IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re	)	**PETITION FOR A WRIT OF ERROR CORAM VOBIS AND FOR MANDAMUS**
	)	Before Panel No.
Airman First Class (E-3) JOSE A. COSSIO, JR., USAF,	)	ACM Misc. Dkt. No
Petitioner,	)	

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

Two Article 32 Officers recommended that Cossio's charge of "exceeding authorized access" under 18 U.S.C. 1030 be dismissed. However, the prosecution, knowing how this court operates, kept the charge and obtained a guilty verdict. This court could not be bothered with an opinion addressing this issue[1]. For over 15 years, the Petitioner has waited for this day, and now the chickens have come home to roost. Petitioner demands, pursuant to *Van Buren v. The United States* 19-783, that this court to do its job and dismiss the findings and sentence, or in the alternative, order a *DuBay* hearing and Article 66 review. The Accused has rights.

I

WHETHER IN LIGHT OF THE SUPREME COURT'S DECISION IN *VAN BUREN V. UNITED STATES*, 19-783 (2021), THE PETITIONER'S CONVICTION FOR VIOLATING 18 U.S.C. 1030 IS INVALIDATED RETROACTIVELY.

II

IF THE ABOVE IS ANSWERED IN THE AFFIRMATIVE, WHETHER THE FINDINGS AND SENTENCE MUST BE DISMISSED, THE PETITIONER BE RESTORED TO ACTIVE DUTY, AND IS ENTITLED TO A *DUBAY* HEARING TO ADDRESS A MYRIAD OF OTHER ISSUES, INCLUDING HIS CONVICTION UNDER 18 U.S.C. 1028, AFTER WHICH ARTICLE 66 WILL APPLY.

[1] This court found "the findings and sentence correct in law and fact". Unlike the civilian courts who all have all made substantial opinions, it did not bother with a detailed opinion on the exceeding authorized access charge.

Jurisdiction

Although a petitioner may file a *writ of coram nobis* at any time, to be entitled to the writ he must meet the following threshold requirements: (1) the alleged error is of the most fundamental character; (2) no remedy other than *coram nobis* is available to rectify the consequences of the error; (3) valid reasons exist for not seeking relief earlier; (4) the new information presented in the petition could not have been discovered through the exercise of reasonable diligence prior to the original judgment; (5) the writ does not seek to reevaluate previously considered evidence or legal issues; and (6) the sentence has been served, but the consequences of the erroneous conviction persist. *Denedo v. United States*, 66 M.J. 114, 126 (C.A.A.F. 2008), aff'd and remanded, 556 U.S. 904 (2009).

Petitioner meets and exceeds all requirements. (1) the error is a fundamental, Petitioner's conviction for violating 18 U.S.C. 1030 has been invalidated by the Supreme Court. (2) Petitioner is no longer in the military or confinement; no other remedy is available (3) this petition could not be made earlier because the Supreme Court just ruled on this issue (4) the information could not be discovered prior to the Supreme Court's ruling (5) the writ does not seek to reevaluate this court's previous considered evidence or legal issues because the court never considered the evidence or issues in the first place[2]. Regardless, the Supreme Court's decision is new (6) the sentence has been served, and Cossio has suffered consequences including being fired from two jobs as a result of his military convictions *Cossio v. Tourtelot* 17-1653 (7th Cir. 2018).

[2] Petitioner is asking for a *Dubay* hearing and a new Article 66 hearing to address other previously submitted issues. These issues were not decided under Article 66 review, but under a higher "probability" standard of error coram vobis. **It is important to understand that this request does not form the basis of this petition**, but is argument as to why a new hearing and/or Article 66 review should be authorized after Petitioner's conviction is set aside.

STATEMENT OF CASE

Van Buren v. United States, 19-783 (2021)

The Supreme Court has ruled that a Defendant cannot be charged under Title 18 USC 1030(a)(2) for merely using their granted access for an improper purpose. In *United States v. Buren, 19-783 (2021)* the granted issue was;

Whether a person who is authorized to access information on a computer for certain purposes violates Section 1030(a)(2) of the Computer Fraud and Abuse Act if he accesses the same information for an improper purpose.

On 3 June 2021, The United States Supreme Court held;

> An individual "exceeds authorized access" when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off-limits to him. *Id*, at Pp.5-20
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> ***
>
> "This provision covers those who obtain information from particular areas in the computer—such as files, folders, or databases—to which their computer access does not extend. It does not cover those who, like Van Buren, have improper motives for obtaining information that is otherwise available to them," *Id,* at Pp. 1.

The Supreme Court went on to say that the Government's interpretation of the statute would "attach criminal penalties to a breathtaking amount of commonplace computer activity." Indeed, this is the same reasoning found in Cossio's Article 32 investigative report. Two Article 32 JAG Officers recommending dismissing this charge prior to trial. As stated above, this court chose to ignore the issue. A fact-pattern that would repeat itself several times over. However, before we turn to the merits of this petition, which must be granted, we shall recount this court's previous erroneous rulings and denial of relief.

FACTS

Contrary to his pleas, Cossio was found guilty of federal laws prohibiting improperly obtaining another person's Social Security number and using that person's Social Security number with intent to commit larceny, and communicating a threat, in violation of Articles 121 and 134, UCMJ, 10 U.S.C. §§ 921, 934. The two federal crimes at issue are 18 U.S.C. 1028 and 18 U.S.C. 1030(a)(2). The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for ten months, reduction to E-1, and a fine of $750 with an additional three months of confinement if the fine was not paid. *United States v. Cossio*, ACM 36206 (A.F. Ct. Crim. App. 24 August 2006) (unpub. op.). This court affirmed the findings and sentence after "conclud[ing] there [was] ***overwhelming evidence*** in the record of trial to support the court-martial's findings of guilty of wrongful communication of a threat and ***computer fraud and abuse***, both in violation of Article 134, UCMJ, 10 U.S.C. § 934" (emphasis added) and that his other assignments of error were without merit. *Id*. at 2. On 30 January 2007, the Court of Appeals for the Armed Forces ("CAAF") denied the petitioner's petition for review. *United States v. Cossio*, 64 M.J. 401 (C.A.A.F. 2007). On 25 July 2008, a final court-martial order ordered the bad-conduct discharge to be executed.

