

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee,</i>	)	ENLARGEMENT OF TIME (FIRST)
)	
v.	)	Before Panel No. 1
)	
Staff Sergeant (E-5)	)	No. ACM 40464
BRIAN W. GUBICZA,)	
United States Air Force	)	5 July 2023
<i>Appellant</i>)	

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

Pursuant to Rule 23.3(m)(1) and (2) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 60 days, which will end on **14 September 2023**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 49 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Appellate Government Division on 5 July 2023.

SAMANTHA P. GOLSETH, Capt, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
1500 West Perimeter Road, Suite 1100
Joint Base Andrews NAF, MD 20762-6604

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 5 July 2023.

OLIVIA B. HOFF, Capt, USAF
Appellate Government Counsel
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	APPELLANT’S MOTION FOR
<i>Appellee,</i>	)	ENLARGEMENT OF TIME
	)	(SECOND)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>)	
	)	6 September 2023

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

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a second enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **14 October 2023**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 112 days have elapsed. On the date requested, 150 days will have elapsed.

On 23 January 2023, Appellant was tried by a general court-martial composed of a military judge alone at Beale Air Force Base, California. Consistent with his pleas, the military judge found Appellant guilty of one charge and two specifications of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ). Record of Trial (ROT), Vol. 1, Entry of Judgment (EOJ), dated 16 March 2023; Record (R.) at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. ROT, Vol. 1, Convening Authority Decision on Action, dated 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs the [EOJ]” and waived

all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. ROT, Vol. 1, EOJ at 2; *see* Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. ROT, Vol. 1, EOJ. The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant's case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant's case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

<p>UNITED STATES</p> <p style="padding-left: 40px;"><i>Appellee,</i></p> <p style="padding-left: 80px;">v.</p> <p>Staff Sergeant (E-5) BRIAN W. GUBICZA, United States Air Force, <i>Appellant.</i></p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>APPELLANT’S MOTION FOR</p> <p>ENLARGEMENT OF TIME</p> <p>(THIRD)</p> <p>Before Panel No. 1</p> <p>No. ACM 40464</p> <p>19 September 2023</p>
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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
AIR FORCE COURT OF CRIMINAL APPEALS:**

Pursuant to Rule 23.3(m)(3) and (4) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a third enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **13 November 2023**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 125 days have elapsed. On the date requested, 180 days will have elapsed.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM). Entry of Judgment (EOJ), dated 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, dated 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military

judge signs the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; *see* Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, dated 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is currently in confinement.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 19 September 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 21 September 2023.

PETE FERRELL, Lt Col, USAF
Director of Operations
Government Trial and Appellate Operations Division
Military Justice and Discipline Directorate
United States Air Force

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	(FOURTH)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>	)	6 November 2023
)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a fourth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **13 December 2023**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 173 days have elapsed. On the date requested, 210 days will have elapsed.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs

the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 14 cases pending brief before this Court. Seven cases pending before this Court currently have priority over the present case:

1. *United States v. Stanford*, No. ACM 40327 – The record of trial consists of 29 prosecution exhibits, 13 defense exhibits, and 59 appellate exhibits. The transcript is 753 pages. The appellant is not confined and his assignments of error will be filed this week.
2. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. The appellant is confined. Undersigned counsel is reviewing the record of trial and discussing potential issues with lead civilian appellate defense counsel, Mr. Scott Hockenberry.
3. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is

1233 pages. The appellant is confined and undersigned counsel will begin her review as soon as possible.

4. *United States v. George*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined.
5. *United States v. Goodwater*, No. ACM 40304 (f rev) – The record of trial consists of 18 prosecution exhibits, 5 defense exhibits, and 26 appellate exhibits. The transcript is 413 pages. The appellant is confined.
6. *United States v. Johnson*, No. ACM 40291 (f rev) – The record of trial consists of 23 appellate exhibits, 28 prosecution exhibits, and 4 defense exhibits. The transcript is 395 pages. The appellant is not confined.
7. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 November 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	(FIFTH)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>	)	6 December 2023
)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a fifth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 January 2024**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs

the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 27 clients and is presently assigned 13 cases pending brief before this Court. Four cases pending before this Court currently have priority over the present case:

1. *United States v. Kight*, No. ACM 40337 – The record of trial consists of 6 prosecution exhibits, 5 defense exhibits, 1 court exhibit, and 36 appellate exhibits. The transcript is 1068 pages. The appellant is confined. Undersigned counsel has reviewed the record and is drafting assignments of error with lead civilian appellate defense counsel for filing by or before 8 January 2024.
2. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. The appellant is confined and undersigned counsel is reviewing the record.

3. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined.
4. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 6 December 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 8 December 2023.

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40464
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Brian W. GUBICZA)	
Staff Sergeant (E-5))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 6 December 2023, counsel for Appellant submitted a Motion for Enlargement of Time (Fifth) requesting an additional 30 days to submit Appellant’s assignments of error. The Government opposes the motion.

