimer and acknowledge that if he had answered "Yes" to the question, indicated *supra*, he would have been "prohibited from receiving or possessing a firearm" and "that making any false oral or written statement is a crime punishable as a felony under Federal law, and may also violate State and/or local law." Appellant signed and dated the form and then presented his military identification card to prove his identity.

The Federal Bureau of Investigation's National Instant Criminal Background E-Check System identified Appellant as ineligible to receive the firearm, and the information regarding this attempted transaction was conveyed to investigators at Laughlin AFB. Appellant's response formed the basis of his conviction for recklessly completing a firearms form, which conduct was of a nature to discredit to the armed forces, in violation of Article 134, UCMJ.

## II. DISCUSSION

### A. The Plea Agreement as an "Empty Ritual"

Appellant argues that the mandatory dismissal provision of his plea agreement is contrary to public policy because the "term hollowed out the presentencing proceeding and deprived [him] of his opportunity to secure a fair and just sentence." As explained below, we disagree.

#### 1. Additional Background

Appellant entered into a plea agreement with the convening authority. Part of the plea agreement stated the military judge would sentence Appellant to a dismissal. According to the agreement, Appellant acknowledged that the provisions of the plea agreement were in his best interest; that his defense counsel explained the plea agreement to him; that no one forced him into the plea agreement; and that he could withdraw from the plea agreement at any time before the sentence was announced.

Additionally, during the guilty plea inquiry, trial counsel asked the military judge to discuss the mandatory dismissal provision of the plea agreement with Appellant. The military judge first asked Appellant if he understood that pursuant to the plea agreement between Appellant and the convening authority, the military judge would be required to sentence him to a dismissal from the Air Force. Appellant answered that he understood both the mandatory dismissal provision and how a dismissal is one of the most severe punishments that could be adjudged an officer. Furthermore, Appellant acknowledged it was in his best interest to agree to the provision of the plea agreement mandating dismissal in exchange for the benefit of a "confinement cap." Appellant concluded that no one forced him into that provision of the agreement. Appellant did not raise any allegation of ineffective assistance of counsel pertaining to his counsel's advice as to the plea agreement, either at trial or now on appeal.

#### 2. Law

We review questions of interpretation of plea agreements de novo. *See United States v. Lundy*, 63 M.J. 299, 301 (C.A.A.F. 2006) (citation omitted);

*United States v. Cron*, 73 M.J. 718, 729 (A.F. Ct. Crim. App. 2014) (citation omitted).

An accused and a convening authority may enter into an agreement which includes limitations on the sentence that may be adjudged. Article 53a(a)(1)(B), UCMJ, 10 U.S.C. § 853a(a)(1)(B); R.C.M. 705(b)(2)(E). Specifically, a plea agreement which limits the sentence may contain a specified sentence or portion of a sentence that shall be imposed by the court-martial. R.C.M. 705(d)(1)(D); *United States v. Hunter*, 65 M.J. 399 (C.A.A.F. 2008); Article 53a (a)(1)(B), (d), UCMJ.

"This court has adopted the principle that terms in a pretrial agreement are contrary to public policy if they interfere with court-martial fact-finding, sentencing, or review functions or undermine public confidence in the integrity and fairness of the disciplinary process." *United States v. Kroetz*, No. ACM 40301, 2023 CCA LEXIS 450, at *8–9 (A.F. Ct. Crim. App. 27 Oct. 2023) (unpub. op.) (alteration, internal quotation marks, and citation omitted), *rev. denied*, __ M.J. __, No. ACM 40301, 2024 CAAF LEXIS 230 (C.A.A.F. 25 Apr. 2024).

**3. Analysis**

Different panels of this court have dealt with the issue of whether a plea agreement requiring a punitive discharge renders the sentencing procedure an empty ritual and thus violates public policy. We highlight four opinions where this court found that a plea agreement requiring a punitive discharge does not render the sentencing procedure an empty ritual and, as such, does not violate public policy: *United States v. Reedy*, No. ACM 40358, 2024 CCA LEXIS 40, at *13–14 (A.F. Ct. Crim. App. 2 Feb. 2024) (unpub. op.); *Kroetz*, unpub. op. at *17–18; *United States v. Walker*, No. ACM S32737, 2023 CCA LEXIS 355, at *2–3 (A.F. Ct. Crim. App. 21 Aug. 2023) (unpub. op.) (citation omitted); *United States v. Geier*, No. ACM S32679 (f rev), 2022 CCA LEXIS 468, at *13 (A.F. Ct. Crim. App. 2 Aug. 2022) (unpub. op.), *rev. denied*, 83 M.J. 86 (C.A.A.F. 2022). We generally agree with the analysis and holdings of each.

Appellant's plea agreement term regarding a dismissal was not prohibited by law or public policy as it did not deprive Appellant of his opportunity to secure a fair and just sentence, nor did it render the sentencing proceeding an "empty ritual." Therefore, no relief is warranted.

**B. Improper Sentencing Argument**

Appellant claims trial counsel "improperly harnessed dismissed charges to increase [his] sentence." He points to several phrases trial counsel used during the sentencing argument to claim that trial counsel was basing the argument on specifications that had been dismissed. We disagree.

**1. Additional Background**

Pursuant to the plea agreement, three specifications alleging conduct unbecoming an officer and a gentleman, in violation of Article 133, UCMJ, were dismissed with prejudice. The specifications alleged that Appellant: (1) wrongfully possessed intimate visual images of MV without her knowledge or consent; (2) wrongfully obtained visual images of intimate personal effects of MV without her knowledge or consent; and (3) wrongfully attempted to purchase a firearm while being prohibited from making such purchase.

Appellant pleaded guilty to knowingly, wrongfully, and without the explicit consent of MV, (1) distributing intimate visual images of MV, on divers occasions, when he knew or reasonably should have known that the visual images were made under circumstances in which MV retained a reasonable expectation of privacy regarding any distribution of the visual images; (2) when he knew or reasonably should have known that the distribution of the visual images was likely to cause harm, harassment, intimidation, or emotional distress, or to harm MV substantially with respect to her health, safety, career, reputation, or personal relationships; and (3) which conduct, under the circumstances, had a reasonably direct and palpable connection to a military mission or military environment. Appellant also pleaded guilty to recklessly and untruthfully completing a form in connection with the acquisition of a firearm from a licensed firearm dealer, and that the conduct was of a nature to bring discredit upon the armed forces. The military judge comprehensively covered this issue on the record.[3]

During presentencing proceedings, Appellant made an unsworn statement. In his statement, Appellant explained that he had "emotional feelings" for MV and by sending the nude photos of her to their co-workers, he violated her trust and caused her embarrassment and emotional distress.