First Error Coram Nobis

Brady Violation

On 14 November 2007, the petitioner, claiming a *Brady* violation by the trial counsel *Brady v. Maryland*, 373 U.S. 83, 87 (1963), held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the

prosecution." Here, the essence of the petitioner's coram vobis claim was that the trial counsel was aware of, and failed to disclose to the defense that [redacted] MHT, a witness this first court-martial, asked this court to issue a writ of coram vobis and set aside the findings and sentence. On 21 November 2007, this court issued an order prohibiting the execution of the approved bad-conduct discharge pending resolution of the petition.

On 15 February 2008, this court, pretending to address the petition for a writ of coram vobis on its merits, rescinded the writ of prohibition regarding the execution of the petitioner's bad-conduct discharge and denied the petitioner's writ of coram vobis. *United States v. Cossio*, ACM 36206 (A.F. Ct. Crim. App. 15 February 2008) (unpub. op.). In doing so, this court found that the petitioner was not prejudiced by not being advised of the nolo contendere pleas of a witness, [redacted] MHT, as there was no probability that the outcome of the petitioner's court-martial would have been different even if the petitioner's trial defense counsel had been aware of the evidence. *Id*. at 4. In making this finding, this court incorrectly stated that: (1) the petitioner's guilt was overwhelming; (2) to the extent that [redacted] MHT's credibility was relevant, the petitioner's trial strategy focused more on minimizing his culpability rather than attacking [redacted] MHT's credibility; (3) [redacted] MHT's credibility was already undermined by his admission to repeated larcenies by fraud; and (4) it was highly unlikely that the trier-of-fact, the military judge sitting alone, would have found [redacted] MHT's nolo contendere pleas significant in evaluating the evidence. *Id*. The petition for grant of review of the writ-appeal was denied on 24 April 2008. *Cossio v. United States*, 66 M.J. 381 (C.A.A.F. 2008).

This court's opinion is wrong on all counts. First, the evidence was not "overwhelming" that Cossio threatened [redacted] T[redacted] outside his dorm room after inviting [redacted] T[redacted] to attend a concert with him. The allegation was pure hearsay made three months after the fact.

The only "evidence" used to convict Cossio was [redacted] T[redacted]'s statement that Cossio told him he "could put [him] in a coma". We note that [redacted] T[redacted] perjured himself about how many times he had stolen from his girlfriend. Yet the court found him credible enough to sustain a conviction based completely on his lying mouth. Regardless, this court cannot point to any other evidence that [redacted] T[redacted] was threatened by Cossio. So much for "overwhelming".

Second, it did not matter what the Defense counsel's strategy was. This court admitted that ***it was*** a strategy to attack [redacted] T[redacted]'s credibility, the degree of arbitration matters not. Of course, any lack of attacks on [redacted] T[redacted] credibility were the result of the Prosecution's *Brady* violation. Therefore, the reason why attacking [redacted] T[redacted]'s credibility was not the "real defense strategy" was that the TDC did not know about it. The court's illogical conclusion is the legal equivalent of grabbing your little brothers' hands and striking him asking "why are you hitting yourself?" It is sufficient to say a monkey banging away on a typewriter could have come up with something better than circular logic.

This court would later mischaracterize its own opinion in *United States vs. Cossio*, Misc. Dkt. No. 2014-14. Contrary to the last two opinions, this court ***did not*** find the discovery violations to be "irrelevant"[3]. Rather this court ruled that "to the extent that the credibility of [redacted] MHT ***was relevant*** it was already significantly undermined by his admission to repeated larcenies and fraud from another party" (emphasis added) *Id.*, citation omitted. Therefore, ***this court did find*** [redacted] T[redacted]'s convictions to be relevant, just not exceptionally so to warrant intervention. The court ruled that T[redacted]'s credibility was as low as it could go, but at the same time high enough to support Cossio's conviction. However, as we will see, this court's facts

[3] "In making this finding, this court specifically found that…even assuming that [redacted] MHT's credibility was relevant, the petitioner's trial strategy focused more on minimizing his culpability rather than attacking [redacted] MHT's credibility" *Cossio*, Misc. Dkt. No. 2014-14. However, the court never said the Brady violation were irrelevant. That makes no sense, of course T[redacted]'s credibility was relevant. The court ruled that T[redacted]'s credibility was already undermined by admissions of repeated larcenies.

came from an empty universe. [redacted] T[redacted] never admitted to "repeated larcenies". He only admitted to one theft, which was the point in one of those petitions. In Cossio's subsequent filing with this court, the evidence showed [redacted] T[redacted] lied and there were in fact multiple thefts.

We believe this to be the most irrational of this court's rulings. The only evidence regarding the threat charge is [redacted] T[redacted] statements which this court claimed is undermined, but believable. This evidence is not "overwhelming" for the simple fact it is pure hearsay. [redacted] T[redacted] was a sentencing witness. He cried to the trial court about the financial strain that Cossio put on him, yet we see that [redacted] T[redacted] repeatedly had financial problems regardless of Cossio. Sentencing evidence is indeed relevant *Swank v. Smart*, 898 F.2d 1247, 1254 (7th Cir. 1990). [redacted] T[redacted] credibility had to be of a certain magnitude for the judge to have believed his story and find Cossio guilty. How [redacted] T[redacted]'s credibility could be so diminished, yet his testimony be enough to be labeled "overwhelming" by this court, boggles the mind.

Second Error Coram Nobis

OSI Investigation

On 21 June 2010, the petitioner filed a petition for extraordinary relief in the nature of a writ of error coram vobis. The petitioner, alleging that [redacted] MHT "may have committed perjury, further acts of larceny, and conspired with another witness to hide such conduct from the court," asked this court to order a *Dubay* hearing to: (1) "[r]elease the criminal report on [redacted] MHT's perjury and larceny," (2) "make a finding of fact considering [the] petitioner's allegations that the government suppressed evidence to include [redacted] MHT's Nolo Contendere pleas," and (3) determine "whether the government asserted unlawful command influence to quash any investigation into witnesses who may have committed crimes relevant to petitioner's court martial despite a key witness who testified against the petitioner, had pled nolo contendere to

four separate misdemeanor worthless check charges. The petitioner asserted that he was deprived of this impeachment evidence and prejudiced. On 1 July 2010, this court told the petitioner to go kick rocks, finding the petitioner had failed to meet several of the threshold requirements. *Id*. The court also concluded that even if petitioner had met all of the threshold requirements, he still was not entitled to any relief because he is a convict. *Id*. This court ignored that [redacted] T[redacted] only admitted to ***one theft***, and the MySpace messages have him admitting to ***multiple thefts***;

> ***I told them I was honest about the one time and the one time only***. There wasnt anything else they mostly just asked about the death threats. just tell them the same thing you did last time. I dont remember much about it. Just tell them what you did before and they can't do anything about it. thats your story and your stickin to it.
>
> – [redacted] T[redacted] admitting he only told the trial court about one theft, despite this court's asinine opinion that [redacted] T[redacted] confessed to "***repeated*** larcenies by fraud form another party" *United States v. Cossio* ACM 36206[4] (pet).