The court has considered Appellant’s motion, the Government’s opposition, case law, and this court’s Rules of Practice and Procedure. Accordingly, it is by the court on this 8th day of December, 2023,

ORDERED:

Appellant’s Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **12 January 2024**.

Any subsequent motions for enlargement of time shall, in addition to the matters required under this court’s Rules of Practice and Procedure, include a statement as to: (1) whether Appellant was advised of Appellant’s right to a timely appeal, (2) whether Appellant was advised of the request for an enlargement of time, and (3) whether Appellant agrees with the request for an enlargement of time.



FOR THE COURT

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	(SIXTH)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>	)	4 January 2024
)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a sixth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 February 2024**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 232 days have elapsed. On the date requested, 270 days will have elapsed. Appellant was advised of his right to a timely appeal and this request for an enlargement of time. Appellant agrees with the request for an enlargement of time.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or

sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 30 clients and is presently assigned 15 cases pending brief before this Court. Three cases pending before this Court currently have priority over the present case:

1. *United States v. Donley*, No. ACM 40350 – The record of trial consists of 7 prosecution exhibits, 4 defense exhibits, 1 court exhibit, and 66 appellate exhibits. The transcript is 1233 pages. The appellant is confined and the brief on his behalf will be filed by 22 January 2024.
2. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined.

3. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' GENERAL
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time to file an Assignment of Error in this case.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 January 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>	)	APPELLANT’S MOTION FOR
	)	ENLARGEMENT OF TIME
	)	(SEVENTH)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>	)	2 February 2024
)	

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for a seventh enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **12 March 2024**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed. Appellant was advised of his right to a timely appeal and this request for an enlargement of time. Appellant agrees with the request for an enlargement of time.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or

sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 36 clients and is presently assigned 17 cases pending brief before this Court. Two cases pending before this Court currently have priority over the present case:

1. *United States v. George Jr.*, No. ACM 40397 – The record of trial consists of 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, and 22 appellate exhibits. The transcript is 779 pages. The appellant is not confined and undersigned counsel is reviewing his record and anticipates filing his assignments of error no later than 27 February 2024.
2. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 2 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES' OPPOSITION
<i>Appellee,</i>	)	TO APPELLANT'S MOTION
	)	FOR ENLARGEMENT OF TIME
v.)	
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its general opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 300 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 8 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force
Appellate Defense Division on 5 February 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,) APPELLANT’S MOTION FOR
 Appellee,) ENLARGEMENT OF TIME
) (EIGHTH)
)
) Before Panel No. 1
)
) No. ACM 40464
)
) 1 March 2024
)
)

v.)
)
Staff Sergeant (E-5))
BRIAN W. GUBICZA,)
United States Air Force,)
 Appellant.)

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

Pursuant to Rule 23.3(m)(3) and (6) of this Honorable Court’s Rules of Practice and Procedure, Appellant hereby moves for an eighth enlargement of time (EOT) to file Assignments of Error. Appellant requests an enlargement for a period of 30 days, which will end on **11 April 2024**. The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 289 days have elapsed. On the date requested, 330 days will have elapsed. Appellant was advised of his right to a timely appeal and this request for an enlargement of time. Appellant agrees with the request for an enlargement of time.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or

sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined.

Through no fault of Appellant, undersigned counsel has been working on other assigned matters and has yet to complete her review of Appellant’s case. This enlargement of time is necessary to allow undersigned counsel to fully review Appellant’s case and advise Appellant regarding potential errors. Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 30 clients and is presently assigned 17 cases pending initial brief before this Court. One (though potentially two) case(s) pending before this Court have priority over the present case:

1. *United States v. Christensen*, No. ACM 40408 – The record of trial consists of 4 prosecution exhibits, 14 defense exhibits, 3 court exhibits, and 31 appellate exhibits. The appellant is not confined.
2. *United States v. Carlisle*, Misc. Dkt. No. _____, – Undersigned counsel has been detailed to represent the real party in interest, following the Government’s notice of Article 62 appeal and anticipates this case will become her second priority based on the timing requirements of this Court’s Rules of Practice and Procedure, assuming the Government indeed files an Article 62 appeal.

Since filing Appellant's seventh enlargement of time, undersigned counsel participated in five moot arguments; drafted assignments of error in *United States v. George*, No. ACM 40397 (a case which involved 3 prosecution exhibits, 12 defense exhibits, 1 court exhibit, 22 appellate exhibits, and 779 transcript pages), filed on 27 February 2024; and drafted reply briefs in *United States v. Donley*, No. ACM 40350, filed on 28 February 2024, and *United States v. Kight*, No. ACM 40337, filed on 29 February 2024.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 1 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	UNITED STATES'
<i>Appellee,</i>	)	OPPOSITION TO APPELLANT'S
	)	MOTION FOR ENLARGEMENT
v.	)	OF TIME
)	
Staff Sergeant (E-5)	)	ACM 40464
BRIAN W. GUBICZA, USAF,)	
<i>Appellant.</i>	)	Panel No. 1
)	

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

Pursuant to Rule 23.2 of this Court's Rules of Practice and Procedure, the United States hereby enters its opposition to Appellant's Motion for Enlargement of Time.