JL, MV's boyfriend and a fellow pilot, testified in presentencing. He explained that by sending nude photos of MV, Appellant caused harm to MV's reputation. JL emphasized that the fighter pilot community is very small, and the news of what Appellant did spread throughout more than one military installation. Specifically, the talk of MV's nude photos "quickly traveled around the F-16 community" in the context of what Appellant alleged, namely that MV

[3] Pursuant the plea agreement, Appellant pleaded guilty by exceptions and substitutions to recklessly completing a firearms form which conduct was of a nature to bring discredit upon the armed forces, in violation of Article 134, UCMJ. He did not plead guilty to the original charge of knowingly making a false written statement which was intended or likely to deceive the dealer and was material to the lawfulness of the sale or disposition of the firearm in violation of 18 U.S.C. § 922(a)(6), an offense not capital, also in violation of Article 134, UCMJ.

cheated on JL with Appellant. JL continued, "This [had] a material impact on [MV's] mental health," and made her feel like her squadron turned against her, a feeling which caused MV to "cr[y] almost every night."

Appellant takes issue with multiple phrases trial counsel used in his sentencing argument. Specifically, he argues that trial counsel used the dismissed specifications to justify the sentence. We have italicized those portions of trial counsel's sentencing argument that Appellant highlights as improper argument. At the beginning of the argument, trial counsel stated:

> *This case is about [Appellant] trying to destroy [MV's] reputation*, because she had the audacity to be an adult woman who said no. She told him she did not want to participate with him, and he reacted by destroying and trying to destroy her reputation by sending images to people in her community, in the pilot community, in the instructor pilot community, to destroy her reputation.

As it relates to how Appellant may have obtained the photographs, trial counsel argued:

> Your Honor, pay close attention to the photographs specifically, and you have the redact -- the unredacted photographs in attachment three. That's the digital version. Attachment two has the redacted version, but pay attention to these. When he takes these photographs these photographs don't look like others. These photographs have lines on them. Use your common sense, knowledge of the ways of the world. That means they were taken -- he photographed them. You can see in the first image there's the black line, because he photographed the images. You see the lines in them.
>
> . . . .
>
> Your Honor, I request that you go and specifically look at the blown up version of her computer where he got that photograph of [MV] and her then boyfriend, [ ] and look through the images -- the other kinds of images [Appellant] had to look through to *steal* that photo -- to take that photograph.
>
> . . . .
>
> He got those from [MV] 12 hours later while she was in San Antonio. 12 hours later. What does that mean? He was either at her house for at least 12 hours, or did he enter her house when they weren't speaking, and then left, and then came back 12 hours later. *That is a huge violation of her trust and her privacy*.

As it relates to the phrase "gaslighting," Appellant claims that it was improper for trial counsel to argue:

> [MV] ends any sort of friendship with him. How does [Appellant] respond? He gas lights [sic] her. He explains I have no idea what you're referring to. He also threatens her and says he's going to send this list of every interaction they've had that is essentially her cheating.

Finally, Appellant takes issue with the reasoning behind trial counsel's request for severe punishment.

> [Appellant's] *intent* here of distributing those images, the *vindictiveness* with which he acted is incredibly important, and that deserves a *severe punishment*.
>
> . . . .
>
> As you look at the *intent*, Your Honor, please look at all of the attachments to the stipulation and consider his threat to [MV] to ruin her relationship with her boyfriend by sending the list, his claim to prove up his intimacy with the two when he sent them the images.
>
> . . . .
>
> As you look to the aggravating facts this is a course over months what he did. *Stealing the photos without her consent*, sending the photos, *continuing to claim things that are not true about [MV] and him*. That's why he deserves confinement to the maximum amount possible.

Trial defense counsel did not object during any part of trial counsel's argument which Appellant now raises as an appellate issue.

**2. Law**

We review allegations of improper argument and prosecutorial misconduct de novo. *United States v. Voorhees,* 79 M.J. 5, 9 (C.A.A.F. 2019) (citation omitted). However, if the defense does not object to the argument by trial counsel, we review the issue for plain error. *United States v. Norwood*, 81 M.J. 12, 19 (C.A.A.F. 2021) (citation omitted).

To establish plain error, an "[a]ppellant has the burden of establishing (1) there was error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id.* (internal quotation marks and citation omitted). "As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim." *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006). "Appellant has the burden

of persuading this Court that there was plain error." *United States v. Barraza*[ *M*]*artinez*, 58 M.J. 173, 175 (C.A.A.F. 2003) (citation omitted).

"In his arguments, trial counsel may strike hard blows, [but] he is not at liberty to strike foul ones." *United States v. Sewell*, 76 M.J. 14, 18 (C.A.A.F. 2017) (alteration in original) (internal quotation marks and citation omitted). "[T]rial counsel [may] argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Id.* (internal quotation marks and citation omitted). "He may not, however, inject his personal opinions or inflame the factfinder's passions or prejudices." *Id.*

"Where improper argument occurs during the sentencing portion of the trial, we determine whether or not we can be confident that [the appellant] was sentenced on the basis of the evidence alone." *United States v. Pabelona*, 76 M.J. 9, 12 (C.A.A.F. 2017) (alteration in original) (quoting *United States v. Frey*, 73 M.J. 245, 248 (C.A.A.F. 2014)). "Relief will be granted only if the trial counsel's misconduct 'actually impacted on a substantial right of an accused (i.e., resulted in prejudice).'" *Frey*, 73 M.J. at 249 (C.A.A.F. 2014) (quoting *United States v. Fletcher*, 62 M.J. 175, 178 (C.A.A.F. 2005)). In assessing prejudice from improper argument, we analyze: (1) the severity of the misconduct; (2) the measures, if any, adopted to cure the misconduct; and (3) the weight of the evidence supporting the conviction. *Fletcher*, 62 M.J. at 184. In some cases, "the third factor may so clearly favor the [G]overnment that the appellant cannot demonstrate prejudice." *Sewell*, 76 M.J. at 18 (citing *Halpin*, 71 M.J. at 480).