Naturally, Cossio disagrees with this court's opinion. That's because it's wrong. Not only did [redacted] T[redacted] ***not admit*** "to repeated larcenies" as this court falsely stated, but he lied to Trial Counsel and told "them I was honest about the one time and the one time only", *Id*. Lying about how many times you stole money from your girlfriend, who was also in the military, would be impeachment evidence in every other jurisdiction in America, except this court. What an embarrassment. At the very least, ordering the OSI to release its perjury investigation into [redacted] T[redacted] was a reasonable request. Most likely such a report would be inaccurate and biased with the sole purpose of protecting [redacted] T[redacted] However, this court could not even order its release. To this day, nobody outside of the OSI investigators know the contents of this investigation into repeated larcenies by [redacted] T[redacted]. It is known that the information would have formed the basis of impeachment evidence in regards to the threat charge.

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[4] There are multiple exhibits showing that (1) [redacted] **T[redacted] stated there was <u>only one theft</u>** (2) that Trial Counsel used this to rehabilitate T[redacted]'s credibility because it was only one theft (3) T[redacted] and his ex-girlfriend made multiple statements after the fact that T[redacted] stole multiple times (4) this court ignored T[redacted]'s perjury, and incorrectly stated that T[redacted] admitted to "repeated larcenies".

Third Error Coram Nobis

IAC under *Grostefon*

In 2014 Cossio brought to this court's attention that his Appellate Counsel never submitted his *Grostefon* issue challenging his larceny conviction. This court ruled that Cossio's attached emails to his counsel lacked an affidavit to its authenticity, so instead of asking for an affidavit, the court decided to deny the petition. Additionally, this court stated that petitioner did not articulate a valid reason why this issue was not raised earlier. The court stated "that the legal and factual sufficiency of the larceny and threat ***was not*** raised pursuant to *Grostefon*, is readily apparent in this court's first opinion in 2006." *Id*. Upon inspection, it appears this court actually wrote a footnote in the original order stating that all of Cossio's issues were raised under *United States v. Grostefon*. So much for "readily apparent". What is "readily apparent" is that this court mislead Cossio into believing that it had considered all of his *Grostefon* issues. The reason why the IAC issue could not be raised earlier was that Cossio's military appellate lawyer told him that the issue had been briefed[5]. This court's opinions merely state that it "found the findings and sentence correct", as it does with majority of cases. It is impossible to know what issues were briefed when this court rubber-stamps convictions. Finally, why have *Grostefon* if the court can dismiss violations by merely stating it completed its Article 66 review? If that was true, then *Grostefon* issues need never to be briefed because the court ***says it*** conducts an Article 66 review in every case. Cossio appealed this court's incredulous ruling. The Court of Appeals for the Armed Forces issued a show cause order that the Government answer for this chicanery. Ultimately, the CAAF summarily denied review without comment.

[5] Originally, Cossio thought he had received a copy of the brief that was distorted. Upon further inspection, the distorted brief is actually in reference to his second court-martial. Cossio apparently never received a copy.

ARGUMENT

I. *Van Buren* invalidates Cossio's conviction and must be applied retroactively

We now arrive at the present issue. There are two types of Error Coram Vobis petitions dealing with retroactive application of rulings by a superior court, the seminal case being *Teague v. Lane*, 489 U.S. 288 (1989). The first type of petition is actual innocence; the Petitioner should never had been found guilty of the law they supposedly violated because the law was unconstitutional or interpreted incorrectly. Nothing will bar retroactive application for these types of petitions that deal, "...with the kind of conduct that cannot constitutionally be punished in the first instance." *United States v. U.S. Coin & Currency*, 401 U.S. 715 (1971) (applying retroactivity). The second type of petition concern a change in the rules of criminal procedure and are not usually given retroactive application unless the rule is a "watershed" change of law or a "new rule" *Whorton v. Bockting*, 549 U.S. 406, 418 (2007), *United States v. James Lewis*, 76 M.J. 829, 832. This petition falls under the former, not the later. Therefore, if *Van Buren* applies to Petitioner's court-martial, his conviction under 18 U.S.C. 1030 must be retroactively dismissed. Additionally, his other conviction under 18 U.S.C. 1028 could also fail, however that would be better briefed and submitted under Article 66.

The first step is to determine if Cossio's charges mirror *Van Buren*'s to an extent that the Supreme Court's ruling decriminalizes Cossio's conduct. As we stated above, both cases the Defendants were charged under 18 U.S.C. 1030(a)(2). Van Buren used his access as a police officer to lookup the identity of a license plate owner. Similarly, Cossio used his access to look up the identity of [redacted] in order to transfer his money to a children's charity in Siberia. The only difference is that Van Buren was a Police Officer looking up license plate information for

cash. However, these very small differences do not matter because the Supreme Court declared all of 18 U.S.C. 1030(a)(2) to be unconstitutional.

In both cases, *Cossio* and *Van Buren* used their authorized access for their own "improper" purpose. SCOTUS has invalidated that line of reasoning. If *Van Buren* were decided prior to Cossio's court-martial, he would not have been found guilty. We say this as a practical manner, because it is likely that some mouth-breathing JAG would still have charged Cossio under 18 U.S.C. 1030 and have this court rubber-stamp the erroneous conviction regardless of the Supreme Court's decision.