The United States respectfully maintains that short of a death penalty case or other extraordinary circumstances, it should not take any appellant nearly a year to submit an assignment of error to this Court. If Appellant's new delay request is granted, the defense delay in this case will be 330 days in length. Appellant's nearly year long delay practically ensures this Court will not be able to issue a decision that complies with our superior Court's appellate processing standards. Appellant has already consumed almost two-thirds of the 18-month standard for this Court to issue a decision, which only leaves about 7 months combined for the United States and this Court to perform their separate statutory responsibilities. It appears that Appellant's counsel has not completed review of the record of trial at this late stage of the appellate process.

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

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 4 March 2024.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	CONSENT MOTION
<i>Appellee,</i>	)	TO EXAMINE SEALED
	)	MATERIALS
)	
v.	)	Before Panel No. 1
)	
Staff Sergeant (E-5)	)	No. ACM 40464
BRIAN W. GUBICZA,)	
United States Air Force,	)	20 March 2024
<i>Appellant.</i>)	

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

Pursuant to Rule for Courts-Martial (R.C.M.) 1113(b)(3)(B)(i) and Rules 3.1(c)(2), 23.1(b), and 23.3(f)(1) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel hereby moves this Court to permit appellate counsel to examine Attachment 3 of Prosecution Exhibit 1. This attachment was presented at trial and sealed by the military judge.

Facts

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96.

Attachment 3 of Prosecution Exhibit 1 was presented at trial and admitted into evidence. R. at 26. The military judge sealed Attachment 3 of Prosecution Exhibit 1. R. at 95.

Law

Appellate counsel may examine materials presented or reviewed at trial and sealed, as well as materials reviewed *in camera*, released to trial or defense counsel, and sealed, upon a colorable showing to the appellate authority that examination is reasonably necessary to a proper fulfillment of the appellate counsel's responsibilities under the UCMJ, the [*Manual for Courts-Martial, United States*], governing directives, instructions, regulations, applicable rules for practice and procedure, or rules of professional conduct. R.C.M. 1113(b)(3)(B)(i).

Air Force regulations governing professional duties and conduct of appellate defense counsel impose upon counsel, *inter alia*, a duty to provide “competent representation,”¹ perform “reasonable diligence,”² and to “give a client his or her best professional evaluation of the questions that might be presented on appeal...[to] consider all issues that might affect the validity of the judgment of conviction and sentence...[to] advise on the probable outcome of a challenge to the conviction or sentence...[and to] endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.”³ These requirements are consistent with those imposed by the state bar to which undersigned counsel belongs.⁴

This Court may grant relief “on the basis of the entire record” of trial. Article 66, UCMJ, 10 U.S.C. § 866. Appellate defense counsel so detailed by the Judge Advocate General shall represent accused servicemembers before this Court. Article 70, UCMJ, 10 U.S.C. § 870. This Court's “broad mandate to review the record unconstrained by appellant's assignments of error” does not reduce “the importance of adequate representation” by counsel; “independent review is not the same as competent appellate representation.” *United States v. May*, 47 M.J. 478, 481

¹ Air Force Instruction (AFI) 51-110, *Professional Responsibility Program*, Attachment 2: Air Force Rules of Professional Conduct, Rule 1.1 (11 Dec. 2018).

² *Id.* at Rule 1.3.

³ AFI 51-110, Attachment 7: Air Force Standards for Criminal Justice, Standard 4-8.3(b).

⁴ Counsel of record is licensed to practice law in California.

(C.A.A.F. 1998).

Analysis

The sealed attachment to Prosecution Exhibit 1 was presented at trial and admitted into evidence. R. at 26. It is reasonably necessary for undersigned counsel to review the sealed attachment to competently conduct a professional evaluation of SSgt Gubicza's case and to uncover all issues which might afford him relief.

The Government consents to both parties viewing Attachment 3 of Prosecution Exhibit 1.

WHEREFORE, SSgt Gubicza respectfully requests this Honorable Court grant this motion and permit examination of Attachment 3 of Prosecution Exhibit 1 contained within the original record of trial.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 20 March 2024.

Respectfully submitted,

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

**UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS**

UNITED STATES	)	No. ACM 40464
<i>Appellee</i>)	
)	
v.)	
	)	ORDER
Brian W. GUBICZA)	
Staff Sergeant (E-5))	
U.S. Air Force)	
<i>Appellant</i>	)	Panel 1

On 20 March 2024, counsel for Appellant submitted a Consent Motion to Examine Sealed Materials, requesting both parties be allowed to examine Attachment 3 to Prosecution Exhibit 1. The sealed exhibit to Prosecution Exhibit 1 was presented at trial and admitted into evidence. The court finds that the attachment was reviewed by trial and defense counsel at Appellant’s court-martial. Appellant acknowledges that the Government consents to this motion.