The United States Court of Appeals for the Armed Forces (CAAF) has identified five indicators of severity: "(1) the raw numbers—the instances of misconduct as compared to the overall length of the argument; (2) whether the misconduct was confined to the trial counsel's rebuttal or spread throughout the findings argument or the case as a whole; (3) the length of the trial; (4) the length of the panel's deliberations; and (5) whether the trial counsel abided by any rulings from the military judge." *Fletcher*, 62 M.J. at 184 (citation omitted). In *Halpin*, the CAAF extended the *Fletcher* test to improper sentencing argument. 71 M.J. at 480. In assessing prejudice, the 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)).

Finally, "the argument by a trial counsel must be viewed within the context of the entire court-martial." *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F 2000). Thus, "[t]he focus of our inquiry should not be on words in isolation, but on the argument as viewed in context." *Id.* (internal quotation marks and citations omitted).

**3. Analysis**

Appellant argues that trial counsel's argument was improper because it was based on speculation, unproven allegations, and focused on Appellant's "vindictiveness." According to Appellant, "[a]ll of this goes beyond matters directly related to the offenses to which [Appellant] pleaded guilty; instead, it invokes the dismissed offenses to magnify the gravity of the remaining offenses." Since Appellant did not object to this argument, we review for plain error.

We first consider the argument concerning the trial counsel's use of the word "vindictiveness" and remark that this case is "about [Appellant] trying to destroy [MV's] reputation." By pleading guilty, Appellant admitted that he knew or reasonably should have known that by sending nude photos of MV, he would substantially harm MV's health, safety, career, reputation, or personal relationships which had a reasonably direct and palpable connection to a military mission or military environment. Appellant's stipulation of fact explains that he did not send out the nude photos of MV until he was messaging a co-worker who was attempting to dissuade Appellant from seeking a relationship with MV because MV was already in a relationship. Based on this admission, we find that trial counsel drew a reasonable inference that Appellant sent the nude photos because he was angry with MV who was in a relationship with someone else. Likewise, trial counsel drew a reasonable inference that the goal behind Appellant's actions was to affect MV's relationships and social standing. This inference was supported by testimony that MV's reputation within the fighter pilot community was, in fact, impacted across multiple military installations. We find that trial counsel's argument was based on both the evidence in the record, as well as the reasonable inferences fairly derived from the evidence. As such, we do not find error in this argument.

We next review the argument concerning trial counsel's comments regarding how Appellant may have obtained the photographs. We also find that the trial counsel's argument was a reasonable inference from the evidence. Although he never admitted to taking the photographs from MV's laptop, the evidence showed that the photos were taken from her laptop (likely photographed from her laptop screen) and were later found on Appellant's phone. The dates when the photographs appeared on Appellant's phone correspond to those days when MV was away from her home, when the laptop was at her house, and when Appellant was in her house. Therefore, we do not find error in this argument.

As to trial counsel's argument concerning Appellant "gaslighting" MV, Appellant does not explain how this was improper argument or how it related to one of the dismissed specifications. We find that trial counsel was properly

arguing evidence that was presented during Appellant's court-martial. Specifically, this argument was directly supported by the evidence in the stipulation of fact. After MV confronted Appellant about the photos, he first claimed that he had no idea what she was talking about, then told her that she made it up, in her head. He also claimed that it was actually MV who had feelings for him and that he was the one who needed space from her. Based on this, we find that trial counsel was appropriately arguing the evidence in the record. Thus, we find no error in this argument.

Finally, we consider trial counsel's request for "severe punishment." According to Appellant, "this goes beyond matters directly related to the offenses to which [Appellant] pleaded guilty; instead, it invokes the dismissed offenses to magnify the gravity of the remaining offenses." We disagree. When trial counsel argued for "severe punishment" and asked the military judge to "look at the intent," trial counsel pointed the military judge to the evidence in the record relating to the convicted offense. Trial counsel specifically stated, "As you look at the intent, Your Honor, please look at all of the attachments to the stipulation." These attachments include the text messages between Appellant and MV in which he threatens to talk to MV's boyfriend and accused her of "making stuff up in [her] head." As such, we do not find error in this argument.

Because we do not find any of the arguments improper, we do not reach the remaining two prongs of plain error analysis.

**C. Sentence Severity**

Appellant claims his sentence to a dismissal is inappropriately severe in light of: (1) the five months of confinement adjudged; (2) his contributions to the Air Force; and (3) his rehabilitative potential. We disagree.

**1. Additional Background**

Appellant points to the following matters in mitigation: Appellant served with distinction as a combat aviator; he had a critical role as part of a team that defeated ISIS in Northeast Iraq; he volunteered to take on a full deployment as opposed to a half deployment because the squadron he served had manning issues; he had no children and wanted to deploy to help others who had children; when he made mistakes, he turned them into opportunities to teach others so that these mistakes would not be repeated; and, overall, his "sentencing [evidence] reflected his six years of meritorious service with Special Operations."

The record also shows that Appellant's misconduct had a significant and deleterious effect on MV, both personally and professionally. JL, MV's boyfriend, testified that he observed the negative impact on MV stemming from

Appellant's crimes. The examples JL gave paint a picture of a young woman living in fear and distress:

> [MV] feared for her life over the last year. Starting when she left her home here in Del Rio and started living with friends out of a suitcase. She gave me her two cats for fear that [Appellant] would break into her home and try to kill them for her.

JL continued that MV "feared for her life" when she found out that Appellant unlawfully attempted to purchase a firearm; that she had elevated stress levels; and that her reputation in the fighter pilot community was negatively impacted.

For her part, MV provided a victim impact statement in which she told the military judge that not a day goes by where she does not think about what Appellant did to her. She explained that after she found out that Appellant distributed her nude photos, she "no longer felt safe in [her] own home." Even with "[a] new security system, new locks, multiple video cameras, watchful neighbors, a gun, nothing made [her] feel safe enough except leaving." She stayed with friends during the weekdays, traveled to Holloman AFB, New Mexico, almost every weekend, and never stayed in her home alone again.

MV also told the military judge that Appellant sent her nude photos to her friends; that after receiving the photos, these friends stopped talking to her and started gossiping behind her back; and that Appellant's lies "spread [and] turned the squadron that [she] held so near for so many years into hell on earth."