II. Cossio is entitled to retroactive application

Having found that if *Van Buren* was the law at the time, Cossio would not been tried under the asinine theory that he exceeded authorized access merely by doing something "improper", we next turn to whether this change of law can be applied retroactively. It can and it must. Retroactive application in a change of law is not automatic. "Subject to two narrow exceptions, a case that is decided after a defendant's conviction and sentence become final may not provide the basis for federal habeas relief if it announces a new rule, *i.e.*, a result that was not dictated by precedent at the time the defendant's conviction became final. This principle validates reasonable, good-faith interpretations of existing precedents made by state courts and therefore effectuates the States' interest in the finality of criminal convictions and fosters comity between federal and state courts." *Gilmore v. Taylor*, 508 U.S. 333 (1993) Pp. 339-340.

The first exception applies to those rules that "plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague v. Lane*, 489 U. S., at 307 (plurality opinion) (internal quotation marks omitted). This exception

is clearly applicable here, since the rule announced in *Van Buren* "decriminalize(s) a class of conduct". See *Saffle v. Parks*, 494 US 484, at 495. Teague's second exception permits the retroactive application of "watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." 494 U. S., at 495 (quoting *Teague*, supra, at 311). This exception inapplicable to Cossio's case, the change of law is not procedural. The military court's cases involving retroactivity in this regard are also inapplicable. *Lewis v. United States*, 76 M.J. 829, No. 2017-05 (A.F. Ct. Crim. App. Sep. 20, 2017). *Washington v. United States*, No. 20140826, 74 M.J. 560. *Calhoun v. United States*, Misc. Dkt. No. 2012-01, slip op. at 4 (A.F.Ct.Crim.App. Dec 3, 2012). (discussing, and denying retroactive application of criminal procedural rights). Here this issue does not concern "procedural rights" but the fact that Cossio is innocent. As this court itself noted;

> "New substantive rules—including "**decisions that narrow the scope of a criminal statute**" and "constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish"—**generally do apply retroactively**. *Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004)." *Lewis v. United States*, 76 M.J. 829, No. 2017-05 (A.F. Ct. Crim. App. Sep. 20, 2017.

Remedy

The question is not whether Cossio's conviction can be, or must be, dismissed. Clearly, the answer to that is "yes". The question is how that should be done, and whether Cossio is entitled to further relief. Cossio is asking that the findings and sentence be set aside and dismissed due to unreasonable delay and the previous issues that this court had completely ignored. While this court may claim those issues were already disposed of (*res judicata*), that is not true under Article 66. First, this court's prior decisions were dead wrong and an embarrassment. Second, this court's prior decisions on Cossio's Error Coram Vobis petitions

were decided under different and higher thresholds[6] then Article 66. There is no *res judicata* effect because none of these issues were examined under Article 66 review. Instead, they were subjected to a higher standard – the probability threshold under Coram Vobis. The Petitioner reiterates that the issue here is his now declared, and void conviction under 18 U.S.C. 1030. However, an Article 66 review should be authorized where these issues can be addressed.

III. Mandamus and consent to jurisdiction to recall Petitioner into the Active Duty

At a minimum, Cossio is entitled to a new Article 66 review, he is also asking for a *DuBay* hearing to submit evidence of unreasonable delay involved in his case. The Petitioner is not submitting his prior issues at this time, the *Brady* violation and other issues will be briefed again under Article 66. We only mention these issues to highlight the need for a rehearing. Because this court's prior decision led to the Convening Authority ordering Cossio's bad-conduct discharge executed, the discharge must be declared null and void, *in ab initio*. We therefore ask this court to issue a ***Writ of Mandamus*** directing that Cossio be placed on the active rolls, invalidate his discharge, and to set aside the sentence and order a rehearing if practical. Cossio being placed back on the rolls for a rehearing and Article 66 review is a consequence of this court's opinion being invalidated. Article 71(c), is since repealed, but the law at the time of Cossio's courts-martial, provides in pertinent part that a punitive discharge "may not be executed until there is a final judgment as to the legality of the proceedings…" Under Article 71(c), the circumstances in which a judgment is considered to be final include "cases when review is completed by a Court of Criminal Appeals…***and the case is not otherwise under review*** by that Court.

[6] The court placed Cossio's Brady claims under the "probability of a different outcome" threshold. This threshold is non-existent in an Article 66 setting.

This is not a purely administrative action, See *Clinton v. Goldsmith* 526 U.S. 529 (1999). Instead, it is a natural extension of this court's jurisdiction. This court cannot issue an opinion under Article 66 *sua sponte*, and it must allow Cossio a *DuBay* hearing to make factual findings and determinations of law concerning the impact of the Government's long history of violating his rights to a fair and speedy trial. Finally, there are a long line of cases where Federal Courts found that they have broad powers of returning fines in criminal cases, *Neely v. United States*, 546 F.2d 1059, *DeCecco v. United States*, 485 F.2d 372, and *Lawson v. United States*, 397 F. Supp. 370. Cossio was fined $750 dollars, we ask that fine to be returned. While the Federal cases found jurisdiction via the Tucker Act to return fines when a case was dismissed, this court has jurisdiction under Article 75 of the UCMJ (Restoration). Finally, Cossio has signed a waiver consenting to military jurisdiction (both personal and subject matter). This "Cossio Waiver" should be sufficient to return Cossio to Active Duty pending resolution of his case regardless of any other legalistic hurdles that may be thrown his way.

IV. This court cannot reassess the sentence *Sua Sponte*

A doctrine of this court is to grant meaningless relief, i.e. taking a month off an already served sentence. We can only imagine the meaningless relief of setting aside a few months of a sentence almost two decades ago that this court may have in mind. However, there are some issues that a neutral judge should consider. For one, this court cannot "confidently…discern the extent of the error's effect on the sentencing authority's decision." *U.S. v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). Therefore, it cannot reassess the sentence. This is because the court's inept ruling in petitioner's prior appeals. As we discussed above, ***this court*** found [redacted] T[redacted]'s credibility to have been undermined by admissions of repeated larceny, but ludicrously stated that there was enough evidence (which consisted solely of [redacted] T[redacted]'s lying mouth), to find

Petitioner guilty beyond a reasonable doubt of communicating a threat[7]. This court's finding that [redacted] T[redacted]'s testimony is credible enough to find Petitioner guilty of communicating a threat, but incredible to warrant relief to overturn the threat charge on discovery of his convictions, disqualifies this court to conduct a sentence reassessment. So does this court's inability to get basic facts correct. This court incorrectly stated that [redacted] T[redacted] admitted to repeated larcenies, when in-fact, he admitted to only one theft at trial, and then later stated there were more in a MySpace message. These messages show that not only did [redacted] T[redacted] lie to the Trial Court, but he also lied to Trial Counsel.