Appellate counsel may examine sealed materials released to counsel at trial “upon a colorable showing . . . that examination is reasonably necessary to a proper fulfillment of the appellate counsel’s responsibilities.” Rule for Courts-Martial 1113(b)(3)(B)(i), *Manual for Courts-Martial, United States* (2024 ed.).

The court finds Appellant has made a colorable showing that review of sealed materials is reasonably necessary for a proper fulfillment of appellate defense counsel’s responsibilities. This court’s order permits counsel for both parties to examine the materials.

Accordingly, it is by the court on this 21st day of March, 2024,

ORDERED:

Appellant’s Consent Motion to Examine Sealed Materials is **GRANTED**. Appellate defense counsel and appellate government counsel may view **Attachment 3 to Prosecution Exhibit 1**, subject to the following conditions:

To view the sealed materials, counsel will coordinate with the court.

No counsel granted access to the materials may photocopy, photograph, reproduce, disclose, or make available the content to any other individual without the court's prior written authorization.



FOR THE COURT

OLGA STANFORD, Capt, USAF
Commissioner

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES,	)	CONSENT MOTION FOR
<i>Appellee,</i>	)	ENLARGEMENT OF TIME
	)	(NINTH)
v.)	
	)	Before Panel No. 1
Staff Sergeant (E-5))	
BRIAN W. GUBICZA,	)	No. ACM 40464
United States Air Force,)	
<i>Appellant.</i>	)	4 April 2024
)	

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

Pursuant to Rule 23.1(b), 23.3(m)(3), and 23.3(m)(6) of this Honorable Court’s Rules of Practice and Procedure, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, hereby moves for a ninth enlargement of time (EOT) to file assignments of error because Appellant’s record of trial has not yet been served on him. The government consents to this motion. Appellant requests an enlargement for a period of 30 days, which will end on **11 May 2024**, to allow the government time to serve the Appellant with a copy of his record of trial and allow time for Appellant to consult with undersigned counsel upon receipt.¹

The record of trial was docketed with this Court on 17 May 2023. From the date of docketing to the present date, 323 days have elapsed. On the date requested, 360 days will have elapsed. Appellant was advised of his right to a timely appeal and this request for an enlargement of time. Appellant agrees with this request for an enlargement of time.

¹ The government previously attempted to serve Appellant with his copy of the record of trial, however, it appears the government utilized an incorrect address. Undersigned counsel has provided the government with the correct address for the confinement facility where Appellant is confined.

On 23 January 2023, consistent with his pleas, Staff Sergeant (SSgt) Brian W. Gubicza, Appellant, was convicted by a military judge at a general court-martial at Beale Air Force Base, California, of one charge and one specification each of possession of child pornography and distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934, *Manual for Courts-Martial, United States* (2019 ed.) (2019 MCM). Entry of Judgment (EOJ), 16 March 2023; R. at 68. On 23 January 2023, the military judge sentenced Appellant to a reprimand, reduction to the grade of E-1, confinement for 36 months, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred automatic forfeitures “until the date that the military judge signs the [EOJ]” and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. EOJ, 16 March 2023.

The record of trial consists of 3 prosecution exhibits, 23 defense exhibits, and 4 appellate exhibits. The transcript is 96 pages. Appellant is confined. Undersigned counsel has completed her review of Appellant’s case. However, Appellant has not yet been served with a copy of his record of trial and he asks for this enlargement of time in an attempt to resolve this issue and fully consult with undersigned counsel.

Pursuant to A.F. CT. CRIM. APP. R. 23.3(m)(6), undersigned counsel also provides the following information: undersigned counsel currently represents 28 clients and is presently assigned 18 cases pending initial brief before this Court. Given the time needed to ensure Appellant receives a copy of his record of trial, one case will take priority over this case.

1. *United States v. Carlisle*, Misc. Dkt. No. 2024-03 – The Government filed the record of trial and notice of its intent to appeal pursuant Article 62, UCMJ, 10 U.S.C. § 862. The Government’s supporting brief is due on 7 April 2024. Undersigned counsel represents the appellee and anticipates the appellee’s answer will be due on 27 April 2024, or sooner if the Government’s brief is filed early. In accordance with Article 62(b), UCMJ, and Rule 20(d) of this Honorable Court’s Rules of Practice and Procedure, undersigned counsel will give priority to this appeal.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested enlargement of time.

Respectfully submitted,

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

CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing was sent via email to the Court and served on the Government Trial and Appellate Operations Division on 4 April 2024.