In her statement, MV also addressed Appellant directly:

> The extent to which you assassinated my character in the squadron and across the Air Force was horrifying. A friend from across the country at a different base told me that he had heard people talking about my nude photos. To say that I was devastated doesn't do it justice. I stopped being me. I wasn't happy to go to work. I didn't want to get out of bed. I didn't want to see anyone.

MV concluded her victim impact statement explaining that when she learned that Appellant lied during a firearm purchase, she "felt so unsafe that [she] decided to get a civilian protection order[, and that t]his has been the darkest tunnel [she has] ever faced."

**2. Law**

This court reviews issues of sentence appropriateness de novo. *See United States v. McAlhaney*, 83 M.J. 164, 166 (C.A.A.F. 2023) (citing *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006)). Our authority "reflects the unique history

and attributes of the military justice system, [and] includes . . . considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citations omitted). We may affirm only so much of the sentence as we find correct in law and fact. Article 66(d), UCMJ, 10 U.S.C. § 866(d). In reviewing a judge-alone sentencing, we "must consider the appropriateness of each segment of a segmented sentence and the appropriateness of the sentence as a whole." *United States v. Flores*, 84 M.J. 277, 278 (C.A.A.F. 2024).

"We 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 the Courts of Criminal Appeals are empowered to "do justice" we are not authorized to grant mercy. *United States v. Guinn*, 81 M.J. 195, 203 (C.A.A.F. 2021) (citation omitted). In the end, "[t]he purpose of Article 66[ ], UCMJ, is to ensure 'that justice is done and that the accused gets the punishment he deserves.'" *United States v. Sanchez*, 50 M.J. 506, 512 (A.F. Ct. Crim. App. 1999) (quoting *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988)).

R.C.M. 1003(b)(8)(A) explains that regardless of the maximum punishment specified for an offense "a dismissal may be adjudged for any offense of which a commissioned officer . . . has been found guilty."

"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) (quoting *United States v. Hendon*, 6 M.J. 171, 175 (C.M.A. 1979) (citation omitted)). When considering the appropriateness of a sentence, courts may consider that a pretrial agreement or plea agreement, to which an appellant agreed, placed limits on the sentence that could be imposed. *See United States v. Fields*, 74 M.J. 619, 625–26 (A.F. Ct. Crim. App. 2015).

**3. Analysis**

Appellant claims that the dismissal is inappropriately severe given the five months of confinement. He makes three arguments. First, he argues that he "did not publicly distribute the [nude] images [of MV] to a website or other more broadly accessible platform." Second, he argues that he had a strong sentencing case. Third, he claims he has strong rehabilitation potential.

We have considered that while awaiting his court-martial, Appellant volunteered with a local organization aiding families affected by domestic violence and sexual assault; that he attended counseling; that he acknowledged wrongdoing; Appellant's military service and deployments. We

also considered the lasting impact of the dismissal in accessing the severity of the sentence adjudged. We weigh these factors in mitigation against the lasting impact Appellant's misconduct had on MV. It is clear from the record that Appellant's crimes changed her entire life and career. Additionally, we do not find Appellant's argument that he did not post MV's nude photos on the Internet to be compelling extenuation or mitigation; the intimate nature of this crime does not make it any less severe. Appellant sent those photos to his coworkers who were also MV's coworkers and her friends, making this crime more personal compared to making these photos available to strangers.

Based on our individualized consideration of Appellant, his character, his service record, and the nature and seriousness of the offenses, we find the sentence, including the dismissal, is not inappropriate in this case.

## 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. *See* Articles 59(a), 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

# Appendix B

# *United States v. Geier*

United States Air Force Court of Criminal Appeals

August 2, 2022, Decided

No. ACM S32679 (f rev)

**Reporter**
2022 CCA LEXIS 468 *; 2022 WL 3079176

UNITED STATES, Appellee v. Craig M. GEIER, Airman Basic (E-1), U.S. Air Force, Appellant

**Notice:** NOT FOR PUBLICATION

**Subsequent History:** Petition for review filed by *United States v. Geier, 2022 CAAF LEXIS 681, 2022 WL 5123156 (C.A.A.F., Sept. 21, 2022)*

Review denied by *United States v. Geier, 2022 CAAF LEXIS 778 (C.A.A.F., Nov. 2, 2022)*

**Prior History:** **[*1]** Appeal from the United States Air Force Trial Judiciary. Upon Further Review. Military Judge: Colin P. Eichenberger (arraignment and pretrial motions); Rebecca E. Schmidt. Sentence adjudged on 4 September 2020 by SpCM convened at Mountain Home Air Force Base, Idaho. Sentence entered by military judge on 9 November 2020 and reentered on 18 November 2020: Bad-conduct discharge and confinement for 105 days.

*United States v. Geier, 2021 CCA LEXIS 46, 2021 WL 351253 (A.F.C.C.A., Jan. 29, 2021)*

## Case Summary

**Overview**
HOLDINGS: [1]-Appellant's argument that the plea agreement's provision requiring the military judge to sentence him to a bad-conduct discharge deprived him of complete sentencing proceedings failed because the plea agreement provision violated neither the Constitution nor the Uniform Code of Military Justice, nor did it run afoul of public policy under the arguments raised on appeal; [2]-The court did not diminish appellant's significant health concerns, but the court also did not find his sentence to be inappropriately severe given his extensive illegal drug use with and in the presence of other Airmen. Considering appellant, his record of service, his personal circumstances, and everything else in the record of trial, appellant's sentence to 105 days of confinement and a bad-conduct discharge was appropriate.

**Outcome**
Findings and sentence affirmed.

**Counsel:** For Appellant: Captain David L. Bosner, USAF.

For Appellee: Lieutenant Colonel Matthew J. Neil, USAF; Major Brittany M. Speirs, USAF; Mary Ellen Payne, Esquire.

**Judges:** Before JOHNSON, KEY, and ANNEXSTAD, Appellate Military Judges. Senior Judge KEY delivered the opinion of the court, in which Chief Judge JOHNSON and Judge ANNEXSTAD joined. Chief Judge JOHNSON filed a separate concurring opinion.

