UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40360**
Appellee	)	
	)	
v.	)	
	)	**NOTICE OF DOCKETING**
Matthew R. DENNEY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

A notice of direct appeal pursuant to Article 66(b)(1)(A), Uniform Code of Military Justice, 10 U.S.C. § 866(b)(1)(A), was received by this court in the above-styled case on 19 January 2023. On 24 January 2023, the record of trial was received by the Military Appellate Records Branch (JAJM) for docketing with the court.

Accordingly, it is by the court on this 25th day of January, 2023,

ORDERED:

The case in the above-styled matter is referred to Panel 2.

FOR THE COURT

[redacted]

TANICA S. BAGMON
Appellate Court Paralegal

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIRST)** Before Panel No. 2 No. ACM 40360 17 March 2023

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

Pursuant to Rule 23.3(m)(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 **25 May 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 51 days have elapsed. On the date requested, 120 days will have elapsed.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]YTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 17 March 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

20 March 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 20 March 2023.

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SECOND)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force	)	No. ACM 40360
Appellant	)	16 May 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **24 June 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 111 days have elapsed. On the date requested, 150 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 16 May 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 May 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 May 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (THIRD)**
v.	)	
	)	Before Panel No. 2
Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force	)	No. ACM 40360
Appellant	)	14 June 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **24 July 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 140 days have elapsed. On the date requested, 180 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 14 June 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

15 June 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 June 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES	)	**NOTICE OF DIRECT APPEAL**
Appellee	)	**PURSUANT TO ARTICLE**
	)	**66(b)(1)(A)**
v.	)	
	)	
Master Sergeant (E-7)	)	No. ACM 40360
MATTHEW R. DENNEY	)	
United States Air Force	)	19 January 2023
Appellant	)	

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

On 7 July 2022, a military judge sitting as a general court-martial convicted Master Sergeant (MSgt) Matthew R. Denney, consistent with his pleas, of one specification of distributing child pornography and one specification of possessing child pornography, each in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (Entry of Judgement, 22 August 2022.) On 26 October 2022, the Government sent MSgt Denny the required notice by mail of his right to appeal within 90 days because his court-martial sentence included confinement for more than six months but less than two years and no dismissal, dishonorable discharge, or bad conduct discharge. Pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A), MSgt Denny files his notice of direct appeal with this Court.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
[redacted]

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 Appellate Government Division on 19 January 2023.

Respectfully submitted,

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division (AF/JAJA)
[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FOURTH)** Before Panel No. 2 No. ACM 40360 14 July 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **23 August 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 170 days have elapsed. On the date requested, 210 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

Counsel is currently assigned 21 cases, with 7 pending initial brief before this Court. Counsel has not yet begun review in this case. Two cases at this Court have priority over this case:

1. *United States v. Reedy*, ACM 40358. The record of trial consists of 3 prosecution exhibits, 24 defense exhibits, and 6 appellate exhibits. The transcript is 107 pages. Counsel has completed the AOE and will file shortly.
2. *United States v. Conway*, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has not yet begun review of the record in this case.

Additionally, counsel will be separating from active duty on 21 July 2023. However, counsel will be returning to JAJA as a reservist on a one-year tour and plans to maintain all cases through the transition. If the administrative logistics create any issues, another counsel from the office will assist in filing the necessary enlargements of time.

Through no fault of MSgt Denney, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. MSgt Denney was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review MSgt Denny's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]
MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 14 July 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 July 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 July 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	))))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (FIFTH)** Before Panel No. 2 No. ACM 40360 16 August 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **22 September 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 203 days have elapsed. On the date requested, 240 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

Counsel is currently assigned 20 cases, with 6 pending initial brief before this Court. Counsel has not yet begun review in this case. One at this Court have priority over this case:

United States v. Conway, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has not yet begun review of the record in this case.

In addition, counsel has a reply in *United States v. Cornwell*, ACM 40335, due on 23 August 2023, as well as a grant brief due on 8 September 2023 in *United States v. Palik*, ACM 40225.

Counsel separated from active duty on 21 July 2023. However, counsel will be returning to JAJA as a reservist on a one-year tour and plans to maintain all cases through the transition. The tour was to start on 1 August 2023 but did not begin until today, 15 August 2023. Counsel still has no access to government computers.

Through no fault of MSgt Denney, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. MSgt Denney was specifically informed of his right to timely appeal, was consulted with

regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review MSgt Denney's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 16 August 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAF
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

17 August 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 17 August 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40360**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew R. DENNEY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 16 August 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 18th day of August, 2023,

ORDERED:

Appellant's Motion for Enlargement of Time (Fifth) is **GRANTED**. Appellant shall file any assignments of error not later than **22 September 2023**.

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

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SIXTH)** Before Panel No. 2 No. ACM 40360 12 September 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **22 October 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 230 days have elapsed. On the date requested, 270 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

Counsel is currently assigned 22 cases, with 8 pending initial brief before this Court. Counsel has begun review in this case. One case at this Court has priority over this case:

United States v. Conway, ACM 40372. The record of trial consists of 6 prosecution exhibits, 17 defense exhibits, 10 appellate exhibits, and 1 court exhibit. The transcript is 128 pages. Counsel has completed review of this record.