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

military judge sentenced SSgt Gubicza to a reprimand, reduction to the grade of E-1, 36 months' confinement, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, 4 March 2023. Pursuant to the plea agreement, the convening authority deferred all automatic forfeitures "from 6 February 2023 until the date the military judge signs the Entry of Judgment" and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner, with the waiver commencing on 6 February 2023. *Id.*; see Appellate Exhibit III at 2. On 16 March 2023, the military judge entered the above findings and sentence in the entry of judgment. Entry of Judgment (EOJ), 16 March 2023.

Statement of Facts

SSgt Gubicza pleaded guilty to one specification each of possession of child pornography and distribution of child pornography. R. at 19. SSgt Gubicza admitted "during the period of January 1, 2021 and April 6, 2021, [he] utilized his cellphone and computer to download and look at files containing child pornography." R. at 30. SSgt Gubicza intentionally sought these files and knowingly kept them in his possession. R. at 30-32, 37. Further, he sent two images of child pornography to an anonymous individual that he believed to be over the age of 18 years old. R. at 43, 45. No evidence was admitted that SSgt Gubicza committed a violent offense, domestic violence offense, or drug offense.

After his conviction, the Government made the determination that SSgt Gubicza's case met the firearm prohibition under 18 U.S.C. § 922. EOJ, 16 March 2023, at 3; Statement of Trial Results, 23 January 2023, at 3. The Government did not specify why, or under which section this case met the requirements of 18 U.S.C. § 922. *Id.*

Argument

THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL, MEANING ITS APPLICATION IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION, WHEN STAFF SERGEANT GUBICZA WAS CONVICTED OF NON-VIOLENT OFFENSES AND THIS COURT CAN DECIDE THAT QUESTION.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo.

United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law and Analysis

The test for applying the Second Amendment is:

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

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

Last year, the Fifth Circuit assessed an appellant who was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order" in violation of § 922(g)(8). *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023), *cert granted*, ___ U.S. ___, 2023 U.S. LEXIS 2830 (30 June 2023). Vacating the conviction, the Court held that "§ 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *Id.* at 461 (citation omitted).

In reaching that conclusion, the Fifth Circuit made three broad points. First, "[w]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id.* at 461 (quoting *Bruen*, 597 U.S. at 8). Therefore, the Government bears

the burden of justifying its regulation “by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.” *Id.*

Second, the Fifth Circuit recognized that *D.C. v. Heller*, 554 U.S. 570 (2008) and *Bruen* both contain language that could limit the Second Amendment’s application to “law-abiding, responsible citizens.” *Id.* at 451. The Fifth Circuit explained that “*Heller*’s reference to ‘law-abiding, responsible’ citizens meant to exclude from the Court’s discussion groups that have historically been stripped of their Second Amendment rights, i.e., groups whose disarmament the Founders ‘presumptively’ tolerated or would have tolerated.” *Id.* at 452. Here the issue is whether the Founders would have “presumptively” tolerated a citizen being stripped of his right to keep and bear arms after being convicted for a non-violent offense. *See id.*

Third, the Fifth Circuit held that “[t]he Government fails to demonstrate that § 922(g)(8)’s restriction of the Second Amendment right fits within our Nation’s historical tradition of firearm regulation.” *Id.* at 460. If the Government failed to prove that our Nation’s historical tradition of firearm regulation did not include a violent offender who pled guilty to possessing a firearm while under a domestic violence restraining order, then it likely cannot prove that its firearm prohibition on SSgt Gubicza for a non-violent offense would be constitutional.

A further problem with the Statement of Trial Results and EOJ is that the Government did not indicate which specific subsection of § 922 it relied on to find that SSgt Gubicza fell under the firearm prohibition. Thus, SSgt Gubicza is unable to argue which specific subsection of § 922 is unconstitutional in his case, although he knows it could not be the domestic violence or drugs section given the facts of his case. Regardless, given *Rahimi*’s holding, the Government cannot meet its burden of proving a historical analog that barred non-violent offenders from possessing firearms.

In *Lepore*, citing to the 2016 edition of the Rules for Courts-Martial, this Court held, “[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within our limited authority under Article 66, UCMJ.” 81 M.J. at 763. Despite the court-martial order erroneously identifying that A1C Lepore fell under the firearms prohibition, this Court did not act because the “correction relates to a collateral matter and is beyond the scope of our authority under Article 66.” *Id.* at 760. However, this Court emphasized, “To be clear, we do not hold that this court lacks authority to direct correction of errors in a promulgating order with respect to the findings, sentence, or action of the convening authority.” *Id.*

Six months after this Court’s decision in *Lepore*, the United States Court of Appeals for the Armed Forces (CAAF) decided *United States v. Lemire*. In that decision, the CAAF granted Sergeant Lemire’s petition, affirmed the Army Court of Criminal Appeals decision, and “directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender.” 82 M.J. 263, at n* (C.A.A.F. 2022). The CAAF’s direction that the Army Court of Criminal Appeals fix—or order the Government to fix—the promulgating order, is at odds with this Court’s holding in *Lepore*.