**Opinion by:** KEY

## Opinion

KEY, Senior Judge:

A military judge sitting as a special court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of two specifications of wrongful use of controlled substances and two specifications of dereliction of duty in violation of *Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a*, and Article 92, UCMJ, *10 U.S.C. § 892*, respectively.[1] The military judge sentenced Appellant to a bad-conduct discharge **[*2]** and confinement for 105 days. Appellant had been placed in pretrial confinement prior to his court-martial, and the military judge determined Appellant was entitled to 187 days of credit for that confinement.

Appellant's case was originally docketed with this court on 14 January 2021, however, we determined the record of trial was incomplete and returned it on 29 January 2021. *See United States v. Geier, No. ACM S32679, 2021 CCA LEXIS 46 (A.F. Ct. Crim. App. 29 Jan. 2021)*. That error was corrected, and Appellant's case was re-docketed with this court on 16 March 2021.

On appeal, Appellant raises three assignments of error: (1) whether a plea agreement provision requiring the military judge to adjudge a bad-conduct discharge is legally permissible; (2) whether Appellant received adequate sentence relief for his pretrial confinement credit; and (3) whether his sentence is inappropriately severe. Finding no error prejudicial to the substantial rights of Appellant in the case as returned to us, we affirm the findings and sentence.

### I. Background

Appellant's offenses involved him ingesting another Airman's prescription hydrocodone on one occasion in 2018, using cocaine at least 14 times between November 2019 and February 2020, and providing alcohol **[*3]** to an Airman and that Airman's wife—both of whom were 20 years old at the time. Some of Appellant's cocaine use was in the presence of other Airmen.

On 3 September 2020, Appellant entered into a plea agreement with the convening authority in which the convening authority agreed to refer Appellant's case to a special court-martial. The convening authority further agreed to dismiss a specification alleging Appellant's wrongful distribution of cocaine and a specification alleging his provision of alcohol to a third underage person. The plea agreement required the military judge to adjudge periods of confinement within specified ranges, all of which would be served consecutively, but in no event would the sentence exceed the number of days Appellant had already served in pretrial confinement.[2] The agreement also required the military judge to adjudge a bad-conduct discharge and noted, "If the provision above regarding a bad[-]conduct discharge is found to be invalid, that determination shall not affect the binding nature and enforceability of the other provisions contained herein."

In discussing the plea agreement with Appellant, the military judge initially questioned the enforceability **[*4]** of the provision requiring her to sentence Appellant to a bad-conduct discharge. After hearing the parties' views, she

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[1] One of the specifications alleging wrongful use of a controlled substance relates to an offense which occurred in 2018. The version of Article 112a, UCMJ, *10 U.S.C. § 912a*, in effect at the time is substantially identical to the version in effect at the time of Appellant's court-martial. Thus, all references to the UCMJ and the Rules for Courts-Martial are to the *Manual for Courts-Martial*, *United States* (2019 ed.).

[2] If the military judge sentenced Appellant to the maximum number of days in each range, Appellant's ultimate sentence would have equaled the number of days of pretrial confinement credit he was due.

concluded the provision violated neither the Rules for Courts-Martial nor public policy in Appellant's case, because she still retained substantial latitude with respect to other types of punishment she could adjudge. Because of this latitude, the military judge reasoned the provision did not interfere with Appellant's right to full sentencing proceedings or render his court-martial "an empty ritual."

## II. Discussion

### A. Agreement to Adjudge a Punitive Discharge

Appellant essentially argues the plea agreement's provision requiring the military judge to sentence him to a bad-conduct discharge deprived him of complete sentencing proceedings. We disagree.

We review questions of interpretation of plea agreements de novo, as such are questions of law. *See* United States v. Lundy, 63 M.J. 299, 301 (C.A.A.F. 2006) (applying de novo review to pretrial agreements). The standard is the same in our assessment of whether a plea agreement's terms violate the Rules for Courts-Martial. *See* United States v. Hunter, 65 M.J. 399, 401 (C.A.A.F. 2008) (applying de novo review in the case of pretrial agreements).

The Military Justice Act of 2016, enacted through the National Defense Authorization Act for Fiscal Year 2017, ushered in **[*5]** a number of changes to the military justice system.[3] Relevant here is the fact the law created Article 53a, UCMJ, 10 U.S.C. § 853a, an entirely new article under the Code. This article, titled "Plea agreements," explains that an accused and convening authority may enter into an agreement over various matters, to include "limitations on the sentence that may be adjudged for one or more charges and specifications." Article 53a(a)(1)(B), UCMJ, 10 U.S.C. § 853a(a)(1)(B).[4] The article requires military judges to reject any plea agreement which "is contrary to, or is inconsistent with, a regulation prescribed by the President with respect to terms, conditions, or other aspects of plea agreements." Article 53a(a)(5), UCMJ, 10 U.S.C. § 853a(a)(5).

Pursuant to the version of Rule for Courts-Martial (R.C.M.) 705 which became effective on 1 January 2019, plea agreements may include promises by convening authorities to limit the sentence which may be adjudged in a given case. R.C.M. 705(b)(2)(E). Such limits may include a limitation on the maximum punishment which may be imposed; a limitation on the minimum punishment which may be imposed; or both. R.C.M. 705(d)(1).[5] A plea agreement, however, may not deprive an accused of certain rights, to include "the right to complete presentencing proceedings." R.C.M. 705(c)(1)(B).

Under the prior version of R.C.M. 705—which addressed "pretrial agreements," as **[*6]** opposed to plea agreements—any sentence limitation constrained the convening authority in taking action, not the sentencing authority's discretion in adjudging a sentence. *See* R.C.M. 705 (b)(2)(E), *Manual for Courts-Martial*, *United States* (2016 ed.) (2016 *MCM*). Like the current version of the rule, the preceding version prohibited agreements which deprived the accused of "complete sentencing proceedings." R.C.M. 705(c)(1)(B), 2016 *MCM*. In deciding whether to accept an accused's guilty plea under the old rules, the military judge would require the disclosure of the entire agreement—with the exception of any sentence limitation in cases in which the military judge was the sentencing authority—and ensure the accused understood the agreement. R.C.M. 910(f)(3)-(4), 2016 *MCM*. Under the current rules, the military judge still ensures the accused understands the agreement, but the entirety of the plea agreement is disclosed, to include any sentence limitations. R.C.M. 910(f)(3)- (4). The sentencing authority must then sentence

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[3] Pub. L. No. 114-328, §§ 5001-5542 (23 Dec. 2016).