The court has already demonstrated it cannot discern the effect of impeachment evidence, its contradictions, nor the precedent of its superior court <u>*US v. Webb*</u>, 66 M.J. 89, 93 (CAAF 2008, discussing impact on impeachment evidence). Therefore, it cannot reassess the sentence. To put it simply, [redacted] T[redacted]'s convictions for worthless checks must be reconsidered under a different threshold. *Id*, <u>*Webb*</u>. One may argue that this issue was already considered in this court's prior order denying relief and thus there is a *res judicata* effect on that ruling. But as we will see, that is not the case.

V. If granted an Article 66 review, there is no *Res Judicata* effect from prior rulings

Again, there is no *res judicata* effect on any of this court's prior rulings because this court analyzed all the issues under the lens of *error coram vobis*. This petition seeks to dismiss Cossio's wrongful conviction. Here, a new Article 66 review is a consequence after his petition is granted, so the "probability threshold" that this court used to dispose Cossio's claims no longer are valid. There are other issues such as excessive post-trial delay under Article 66(c).

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[7] Again, we ignore this court's erroneous opinion which mistakenly staid its prior decision found [redacted] T[redacted]'s convictions "irrelevant". The court actually said "to the extent ***<u>it was</u>*** relevant…"

The Government will likely respond, not attacking the invalidation of Cossio's conviction under 18 U.S.C. 1030, and Article 66 review of his conviction under 18 U.S.C. 1028, but rather Cossio's request for reconsideration of "prior issues already litigated". It's important to note that Cossio is not asking for the court to relitigate those issues at this time[8]. Rather, Cossio is requesting a new Article 66 review where his detailed military counsel may bring those issues in a subsequent brief. Most the issues would be cured with a new Article 66 review. For example, Cossio's *Grostefon* issue in his last petition for Error Coram Vobis would be moot. Cossio's attorneys would simply raise the factual sufficiency of his larceny charge in another brief along with the *Brady* issues.

VI. Cossio's conviction under 18 U.S.C. 1028 must be reviewed under Article 66

Cossio was also found guilty of violating 18 U.S.C. 1028(7) which reads;

> "Knowingly transfers, possesses, or uses, **without lawful authority**, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law; or"

As this court can see, Cossio's other conviction under 18 U.S.C. 1028 may fail now that the exceeding authorization statute under 18 U.S.C. 1030 has been declared void. Or perhaps, one might argue that "without lawful authority" means the crime itself, and not how Cossio obtained the information. Without the record of trial, and an experienced JAG Officer, it is rather difficult to say exactly how the Government supposes now that Cossio did not have "lawful authority" over the information he obtained. Whatever the case, this needs to be briefed in an Article 66 review. Cossio is ***not*** asking the court to decide this issue at this time.

[8] CAAF never ruled on any of the Coram Vobis issues, so there will not be a *res judicata* effect anyway, at least in their court.

***Dubay* Hearing**

A *Dubay* hearing is also warranted for two other reasons. The first is unreasonable post-trial delay under Article 66(c). See also *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002). The second are the collateral consequences Cossio has suffered from this court's delay. We [9]address the latter first. Cossio has been fired from two jobs as a result of his military convictions. The most infamous of the cases has been documented in *Cossio v. Tourtelot*, 17-1653. In that case, a woman filed a retaliatory order of protection against Cossio when ordered to repay Cossio for a loan. The case was assigned to Cook County G[redacted] T[redacted]. A so-called "judge" who was also a military veteran and police officer.

Cossio, seeing how this was going to be played out, filed a motion to substitute this "judge" with another G[redacted]. In Illinois, a party has a right for one substitution of a judge. T[redacted] would not grant the mandatory motion, and proceeded to continue sitting on the case. Ultimately, T[redacted] ruled in Cossio's favor but warned him that it could affect his job. A female Sheriff Deputy was seen talking to opposing counsel, they went back into the court room to have an ex-party discussion. After the hearing, a Sheriff's Deputy emailed the County, where Cossio worked, telling them he had court-martial convictions. The County knew about the convictions when they hired Cossio, but fired Cossio for not reporting a "felony"[10]. The County relied, *inter alia*, on the fact that Cossio was guilty of title 18 U.S.C. 1030. An appeal hearing found Cossio guilty of "failing to cooperate" with county investigators. While this was going on,

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[9] These facts are all contained in *Cossio v. T*[redacted], 17-1653 with exception to T[redacted] being a former Army Officer and Policeman, Cossio discovered those facts in a subsequent investigation.

[10] The County knew about the convictions when they hired Cossio. However, P[redacted] B[redacted], a third-rate lawyer and former prosecutor, now the County Inspector General, wanted Cossio fired. B[redacted] argued that Cossio did not check a box saying he was a "convicted felon". As part of the "investigation", P[redacted] B[redacted] contacted the Chief of Military Justice at Scott Air Force base who assisted B[redacted] in his fishing expedition.

Cossio sued G[redacted] T[redacted]. The District Court dismissed the case on the basis of judicial immunity. Cossio appealed and the 7th Circuit reversed the District Court's ruling. However, the District Court dismissed the case again and the 7th Circuit affirmed the second dismissal.

VII. Prejudice of Delay

This court cannot simply just strike Cossio's convictions. Even without a *DuBay* hearing, Cossio has demonstrated prejudice. A facially unreasonable delay will trigger an analysis that requires this court to balance the four factors elucidated in *Barker v. Wingo*, 407 U.S. 514, 530 (1972), and adopted in *Moreno*, 63 M.J. at 135. Those factors are "(1) the length of the delay; (2) the reasons for the delay; (3) whether the appellant made a demand for a speedy trial; and (4) prejudice to the appellant." *United States v. Mizgala*, 61 M.J. 122, 129 (C.A.A.F. 2005) (citing *Barker*, 407 U.S. at 530). The first factor serves multiple functions: First, the length of delay is to some extent a triggering mechanism, and unless there is a period of delay that appears, on its face, to be unreasonable under the circumstances, there is no necessity for inquiry into the other factors that go into the balance." Second, "if the constitutional inquiry has been triggered, the length of delay is itself balanced with the other factors and may, in extreme circumstances, give rise to a strong presumption of evidentiary prejudice affecting the fourth Barker factor. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005) (quoting *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004)). We are required to "analyze each factor and make a determination as to whether that factor favors the Government or the appellant" and "balance our analysis of the factors to determine whether there has been a due process violation." *Moreno*, 63 M.J. at 136.