Through no fault of MSgt Denney, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. MSgt Denney was specifically informed of his right to timely appeal, was consulted with regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review MSgt Denney's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 12 September 2023.

[redacted]
MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

13 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 13 September 2023.

[redacted]

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

[redacted]

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS** Before Panel No. 2 No. ACM 40360 14 September 2023

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 Rule 23.3(f)(1) of this Honorable Court's Rules of Practice and Procedure, undersigned counsel hereby moves to examine Prosecution Exhibit 2 in volume 1 of the Record of Trial (ROT). The exhibit is the substantive evidence upon which the charge rests and is discussed in the stipulation of fact. (Prosecution Exhibit 1.) Both trial counsel and trial defense counsel had access to the exhibit for the court-martial. (Record at 73.) The compact disc is sealed in counsel's copy of the ROT, and states that it is located at the 20 FW legal office.

In accordance with R.C.M. 1113(b)(3)(B)(i), which requires a colorable showing that examining these materials is reasonably necessary to fulfill appellate counsel's responsibilities, undersigned counsel asserts that viewing the referenced materials is reasonably necessary to assess whether MSgt Denney's guilty plea was provident.

To determine whether the record of trial yields grounds for this Court to grant relief under Article 66(d), UCMJ, 10 U.S.C. § 866(d), appellate defense counsel must examine "the entire record."

> Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation. As we said in *United States v. Ortiz*, 24 M.J. 323, 325 (C.M.A. 1987), independent review is not the same as competent appellate representation.

United States v. May, 47 M.J. 478, 481 (C.A.A.F. 1998). Undersigned counsel must review the sealed materials to provide "competent appellate representation." *See id.* Accordingly, good cause exists in this case since undersigned counsel cannot fulfill his duty of representation under Article 70, UCMJ, 10 U.S.C. § 870, without first reviewing this exhibit.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant his motion.

Respectfully submitted,

[redacted]LYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 14 September 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

15 September 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF *Appellant.*	)))))))))	UNITED STATES' RESPONSE TO APPELLANT'S MOTION TO EXAMINE SEALED MATERIALS ACM 40360 Panel No. 2

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 responds to Appellant's Motion to Examine Sealed Material. The United States does not object to Appellant's counsel reviewing the material listed in Appellant's motion –which appears to have been available to all parties at trial – so long as the United States can also review the sealed portion of the record as necessary to respond to any assignment of error that refers to the sealed material. The United States respectfully requests that any order issued by this Court also allow counsel for the United States to view the sealed materials.

WHEREFORE, the United States respectfully responds to Appellant's motion.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 15 September 2023.

[redacted]

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

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40360**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Matthew R. DENNEY	)	
Master Sergeant (E-7)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 14 September 2023, Appellant's counsel submitted a Motion to Examine Sealed Material, requesting to examine Prosecution Exhibit 2. The Government responded to the motion on 15 September 2023. The Government does not object to Appellant's counsel reviewing Prosecution Exhibit 2, and requests the Government also be authorized to review the exhibit as necessary to respond to any assignment of error that refers to the exhibit.

Prosecution Exhibit 2 is the substantive evidence by which the charge rests and is discussed in the stipulation of fact, Prosecution Exhibit 1. Both trial government counsel and trial defense counsel had access to the exhibit for the court-martial. Appellant's counsel avers that viewing the sealed materials is reasonably necessary to fulfill his duty of representation, because counsel cannot perform his duty of representation without first reviewing the complete record of trial.

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* (2019 ed.).

The court finds Appellant's counsel has made a colorable showing that review of Prosecution Exhibit 2 is necessary to fulfill counsel's duties of representation to Appellant. However, the court further finds that while Prosecution Exhibit 2 is administratively (physically) sealed in the original record of trial, the record does not reflect this exhibit was ordered sealed by the military judge. Therefore, in an abundance of caution, and in its decree below, the court orders Prosecution Exhibit 2 sealed. The Clerk of Court will ensure this court's order is properly reflected on Prosecution Exhibit 2 in the record retained by the court.

Accordingly, it is by the court on this 5th day of October 2023,

ORDERED:

Appellant's Motion to Examine Sealed Materials is **GRANTED**.

Appellate defense counsel and appellate government counsel may view **Prosecution Exhibit 2**, 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.

It is further ordered:

Prosecution Exhibit 2 is sealed.

The Appellee shall take all steps necessary to ensure all copies of Prosecution Exhibit 2 are in fact, sealed.*

However, if appellate defense counsel and appellate government counsel currently possess Prosecution Exhibit 2, counsel are authorized to retain copies of the materials in their possession until completion of our Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866, review of Appellant's case, to include the period for reconsideration in accordance with Rule 31 of the Joint Rules of Appellate Procedure for Courts of Criminal Appeals. After this period, appellate defense and appellate government counsel shall destroy any retained copies in their possession.