[4] Prior to the creation of this article, the UCMJ did not contain any provisions related to such agreements. Rather, the *Manual for Courts-Martial*'s guidance on pretrial agreements was found solely in the Rules for Courts-Martial.

[5] R.C.M. 705(d)(2) addresses plea agreement limitations on confinement and fines, while R.C.M. 705(d)(3) explains that a plea agreement "may include a limitation as to other authorized punishments as set forth in R.C.M. 1003." R.C.M. 1003(b)(8), in turn, discusses punitive separations which may be adjudged by a court-martial.

the accused in accordance with the terms of the agreement. R.C.M. 910(f)(5); R.C.M. 1005(e)(1); R.C.M. 1006(d)(6).

Even before the Rules for Courts-Martial explicitly referred to "complete sentencing proceedings," military appellate courts concluded that pretrial agreements which had the effect of transforming **[*7]** sentencing proceedings into "an empty ritual" were impermissible. *See, e.g.*, *United States v. Davis, 50 M.J. 426, 429 (C.A.A.F. 1999)* (quoting *United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8, 11 (C.M.A. 1957)*) (describing this premise as a "fundamental principle" in military jurisprudence). In arguing that his plea agreement did just that, Appellant points to *United States v. Soto*, which involved a pretrial agreement provision requiring trial defense counsel to argue in favor of a bad-conduct discharge—a provision which was not disclosed to the military judge until after the sentence was adjudged. *69 M.J. 304, 305 (C.A.A.F. 2011)*. The United States Court of Appeals for the Armed Forces (CAAF) found error because the parties failed to inform the military judge about the provision—even after he asked about the existence of any other provisions—which meant the military judge did not have the opportunity to determine whether or not the provision was fair prior to sentencing the accused. *Id. at 307*. Additionally, even when the military judge finally learned of the provision after sentencing the accused, the military judge "did not acknowledge the term . . . let alone discuss it" with the accused. *Id.* In a footnote, the CAAF explained it did not determine whether or not the provision violated R.C.M. 705(c), but cautioned military judges to "be ever vigilant in **[*8]** fulfilling their responsibility to scrutinize pretrial agreement provisions to ensure that they are consistent with statutory and decisional rules, and 'basic notions of fundamental fairness.'" *Id. at 307 n.1* (quoting *United States v. Partin, 7 M.J. 409, 412 (C.M.A. 1979)*).[6]

Appellant argues that *Soto* stands for the proposition that a provision requiring defense counsel to argue for a bad-conduct discharge is invalid, but his reading is incorrect—the ruling in *Soto* was based on the lack of judicial scrutiny of the provision by the military judge, not the validity of the provision itself.[7] *Id. at 307*. At the time of the court-martial in *Soto*, the military judge was unaware of the bad-conduct discharge provision when he sentenced the accused. This deprived the military judge of the ability to either analyze the provision's fairness or discuss it with the accused prior to sentencing him. In Appellant's case, however, the military judge was not only aware of the bad-conduct discharge provision prior to adjudging a sentence, but she discussed it with counsel for both parties as well as with Appellant himself. As a result, *Soto* does not advance Appellant's position.

Appellant also points to the United States Coast Guard Court of Criminal Appeals case of *United States* ***[*9]*** *v. Libecap* in which that court held a provision similar to the one in *Soto* was "against public policy" and therefore impermissible. *57 M.J. 611, 616 (C.G. Ct. Crim. App. 2002)*. That decision was premised on the notion that requiring an accused to argue for a punitive discharge would "always have the potential to seriously undercut any other efforts at trial to avoid a punitive discharge." *Id. at 615*. The court concluded it would "create the impression, if not the reality, of a proceeding that was little more than an empty ritual, *at least with respect to the question of whether a punitive discharge should be imposed*." *Id.* at 606 (emphasis added). *Libecap* does little to advance Appellant's argument because the ruling is based on the fact that the military judge was unaware of the pretrial agreement's sentence limitations and was still deciding whether or not to adjudge a punitive discharge. We read *Libecap* as saying the problem was the accused was required to give up his bargaining position, thereby undermining the sentencing process in place at the time, in which the accused would typically try to obtain a sentence lighter than the limitations in the pretrial agreement. Under the current rules, however, the military judge is aware of—and **[*10]** bound by—the sentence limits in the plea agreement, so the *Libecap* concerns are absent. In fact, one could rationally conclude the rules regarding plea agreements were designed for the purpose of limiting, if not eliminating, defense efforts to "beat the cap" in sentencing proceedings.

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[6] *United States v. Partin* dealt not with an impermissible pretrial agreement term, but rather the military judge's erroneous explanation of the agreement's terms. *7 M.J. 409, 412 (C.M.A. 1979)*.

[7] We offer no opinion on the validity of the provision at issue in *Soto*.

Appellant argues *Libecap* stands for the proposition that Appellant was denied constitutional due process by virtue of the plea agreement provision—which he agreed to—requiring the military judge to adjudge a bad-conduct discharge. *Libecap*, however, was not decided on constitutional grounds and makes no reference to due process at all. Instead, the opinion was grounded in notions of public policy.[8] Appellant identifies no notion of due process that would prohibit a military accused from negotiating for a specific sentence under the UCMJ provisions applicable to his court-martial, and we are aware of none. While the prior system bound convening authorities to take certain actions regarding adjudged sentences, the current system explicitly constrains military judges' and court members' sentencing discretion. Under the former system, sentencing discretion was largely unfettered, cabined only by the maximum **[*11]** sentences identified in the *Manual for Courts-Martial*. That is no longer the case, and the Rules for Courts-Martial's references to "complete sentencing proceedings" must not be read in isolation or inseparably tied to now-obsolete practices, but in conjunction with the evolution of those sentencing proceedings.