Conclusion

We do not condone this court's prior practice of rubber-stamping erroneous convictions based on the cockamamie legal theories of the Government. This court will not do the same in reference to this petition. Cossio clearly meets all threshold requirements for relief and retroactive application. The fact that he stands to gain a "windfall" is none of this court's concern. The Air Force JAG Corps needs to stop being cute in charging federal crimes[11]. Point of fact, two Article 32 JAG Officers warned the government this may happen, but because Article 32 recommendations are not binding, unlike Grand Juries, what should have been an easy case has swelled into a two-decade travesty. This court needs to stop protecting erroneous convictions and perjurers (apparently, only perjury that benefits the Government). Cossio is demanding Article 66 post-trial delay credit. The issue requires Cossio to be placed on Active status and for a *DuBay* hearing to be authorized.

This court cannot summarily dismiss the CFAA charge and resentence Cossio based on this petition alone. It must conduct another Article 66 review, and that review cannot be completed without a *DuBay* hearing.

WHEREFORE, Petitioner respectively requests;

(1) That this court set aside its order approving the findings and sentence, including his executed discharge and order the Air Force to place Petitioner on the active-duty rolls[12].

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[11] I have serious doubts that a prosecution under 18 USC 1030 for "exceeding authorized access" would have withstood appellate scrutiny. There's a lot of case law on what this term means. Most courts have held that it applies only when the defendant had no authorization to access a certain computer page or file (such as where it was password protected and the defendant wasn't issued a password), and that it does not apply when an accused accesses a page he is allowed to access but does so for an unauthorized purpose. Charging 18 USC 1030 would have injected a very dicey appellate issue (where most courts have gone aghainst (sic) the government on the issue) into a case that didn't need the complication. J[redacted] O[redacted], *CAAFlog* http://www.caaflog.com/2010/07/15/caaf-affirms-lcdr-diazsconvictions-for-valentines-day-card-leaks/ (last accessed on July 16, 2010, 11:24 p.m., since removed)

[12] **This court has authority to return Petitioner to active duty, but not to place Petitioner on Appellate Leave**. That authority rests with the Convening Authority, see Article 76(a) of the UCMJ, AFI 51-201, and AFI 36-3003 (authority to place Airmen on appellate review status).

ALTERNATIVELY;

(1) That this court order that Petitioner's bad-conduct discharge be declared null and void.

(2) Petitioner shall be placed on the active rolls, Article 66 review will begin anew and;

(3) A ***DuBay*** hearing is authorized for making determinations of fact and conclusions of law concerning whether Petitioner's conviction under 18 U.S.C. 1028 is also affected by the Supreme Court's ruling in *Van Buren* and;

(4) The impact of (a) [redacted] T[redacted]'s worthless check convictions, (b) the perjury investigation concerning [redacted] T[redacted]'s theft from his then girlfriend, (c) ineffective assistance of appellate counsel and unreasonable post-trial delay under *Tardiff* on Petition's court-martial.

(5) After the ***DuBay*** hearing is concluded, new Appellate briefs under Article 66 shall be filed with this court.

(6) If a rehearing is impractical, that the Convening Authority set aside the findings and sentence.

FIAT IUSTITIA ET PEREAT MVNDVS

[redacted]

JOSE A. COSSIO JR.
Petitioner, Pro Se
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re	)	
	)	**MOTION TO SHOW CAUSE**
	)	
	)	Before Panel No.
Airman First Class (E-3)	)	
JOSE A. COSSIO, JR.,	)	
USAF,	)	ACM Misc. Dkt. No
	)	
Petitioner,	)	

MOTION FOR THE GOVERNMENT TO SHOW CAUSE

COMES NOW THE PETITIONER, PRO SE, and respectively asks this court to order the Government to show cause why;

(1) Petitioner's conviction for violating 18 U.S.C. 1030 should not be vacated in light of *United States v. Van Buren* 19-783.

(2) Why the Petitioner's sentence, including a bad conduct discharge, should not be vacated and Petitioner brought back to the Active-Duty rolls.

(3) Why this Court should not grant another Article 66 review to address Van Buren's impact on Petitioner's conviction under 18 U.S.C. 1028, post-trial delay, and a myriad of other issues outlined in Petitioner's brief.

[redacted]

Mr. JOSE A. COSSIO JR.
Petitioner, Pro Se
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re	)	
	)	**PETITONER'S CONSENT TO MILITARY**
	)	**JURISDICTION AND WAIVER OF**
	)	**OBJECTION TO THE PERSONAL**
Airman First Class (E-3)	)	**JURISDICTION OF THIS COURT**
JOSE A. COSSIO, JR.,	)	
USAF,	)	
Petitioner,	)	

PETITIONER'S CONSENT TO JURISDICTION
AND TO BE PLACED ON ACTIVE DUTY

I, Jose A. Cossio, am the Petitioner, Petitioner, and Accused in the above captioned case, do hereby consent to the personal jurisdiction of this court, to the United States, and the United States Air Force. I waive any objection to my return to Active-Duty status, if ordered by this court, and to this court's personal jurisdiction. This consent, and waiver to challenge the jurisdiction of this court, is not acceptance of being placed on appellate leave, unless this court deems it so proper. Appellate leave should only be ordered by the Convening Authority. Thus, for the time being I request that I am placed on the Active Rolls, and returned to my command at Hurlburt Field Florida.

CONSENT SIGNED AND SWORN, THIS 3rd DAY OF JUNE, 2021

[redacted]

Mr. JOSE A. COSSIO JR.
Petitioner, Pro Se
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re	)	**PETITION FOR A WRIT OF ERROR CORAM VOBIS AND FOR MANDAMUS**
	)	Before Panel No.
Airman First Class (E-3) JOSE A. COSSIO, JR., USAF,	)	ACM Misc. Dkt. No
Petitioner,	)	

NOTICE OF FILING AND MOTION

Please take notice that I, Jose Antonio Cossio Jr., filed Portioner's Petition for a Writ of Error Coram Vobis, Motion for a Show Cause Order, and Consent of Jurisdiction with the AFCCA.