The CAAF’s decision in *Lemire* reveals three things: First, the CAAF has the power to order the correction of administrative errors in promulgating orders—even via unpublished decisions regardless of whether the initial requirement was a collateral consequence. Second, the CAAF believes that Courts of Criminal Appeals have the power to address collateral consequences under Article 66 as well since it “directed” the Army Court of Criminal Appeals to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the Courts of Criminal Appeals have the power to fix administrative errors under

Article 66 as they relate to collateral consequences, then perforce, they also have the power to address constitutional errors in promulgating orders even if the court deems them to be a collateral consequence.

Additionally, *Lepore* is distinguishable from this case. In *Lepore*, this Court made clear that “[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)” 81 M.J. at 760 n.1. This Court then emphasized, how the firearms prohibition was “not required by the Rules for Courts-Martial” as a basis for not having authority to take corrective action. *Id.* at 763. The 2019 rules that apply in this case, however, contain language that both the Statement of Trial Results and the EOJ contain “[a]ny additional information . . . required under regulations prescribed by the Secretary concerned.” R.C.M. 1101(a)(6); 1111(b)(3)(F). At the time SSgt Gubicza’s Statement of Trial Results was signed, paragraph 13.3 of the Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated 14 April 2022, required the Statement of Trial Results to include “whether the following criteria are met . . . firearm prohibitions.” As such, this Court’s analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—a determination on whether the firearm prohibition is triggered. Even if this Court does not find this argument persuasive, it still should consider the issue under *Lepore* since this issue is not an administrative fixing of paperwork, but an issue of constitutional magnitude.

WHEREFORE, SSgt Gubicza requests this Court find the Government's firearm prohibition is unconstitutional and order that the Government correct the Statement of Trial Results.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Government Trial and Appellate Operations Division on 8 May 2024.

Respectfully submitted,

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, <i>Appellee,</i>)	UNITED STATES’ ANSWER TO ASSIGNMENTS OF ERROR
)	
v.	)	Before Panel No. 1
)	
Staff Sergeant (E-5)	)	No. ACM 40464
BRIAN W. GUBICZA)	
United States Air Force	)	7 June 2024
<i>Appellant.</i>)	

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

Assignment of Error

**WHETHER THE GOVERNMENT CAN PROVE 18 U.S.C. §
922 IS CONSTITUTIONAL, MEANING ITS APPLICATION
IS CONSISTENT WITH THE NATION’S HISTORICAL
TRADITION OF FIREARM REGULATION, WHEN STAFF
SERGEANT GUBICZA WAS CONVICTED OF NON-
VIOLENT OFFENSES AND THIS COURT CAN DECIDE
THAT QUESTION.**

Statement of the Case and Facts

The Government generally agrees with Appellant’s statement of the case and facts.

Standard of Review

The scope and meaning of Article 66, UCMJ, is a matter of statutory interpretation, which is reviewed de novo. United States v. Lepore, 81 M.J. 759, 760-61 (A.F. Ct. Crim. App. 2021).

Law & Analysis

The Gun Control Act of 1968 makes it unlawful for a person to possess a firearm if he has been, *inter alia*, “convicted in any court of a crime punishable by imprisonment for a term

exceeding one year” or “discharged from the Armed Forces under dishonorable conditions.” 18 U.S.C. § 922(g)(1), (g)(6).

Appellant, having been convicted and sentenced to over a year in confinement, unquestionably falls into the former category. Having been adjudged a dishonorable discharge, he will fall into the latter category as well. Given that a plain reading of the statute is all it takes to reach this conclusion, this Court should not entertain any notion that Appellant does not know which subsection of 18 U.S.C. § 922 applies to him. (App. Br. at 3.) After all, Appellant “knows it would not be domestic violence, given the facts of his case.” (Id.)

Indeed, Appellant was not convicted of a physically violent offense. Appellant seeks to capitalize on this fact, while completely ignoring the prohibition related to his dishonorable service characterization. Appellant now asks this Court to find the firearms prohibition unconstitutional as applied to him and order correction of post-trial paperwork, citing the Government’s alleged inability to “meet its burden of proving a historical analog[ue] that barred offenders like [him] from possessing firearms.” (Id.)

Appellant is not entitled to relief—first and foremost, because this nation has long barred the possession of firearms by persons who are not law-abiding, responsible citizens; and second, irrespective of whether the statute is constitutional, this Court lacks jurisdiction to grant any relief.

A. The firearms prohibition is constitutional as applied to Appellant because this nation has a historical tradition of disarming the dangerous.

The Second Amendment provides: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST., amend. II. But as the Supreme Court has repeatedly emphasized, “the right secured by the Second Amendment is not unlimited.” District of Columbia v. Heller, 554 U.S.

570, 626 (2008); *see* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 20 (2022); McDonald v. City of Chicago, 561 U.S. 742, 786 (2010) (plurality opinion).