Another argument advanced by Appellant is that a plea agreement term requiring a bad-conduct discharge violates public policy. He correctly notes that laws passed by Congress are a good measure of public policy, and he points to *Article 56(c)(1), UCMJ*, which states that "[i]n general . . . a court-martial shall impose punishment that is sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces." *10 U.S.C. § 856(c)(1)*. Therefore, Appellant argues, courts-martial should be afforded maximum latitude in sentencing decisions. Somewhat undermining this theory is that this very same article requires the mandatory imposition of a dishonorable discharge for specific offenses. *See* Article 56(b), UCMJ, *10 U.S.C. § 856(b)*. Moreover, *Article 53a, UCMJ*—also an indicator of public policy—not only permits plea agreements which impose limitations on the sentence that may be adjudged, but requires sentencing authorities **[*12]** to adhere to those limits. Taking these provisions together, our assessment is that the policy established by Congress is that sentencing authorities should adjudge appropriate and non-excessive sentences, but that certain offenses require certain punishments and—in any event—those facing courts-martial are permitted to enter plea agreements which constrain military judges' or court members' sentencing discretion.

Appellant does not attempt to identify any legal basis for maximal discretion in sentencing other than by pointing to the "complete sentencing proceedings" reference in the Rules for Courts-Martial, 2016 *MCM*. While there may be sound arguments for granting military sentencing authorities broad discretion in those proceedings, we cannot say they are rooted in constitutional due process considerations. As the United States Supreme Court has explained, "Congress has the power to define criminal punishments without giving the courts any sentencing discretion." *Chapman v. United States, 500 U.S. 453, 467, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)* (citing *Ex parte United States, 242 U.S. 27, 37, 37 S. Ct. 72, 61 L. Ed. 129 (1916)*). Individualized sentencing is not derived from the United States Constitution, but from "public policy enacted into statutes." *Id.* (quoting *Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)* (plurality opinion)). In short, Congress may give and Congress may take **[*13]** away. In terms of sentencing proceedings, Congress has authorized plea agreements which involve "limitations on the sentence that may be adjudged." Given the fact Congress elsewhere in the UCMJ addresses minimum and maximum sentences, the absence of such qualifications with respect to the "limitations" in *Article 53a, UCMJ*, is strong evidence such limitations may apply to both the upper and lower ends of the punishment spectrum. We see no indication Congress intended a contrary outcome. In promulgating the current version of R.C.M. 705, it seems clear the President read *Article 53a, UCMJ*, in the same way we do. We conclude the plea agreement provision requiring a military judge or court members to sentence Appellant to a bad-conduct discharge violates neither the Constitution nor the UCMJ, nor does it run afoul of public policy under the arguments raised on appeal.

**B. Credit for Pretrial Confinement**

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[8] We recognize *Soto* and *Libecap* dealt with provisions requiring defense counsel to argue for punitive discharges while Appellant's case involves a provision binding the military judge's discretion, but both types of provisions are designed to reach the same result: a sentence including a punitive discharge.

Appellant served 187 days in pretrial confinement, and the military judge sentenced him to 105 days of confinement and a bad-conduct discharge. She announced, "The accused will be credited with 187 days of pretrial confinement against the accused's term of confinement." For the first time on appeal, Appellant argues he is entitled **[*14]** to additional sentence relief based upon the fact he had more pretrial confinement credit than he had adjudged days of confinement. Seemingly conceding that nothing in the UCMJ or the Rules for Courts-Martial calls for applying "excess" pretrial confinement credit to other elements of an adjudged sentence, Appellant attempts to compare his situation to cases involving illegal pretrial punishment credit, which may be applied against non-confinement punishments. *See, e.g.*, R.C.M. 305(k). Specifically, he argues his 82 days of "excess" credit should be applied against his punitive discharge. We disagree.

We review the application of pretrial confinement credit de novo. *United States v. Spaustat, 57 M.J. 256, 260 (C.A.A.F. 2002)*. Military members who serve pretrial confinement are entitled to day-for-day credit against their adjudged sentence. *United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984)*.

Although Appellant entered into a plea agreement which both required the military judge to adjudge a bad-conduct discharge and virtually guaranteed a "surplus" of pretrial confinement credit (unless the military judge sentenced him to the absolute maximum amount of confinement she was authorized), we will set aside the question of whether he waived this issue. In doing so, we note the same argument Appellant raises now **[*15]** was squarely rejected by the CAAF in *United States v. Smith*. *56 M.J. 290 (C.A.A.F. 2002)*. In that case, the appellant spent 94 days in pretrial confinement, but was sentenced to a bad-conduct discharge, forfeitures, reduction in grade, and three months of hard labor without confinement. *Id. at 291*. The convening authority disapproved the hard labor without confinement after the staff judge advocate encouraged him to do so under the theory such a punishment would have simply amounted to a burden on the appellant's unit.[9] *Id.* As Appellant does now, the appellant in *Smith* argued his pretrial confinement credit should be analogized to illegal pretrial punishment credit. *Id. at 292*. The CAAF rejected this argument and concluded the appellant was only entitled to credit against adjudged confinement insofar as no law, rule, or regulation required the application of credit against non-confinement elements of a sentence. *Id. at 293*. Appellant has similarly not identified any authority directing the result he seeks. We acknowledge Appellant's case is slightly different from *Smith* because Appellant was sentenced to a period of confinement. But we cannot find any logic in the proposition that a person who is sentenced to some confinement should receive **[*16]** a more favorable result than one who is not sentenced to any confinement at all.

We briefly note the fundamental difference between illegal pretrial punishment and pretrial confinement in the UCMJ context. The former involves the illegal treatment of a servicemember—that is, a legal error. Credit is granted in the case of such punishment in order to remedy the error and thereby ensure the sentence "retains its integrity" in spite of the illegality. *United States v. Larner, 24 C.M.A. 197, 1 M.J. 371, 373, 51 C.M.R. 442 (C.M.A. 1976)*. Pretrial confinement, however, involves the entirely legal proposition of confining a servicemember pending court-martial in order to ensure the servicemember's presence at trial or to prevent the servicemember from engaging in serious criminal misconduct. Thus, when pretrial confinement is properly imposed, there is no legal error to remedy, nor does its imposition raise any question about the ultimate sentence. Credit in this circumstance operates to ensure the servicemember's sentence is not inappropriately extended. *See, e.g.*, *Allen, 17 M.J. at 129* (Everett, C.J., concurring) (highlighting the risk of exceeding the maximum amount of confinement authorized by the *Manual for Courts-Martial*). This is not to say Congress or the President is prohibited **[*17]** from directing pretrial confinement credit being applied against non-confinement elements of a sentence, but they have not, and we will not institute such a practice on our own accord.