CERTIFICATE OF SERVICE

I, Jose Antonio Cossio Jr., certify that a copy of the forgoing was submitted the AFCCA and Respondent via electronic service by email at;

[redacted]

[redacted]

JOSE A. COSSIO JR.
Petitioner, Pro Se
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In Re Jose A. COSSIO, JR.	)	**Misc. Dkt. No. 2021-04**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**NOTICE OF DOCKETING**
	)	
	)	
	)	**Panel 1**

A Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and *Coram Nobis* in the above styled case was filed with this court on 3 June 2021.

Accordingly, it is by the court on this 4th day of June, 2021,

ORDERED:

The case has been assigned Misc. Dkt. No. 2021-04 and has been referred to Panel 1 for review. No briefs will be filed unless ordered by the court.

F [redacted]
T [redacted] B [redacted]
Appellate Court Paralegal

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE COURT OF CRIMINAL APPEALS
1500 WEST PERIMETER ROAD, SUITE 1900
JOINT BASE ANDREWS MD 20762-6604

14 June 2021

MEMORANDUM FOR Mr. Jose A. Cossio Jr.

FROM: United States Air Force Court of Criminal Appeals

SUBJECT: *In re* Jose A. Cossio Jr., Misc. Dkt. No. 2021-04

Dear Mr. Cossio,

1. This court is in receipt of your 14 June 2021 email, titled *Filing: Cossio v. United States (Misc. Dkt. No. 2021-04)* and its three documents which consists of: (1) Petition for A Writ of Error Coram Vobis and for Mandamus (notice); (2) Petition for A Writ of Error Coram Vobis and for Mandamus; and (3) On Petition for a Writ of Error Coram Vobis and for Mandamus. This court cannot accept your documents at this time as they are not filed in accordance with this court's order in the subject case dated 4 June 2021, and the court's Rules of Practice and Procedure.

2. Specifically, the court's 4 June 2021 order states that "[n]o briefs will be filed unless ordered by the court." If your intent is to amend your original petition of 3 June 2021, please comply with Rule 23.3(n), *Motion to Amend Pleading.* Further, include your intent to withdraw your original petition in the motion to amend. *See* A.F. Ct. Crim. App. R. 23.3(n).

3. Therefore, in accordance with Rule 13.4, your 14 June 2021 filing is returned with no action. JT. CT. CRIM. APP. R. 13.4.

[redacted]
CAROL K. JOYCE
Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Jose A. COSSIO, JR. **Airman First Class (E-3)** **U.S. Air Force** ***Petitioner***	))))))))))	**Misc. Dkt. No. 2021-04** **ORDER** **Panel 1**

On 3 June 2021, Petitioner filed a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and *Coram Nobis*. On 4 June 2021, this court issued a notice of docketing, assigned the case Misc. Dkt. No. 2021-04 and referred the case to Panel 1 for review.

On 23 June 2021, Petitioner filed a motion requesting to withdraw his Petition dated 3 June 2021 and file an amended Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and *Coram Nobis*.

Accordingly it is by the court on this 25th day of June, 2021,

ORDERED:

Petitioner's 3 June 2021 Petition for Extraordinary Relief is **WITHDRAWN** and his motion to file an amended Petition for Extraordinary Relief in the Nature of a Writ of Mandamus and *Coram Nobis* is **GRANTED**.

FOR THE COURT

[redacted]

NATALIA A. ESCOBAR, Capt, USAF
Deputy Clerk of the Court

DEPARTMENT OF THE AIR FORCE
U.S. AIR FORCE COURT OF CRIMINAL APPEALS
1500 WEST PERIMETER ROAD, SUITE 1900
JOINT BASE ANDREWS MD 20762-6604

UNITED STATES AIR FORCE)
COURT OF CRIMINAL APPEALS)
)
) NOTICE OF PANEL CHANGE
)
)

Effective this 28th day of July, 2021:

The following records of trial are withdrawn from Panel 1 and referred to Panel 3 for appellate review. This panel letter supersedes all previous assignments.

1. [redacted]
2. [redacted]
3. United States v. Cossio, Jose Misc. Dkt. No. 2021-04

FOR THE COURT

[redacted]
Capt, USAF
Deputy Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

THE UNITED STATES,	)	
	)	**NOTICE OF MOTION**
Respondent,	)	
	)	
vs.	)	
	)	Before Panel No. 1
Airman First Class (E-3)	)	
JOSE A. COSSIO, JR.,	)	
	)	ACM Misc. Dkt. No. 2021-04
Petitioner,	)	

NOTICE OF MOTION

Please take notice that I, Jose Antonio Cossio Jr., have filed the attached **Motion for**

Appointment of Counsel, dated 19 August 2021.

CERTIFICATE OF SERVICE

I, Jose Antonio Cossio Jr., certify that a copy of the forgoing was submitted the AFCCA and Respondent via electronic service by email at;

JAJG (Appellate Government): AF.JAJG.AFLOA.Filng.Workflow@us.af.mil

JAJM (Appellate Records): AF.JAJG.AFLOA.Filng.Workflow@us.af.mil

This, 19th of August 2021

JOSE A. COSSIO JR.
Petitioner, Pro Se
[redacted]

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Jose A. COSSIO, JR.	)	**Misc. Dkt. No. 2021-04**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**NOTICE OF PANEL CHANGE**
	)	
	)	
	)	
	)	

It is by the court on this 16th day of September, 2021,

ORDERED:

That the Record of Trial in the above-styled matter is withdrawn from Panel 3 and referred to a Special Panel for appellate review. This panel letter supersedes all previous panel assignments.