While the Amendment guarantees “the right of *law-abiding, responsible citizens* to use arms for self-defense,” Bruen, 597 U.S. at 26 (emphasis added), the same cannot be said for those who have broken the law. The history of firearms regulation reflects “a concern with keeping firearms out of the hands of categories of potentially irresponsible persons, including convicted felons,” Barrett v. United States, 423 U.S. 212, 220 (1976), and “an intent to impose a firearms disability on *any* felon based on the fact of conviction.” Lewis v. United States, 445 U.S. 55, 62 (1980) (emphasis added).

Therein lies the rub. As someone whose right to possess firearms was restricted as a consequence of his conviction, Appellant is in a fundamentally different position than the law-abiding, non-criminal petitioners in Bruen, Heller, and McDonald.¹ For Appellant—now a felon—falls into a class of “irresponsible persons.” Barrett, 423 U.S. at 220. Bruen itself refers over and over to the “law-abiding” citizen’s right to bear arms for self-defense. (See *id.* at 2122 - 2125, 2131 - 2134, 2138, 2150, 2156). And various members of the Court—representing a majority of its current Justices—noted their views that Bruen did not disturb Heller’s and McDonald’s earlier statements about felon-dispossession laws. See *id.* at 2157 (Alito, J., concurring) (“Our holding decides nothing about who may lawfully possess a firearm.”); *id.* at 2162 (Kavanaugh, J., joined by Roberts, C.J.) (noting that Heller’s and McDonald’s statements approving felon-dispossession laws survive Bruen); *id.* at 2189 (Breyer, J., dissenting, joined by

¹ See Bruen, 597 U.S. at 8 (where “law-abiding New York residents” challenged a state restriction on carrying a firearm outside the home); Heller, 554 U.S. at 573 (where a policeman challenged the District of Columbia’s ban on handgun possession in the home); McDonald, 561 U.S. at 790 (challenging a city ordinance that effectively banned “law-abiding members of the community” from having handguns in the home).

Sotomayor & Kagan, JJ.) (“Like Justice Kavanaugh, I understand the Court’s opinion today to cast no doubt on ... Heller’s holding” that felon-dispossession laws are “presumptively lawful”) (capitalization altered).

Nevertheless, Appellant contends that the firearms prohibition is unconstitutional as applied to him because he was not convicted of a violent offense, (App. Br. at 3) and asserts that the Government cannot “demonstrat[e] that it is consistent with the Nation’s historical tradition of firearm regulation,” as required by Bruen, 597 U.S. at 24.

Not so. Fortunately for the Government, there exists a “historical analogue”—the disarmament of “dangerous persons.” In the early days of the republic, the law was frequently used to disarm groups that were considered dangerous, such as British loyalists. *See* Joseph Blocher & Caitlan Carberry, *Historical Gun Laws Targeting “Dangerous” Groups and Outsiders*, DUKE LAW SCHOOL PUBLIC & LEGAL THEORY SERIES NO. 2020-80 (2020). This tradition of disarming the dangerous endures today—in part, through the “longstanding prohibitions on the possession of firearms by felons,” which the Supreme Court has identified as “presumptively lawful regulatory measures.” Heller, 554 U.S. at 626, 627 n.26.

In the modern age, dangerousness cannot be defined by violence alone. Thus, it matters little that Appellant was not convicted of a violent offense. As the world has evolved, crime has evolved with it. There are more laws to violate than there were in the Founding Era, more ways to violate them, and more ways to be dangerous as a result. Appellant’s own crime is one such example. The proliferation of child pornography via new media technology is “a relatively recent, albeit pernicious, development.” United States v. Leonard, 64 M.J. 381, 383 (C.A.A.F. 2007). It is a “tragedy” that is “sustain[ed] and aggravate[ed]” by “everyone who reproduces, distributes, [and] possesses the images of the victim’s abuse.” Paroline v. United States, 572

U.S. 434, 436 (2014). Thus, those convicted of such offenses are required to register as sex offenders—even if they did not personally abuse the child. *See* 34 U.S.C. § 20911.

Such sex offenders “are a serious threat in this Nation.” McKune, 536 U.S. at 32. Their risk of recidivism is “frightening and high,” Smith, 538 U.S. at 103 (citation omitted), and when they reenter society, “they are much more likely than any other type of offender to be rearrested for a new [sex offense].” McKune, 536 U.S. at 33. For offenders like Appellant, recidivism translates into a continued interest in child pornography and sexual abuse of children. This interest in child pornography creates the demand for it, which “harms children in part because it drives production, which involves child abuse.” Paroline, 572 U.S. at 439-40. The materials produced are “a permanent record of the depicted child’s abuse, and the harm to the child is exacerbated by [its] circulation.” Id. at 440 (alteration in original) (internal quotation marks and citation omitted). Consequently, sex offenders like Appellant pose a real threat to our most vulnerable demographic—the children.