**C. Sentence Appropriateness**

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[9] Because the Rules for Courts-Martial at the time employed a ratio of one-and-a-half days of hard labor to one day of confinement, the appellant in *Smith* would have still had "excess" pretrial confinement credit had his credit been applied to the hard labor.

Appellant contends his sentence is inappropriately severe. He primarily argues this is so based upon his substantial health concerns which came to light during his military service. According to his written unsworn statement he presented at his court-martial, Appellant suffered from significant pain and other symptoms due to his medical condition, and he turned to alcohol and cocaine as a method of self-medication.

We review issues of sentence appropriateness de novo. *United States v. Lane, 64 M.J. 1, 2 (C.A.A.F. 2006)* (citation omitted). Our authority to determine sentence appropriateness "reflects the unique history and attributes of the military justice system, [and] includes but is not limited to considerations of uniformity and evenhandedness of sentencing decisions." *United States v. Sothen, 54 M.J. 294, 296 (C.A.A.F. 2001)* (citations omitted). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved on the basis of the entire record. Article 66(d), UCMJ, *10 U.S.C. § 866(d)*. "We assess sentence appropriateness by considering the particular appellant, the nature **[*18]** and seriousness of the offense[s], the appellant's record of service, and all matters contained in the record of trial." *United States v. Anderson, 67 M.J. 703, 705 (A.F. Ct. Crim. App. 2009)* (per curiam) (citations omitted). Although we have great discretion to determine whether a sentence is appropriate, we have no power to grant mercy. *United States v. Nerad, 69 M.J. 138, 146 (C.A.A.F. 2010)* (citation omitted).

We do not diminish Appellant's significant health concerns, but we also do not find his sentence to be inappropriately severe given his extensive illegal drug use with and in the presence of other Airmen. Appellant stipulated that his hydrocodone use came about when another Airman complained of the unpleasant side effects he suffered from his prescribed medication. Appellant took the opportunity to research—on the spot—whether one could get high from the pills. He then took a pill, crushed it up, and snorted it in front of several others. Later, Appellant began using cocaine once or twice a weekend for about three months, leading up to his placement in pretrial confinement. The military judge sentenced Appellant to be confined for 25 days for the hydrocodone use and 85 days for the cocaine use. During the period in which he was using cocaine, Appellant provided alcohol to an underage Airman and that **[*19]** Airman's underage wife in anticipation of the wife's 21st birthday; Appellant received no confinement time for this conduct. Considering Appellant, his record of service, his personal circumstances, and everything else in the record of trial, we conclude Appellant's sentence to 105 days of confinement and a bad-conduct discharge is appropriate.

### 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 sentence are **AFFIRMED**.

**Concur by:** JOHNSON

## Concur

JOHNSON, Chief Judge (concurring):

The opinion of the court, which I join, explains why the plea agreement provision requiring the military judge to adjudge a bad-conduct discharge did not violate Appellant's due process rights and was not contrary to public policy. The opinion of the court does not need to, and does not, decide whether a more restrictive plea agreement term—e.g., one that prescribed the entire precise sentence the military judge was bound to impose—might be unenforceable under R.C.M. 705(c)(1)(B), which prohibits plea agreement terms which deprive the accused of "the right to complete presentencing proceedings." **[*20]** However, the reasoning of the opinion might be read to *imply* that such a restrictive term would be consistent with complete presentencing proceedings. I do not agree with that proposition, and I write separately to clarify my understanding of the relationship between punishment limitations and the requirement for "complete" proceedings under R.C.M. 705.

As the opinion of the court explains, the plea agreement process created by the Military Justice Act of 2016 differs from the prior practice of creating pretrial agreements between the convening authority and the accused. In particular, there is a fundamental difference in how the two practices operate to put limits on the sentence that an accused may receive from a court-martial. In a pretrial agreement that included a limitation or "cap" on one or more forms of punishment, the convening authority agreed to approve a sentence no greater than that authorized by the cap. The sentencing authority was not made aware of the limitations before the sentence was announced. Therefore, the sentencing authority was free to adjudge any lawful sentence that they believed to be appropriate for the offenses of which the accused was convicted.

Plea agreements are significantly different **[*21]** from pretrial agreements in that they can directly constrain the punishment the sentencing authority may impose. Thus, in a plea agreement, the accused may negotiate away his or her right to have an independent sentencing authority fully exercise independent discretion to decide what, if any, punishment is appropriate for the offenses, unconstrained by any minimum punishment required by the plea agreement. Put another way, plea agreements enable the removal of the safeguard of an independent sentencing authority's judgment as to what punishments the accused's sentence should and should not include. Of course, the requirement remains that the accused enters the plea agreement voluntarily. R.C.M. 705(c)(1)(A). However, in a system where an undeniable imbalance of power exists between the Government and the accused servicemember, the substitution of a prescribed negotiated result for the independent judgment of a neutral and detached sentencing authority is potentially concerning.

Yet R.C.M. 705(c)(1)(B) still prohibits plea agreement terms that deprive the accused of, *inter alia*, "the right to complete presentencing proceedings." Certainly, the primary purpose of presentencing proceedings—including the introduction of evidence, **[*22]** the testimony of witnesses, the receipt of statements from the victim and the accused, all provided or addressed to the sentencing authority—is to enable the sentencing authority to make an informed decision on the appropriate sentence. If a specific sentence were predetermined by a plea agreement before the presentencing hearing even begins, it is difficult to avoid the conclusion that the presentencing proceeding becomes a substantially hollow exercise.

I do not purport to decide or know at what point maximum and minimum sentence limitations so constrain the military judge's discretion that they might deprive an accused of complete presentencing proceedings. But I agree the requirement to adjudge a bad-conduct discharge in Appellant's case did not cross such a line, because the military judge retained significant discretion over the other potential elements of the sentence,[*] and I agree the findings and sentence should be affirmed.

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[*] The plea agreement required the military judge to adjudge a sentence that included a bad-conduct discharge, between 0 and 77 days of confinement for wrongful use of hydrocodone, between 0 and 90 days for divers wrongful use of cocaine, and between 0 and 10 days for each of the two derelictions of duty, with the adjudged terms of confinement to be served consecutively. The plea agreement did not constrain the military judge's discretion with respect to any other form of punishment.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 4,534 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 Air Force Government Trial and Appellate Operations Division on September 12, 2024.

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