The Special Panel in this matter shall be constituted as follows:

LEWIS, MICHAEL A., Colonel, Senior Appellate Military Judge
RICHARDSON, NATALIE D., Colonel, Appellate Military Judge
ANNEXSTAD, WILLIAM J., Colonel, Appellate Military Judge

FOR THE COURT

[redacted]

NATALIA A. ESCOBAR, Capt, USAF
Deputy Clerk of the Court

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

In re Jose A. COSSIO, JR.	)	**Misc. Dkt. No. 2021-04**
Airman First Class (E-3)	)	
U.S. Air Force	)	
Petitioner	)	
	)	**ORDER**
	)	
	)	
	)	
	)	**Special Panel**

On 3 June 2021, a Petition for Extraordinary Relief in the nature of a Writ of Mandamus and *Coram Nobis* in the above-styled case was docketed with this court. On 23 June 2021, Petitioner filed a motion requesting to withdraw his Petition, dated 3 June 2021, and file an amended Petition for Extraordinary Relief in the nature of a Writ of Mandamus and *Coram Nobis*. On 25 June 2021, this court ordered Petitioner's original petition withdrawn and granted his motion to file an amended petition in the nature of a Writ of Mandamus and *Coram Nobis*. On 19 August 2021, Petitioner filed a motion for appointment of appellate defense counsel under Article 70, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 870. On 26 August 2021, the Government opposed the motion.

This court does not have the authority under Article 70, UCMJ, to appoint appellate defense counsel. After considering Petitioner's filings in this matter, we decline to request that The Judge Advocate General appoint appellate defense counsel for the Petitioner.

Accordingly it is by the court on this 7th day of October, 2021,

ORDERED:

Petitioner's motion for appointment of appellate defense counsel is **DENIED**.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

In Re	)	
	)	**MOTION FOR THE APPOINTMENT OF CONSEL under Article 70, UCMJ**
Airman First Class (E-3) JOSE A. COSSIO, JR., USAF,	)	Before Panel No.
	)	ACM Misc. Dkt. No. 2021-04
Petitioner,	)	

MOTION FOR THE APPOINTMENT OF APPELLATE COUNSEL

COMES NOW THE PETITIONER, PRO SE, and respectively asks this court to appoint Appellate Counsel in the above captioned case. In support of this motion Petitioner states;

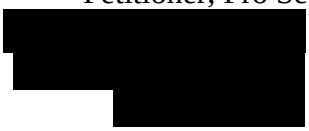
(1) Petitioner's conviction for violating 18 U.S.C. 1030 must be vacated in light of *United States v. Van Buren* 19-783.

(2) There is no question that Petitioner is entitled to relief, his conviction under 18 U.S.C. 1030 is void. However, there is a question of how the sentence should be remedied.

(3) The accused has attempted to contact the Appellate shop, but is greeted only with a recording to leave a message. No messages have been returned.

(4) This Court can order appellate counsel to represent the accused when requested under Article 70, UCMJ. This Court should also order the Government to submit a brief outlining the possible remedies in cases where the Supreme Court has narrowed the interpretation of a Federal statute and an accused, who has already been long since discharged, would have not been found guilty as a result of this change of law.

WHEREFORE, the Petitioner requests this Honorable Court to order the appointment of Appellate Counsel to represent petitioner and the Government to file a response brief.

Mr. JOSE A. COSSIO JR.
Petitioner, Pro Se


26 August 2021

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

	)	UNITED STATES' RESPONSE TO
	)	PETITIONER'S MOTION FOR
In Re JOSE A. COSSIO, JR., USAF	)	APPOINTMENT OF APPELLATE
Airman First Class (E-3)	)	COUNSEL, UNDER ARTICLE 70, UCMJ
Petitioner	)	
	)	Before Panel No. 3
	)	
	)	Misc. Dkt. No. 2021-04

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

Pursuant to Rules 23 and 23.2 of this Court's Rules of Practice and Procedure, the United States hereby responds in opposition to Petitioner's Motion for the Appointment of Counsel under Article 70, UCMJ, filed 20 August 2021.

Petitioner's motion should be rejected due to his failure to follow this Court's Rules of Practice and Procedure. Given that a motion for the appointment of counsel is not expressly authorized by this Court's rules, Petitioner's pleading is in violation of Rules 23(d) and 23.3(c) for failing to accompany his filing with a motion for leave to file. In addition, Petitioner has not shown good cause to suspend the requirement to file a motion for leave to file as required by Rule 32. Therefore, this Court should reject his motion on these grounds.

Even if the motion is accepted, this Court should deny Petitioner's requested relief. This Court does not have the authority to appoint appellate defense counsel or order the Judge Advocate of the Air Force to appoint appellate defense counsel to represent Petitioner since his appellate review is final under Article 76, UCMJ,[1] and the final court-martial order ordered the adjudged bad-conduct discharge to be executed. Juillerat v. United States, 2016 CCA LEXIS

[1] United States v. Cossio, 2006 CCA LEXIS 196 (A.F. Ct. Crim. App. 24 August 2006) (unpub. op.).

211, at *7 (A.F. Ct. Crim. App. 31 Mar. 2016) (unpub. op.) (citing Diaz v. JAG of the Navy, 59 M.J. 34, 37 (C.A.A.F. 2003)); United States v. Cossio, 2015 CCA LEXIS 342, at *14 (A.F. Ct. Crim. App. 17 Aug. 2015) (unpub. op.); United States v. Chapman, 2014 CCA LEXIS 108 (A.F. Ct. Crim. App. 25 Feb. 2014) (unpub. op.); United States v. Chapman, 2012 CCA LEXIS 374 (A.F. Ct. Crim. App. 28 Sep. 2012) (unpub. op.). Rather, whether Petitioner will be appointed military appellate defense counsel is within the sole discretion of the Judge Advocate General of the Air Force. *See* Chapman, 2012 CCA LEXIS 374. Accordingly, Petitioner is not entitled to his requested relief.

Further, Rule 19(e) of this Court's Rules of Practice and Procedure provides that this "Court may dismiss or deny the petition without answer, order the respondent to show cause and file an answer, or take whatever other action it deems appropriate." Here, Petitioner has not demonstrated a need for appellate defense counsel absent an order directing the United States to show cause or granting leave for the United States to file a response pursuant to Rule 19(f). Since Petitioner has already filed, and refiled with amendments, his petition for extraordinary relief, he does not require an appellate defense counsel unless he's allowed to file a Rule 19.2 reply brief, which is only triggered when the United States files an answer to the petition pursuant to a show cause order.

WHEREFORE, the United States respectfully requests this Honorable Court deny Petitioner's motion.

PETER F. KELLETT, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force

[redacted]
MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Operations
United States Air Force
[redacted]

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, Petitioner, and to the Appellate Defense Division on 26 August 2021.

PETER F. KELLETT, Maj, USAFR
Appellate Government Counsel
Government Trial and Appellate Operations
United States Air Force