Appellant may not be a physically violent offender, but he is still a danger to our society. *See* New York v. Ferber, 458 U.S. 747, 758 n.9 (1982) (“[The] use of children as . . . subjects of pornographic materials is very harmful to both the children and the society as a whole.”). Given this nation’s historical tradition of disarming dangerous persons, 18 U.S.C. § 922 is constitutional as applied to Appellant, and he is not entitled to relief.

B. Irrespective of its constitutionality, the firearms prohibition is a collateral matter outside the scope of this Court’s authority under Article 66, UCMJ.

“The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute.” United States v. Arness, 74 M.J. 441, 442 (C.A.A.F. 2015). Article 66(d), UCMJ, provides that this Court “may only act with respect to the findings and sentence as entered into the record under section 860c of this title.” 10 U.S.C. § 866(d). It does not authorize this Court

to act on the collateral consequences of a conviction, such as the firearms prohibition. And this Court has said as much before. In United States v. Lepore, this Court held that the firearms prohibition was a collateral matter outside the scope of this Court’s authority under Article 66, UCMJ, and that the Court therefore lacked authority to “direct correction of the 18 U.S.C. § 922 firearms prohibition” on a court-martial order. 81 M.J. at 760-63. In so holding, this Court reasoned that the firearms prohibition “relates to a reporting mechanism external to the UCMJ and Manual for Courts-Martial,” and “was not a finding or part of the sentence, nor was it subject to approval by the convening authority.” Id. at 763. “[T]he mere fact that a firearms prohibition annotation, not required by the Rules for Courts-Martial, was recorded on a document that is itself required by the Rules for Courts-Martial is not sufficient to bring the matter within [this Court’s] limited authority under Article 66, UCMJ.” Id. This rationale remains viable today, and this Court should decline to deviate from it.

Naturally, Appellant disagrees. According to Appellant, Lepore is both distinguishable from the instant case and no longer good law. (App. Br. at 5-6.) Citing the 2019 versions of R.C.M. 1101(a)(6) and R.C.M. 1111(b)(3)(F)—which provide for the inclusion of “[a]ny additional information ... required under the regulations prescribed by the Secretary concerned” in the statement of trial results and entry of judgment, respectively—Appellant suggests that the rules now require the firearms prohibition annotation “by incorporation.” (App. Br. at 5.) But what Appellant fails to realize is that annotation by incorporation has *always* been the posture, even under the 2016 rules that governed in Lepore. R.C.M. 1114(a) in the 2016 Manual for Courts-Martial provided that promulgating orders were to be prepared as set forth in the rule, “[u]nless otherwise prescribed by the Secretary concerned.” At the time the court-martial order at issue in Lepore was published, Air Force Instruction 51-201, *Administration of Military*

Justice, ¶ 15.30 (18 Jan. 2019), prescribed the following requirement: “‘FIREARMS PROHIBITION - 18 U.S.C. § 922’ must be annotated in the header [of the court-martial order].” See Lepore, 81 M.J. at 761. Thus, there is no appreciable distinction between the entry of judgment in this case and the court-martial order in Lepore.

Appellant also avers that Lepore is “no longer controlling” in light United States v. Lemire, in which the Court of Appeals for the Armed Forces ordered the Army to delete an annotation regarding sex offender registration from a promulgating order. 82 M.J. 263 n.* (C.A.A.F. 2022) (decision without published opinion). Relying entirely on a 20-word footnote² in a summary decision without a published opinion, Appellant insists that the Lemire decision stands for the proposition that CAAF can order correction of administrative errors in post-trial paperwork; that CAAF believes the CCA can address collateral consequences; and that CAAF and the have the power to address “constitutional errors...even if the Court deems them to be a collateral consequence.” (App. Br. at 5.) This Court should be unpersuaded. Although Lemire is technically a published decision, it is devoid of substance—it did not call attention to a rule of law or procedure, nor did it analyze why the ordered correction was viable and appropriate in that case. Accordingly, it is not the kind of decision that can be treated as precedent. See Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.³

² “It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender.” Lemire, 82 M.J. at 263 n.*.

³ “Published opinions are those that call attention to a rule of law or procedure that appears to be overlooked or misinterpreted or those that make a significant contribution to military justice jurisprudence. Published opinions serve as precedent, providing the rationale of the Court’s decision to the public, the parties, military practitioners, and judicial authorities.” Rule 30.4(a), Air Force Court of Criminal Appeals, Rules of Practice and Procedure.

Ultimately, the constitutional question posed here is unrelated to the actual findings and sentence in the case, and therefore outside the scope of this Court's authority. Appellant is not only unentitled to relief, but also powerless to obtain any from this Court.

WHEREFORE, the United States respectfully requests that this Honorable Court affirm the findings and sentence.

CONCLUSION

For the above reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the findings and sentence in this case.

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CERTIFICATE OF FILING AND SERVICE

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

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