FOR THE COURT

[redacted]

CAROL K. JOYCE
Clerk of the Court

* The base legal office may maintain a sealed copy in accordance with Department of the Air Force Manual 51-203, *Records of Trial*, ¶ 9.3.6 (21 Apr. 2021).

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,* v. Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)))))))))	**APPELLANT'S MOTION FOR ENLARGEMENT OF TIME (SEVENTH)** Before Panel No. 2 No. ACM 40360 13 October 2023

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

Pursuant to Rule 23.3(m)(3) 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 30 days, which will end on **21 November 2023.** The record of trial was docketed with this Court on 25 January 2023. From the date of docketing to the present date, 261 days have elapsed. On the date requested, 300 days will have elapsed.

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2019). (Record (R.) at 18, 69; Entry of Judgment (EOJ), Record of Trial (ROT) Vol. 1, 22 August 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ, ROT Vol. 1.) The convening authority took no action on the findings, disapproved the

reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, ROT Vol. 1, 22 July 2022.)

The record of trial consists of 17 prosecution exhibits, 11 defense exhibits, and 5 appellate exhibits. The transcript is 99 pages. MSgt Denney is not currently confined.

Counsel is currently assigned 24 cases, with 8 pending initial brief before this Court. Counsel has begun review in this case.

One case at this Court has priority over this case: *United States v. Cook*, ACM 40333. The trial transcript is 639 pages long and the record of trial is comprised of 11 volumes containing 28 prosecutions exhibits, 10 defense exhibits, 48 appellate exhibits, and zero court exhibits. Counsel has drafted the majority of the AOE in *Cook*.

In addition to *Cook*, counsel has a number of replies due in the upcoming weeks: (1) Motion for Reconsideration response in *United States v. Boren*, ACM 40267, due 17 October 2023; (2) reply due in *United States v. Roan*, ACM 22033, on 17 October 2023; (3) reply in *United States v. Harrington*, ACM 39825 (rem), due 19 October 2023; (4) reply at CAAF in *United States v. Palik*, Dkt. No. 23-0206, due 20 October 2023. Counsel also may have to argue *Palik* on 8 November 2023, but CAAF has not finalized scheduling for that date yet.

Through no fault of MSgt Denney, undersigned counsel has been working on other assigned matters and has yet to complete the assignment of errors. MSgt Denney was specifically informed of his right to timely appeal, was consulted with

regard to this enlargement of time, and agrees with this enlargement of time. Accordingly, an enlargement of time is necessary to allow undersigned counsel to fully review MSgt Denney's case and advise him regarding potential errors.

WHEREFORE, Appellant respectfully requests that this Honorable Court grant the requested EOT.

Respectfully submitted,

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

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 13 October 2023.

[redacted]
M LYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

16 October 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* v. Master Sergeant (E-7) MATTHEW R. DENNEY, USAF, *Appellant.*	)))))))))	UNITED STATES' GENERAL OPPOSITION TO APPELLANT'S MOTION FOR ENLARGEMENT OF TIME ACM 40360 Panel No. 2

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 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 his 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.

[redacted]

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

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and to the Air Force Appellate Defense Division on 16 October 2023.

[redacted]

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

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)	No. ACM 40360 16 November 2023

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

ASSIGNMENT OF ERROR

WHETHER, AS APPLIED TO MSGT DENNEY, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF A NONVIOLENT OFFENSE.

STATEMENT OF THE CASE

On 7 July 2022, at a general court-martial at Shaw Air Force Base, South Carolina, Master Sergeant (MSgt) Matthew R. Denney pleaded guilty before a military judge to one specification of distribution of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2018). (Record (R.)) at 18, 69; Entry of Judgment (EOJ), 22 Aug. 2022.) The military judge sentenced MSgt Denney to 12 months' confinement, reduction to the grade of E-4, and a reprimand. (R. at 99; EOJ.) The convening authority took no action on the

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

findings, disapproved the reprimand, and waived automatic forfeitures for the benefit of MSgt Denney's dependent child. (Convening Authority Decision on Action, 22 Jul. 2022.)

STATEMENT OF FACTS

MSgt Denney had a pornography addiction and amassed a collection of over 1,800 items of legal pornography. (R. at 35.) He uploaded a single video of child pornography to a Kik chat group, and a military judge accepted his guilty plea to that single distribution. (R. at 69; PE 1 at 1.) After his conviction, the Government determined that MSgt Denney's case qualified for a firearms prohibition under 18 U.S.C. § 922. (EOJ.)

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021).

Law and Analysis

1. 18 U.S.C. § 922 is unconstitutional as applied to MSgt Denney.

The test for applying the Second Amendment is as follows:

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

Bruen, 142 S. Ct. at 2129–30 (citation omitted).

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

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition.

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

C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not own or have in his possession or under his control, a pistol or revolver." *Id.* at 701, 704 (quotations omitted). A "crime of violence" meant "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny],

burglary, and housebreaking." *Id.* at 701 (quotations omitted). It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

The Third Circuit recently adopted this logic to conclude that § 922(g)(1) was unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps, which was punishable by five years' confinement. *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), *petition for cert. filed*, No. 23-374 (U.S. 5 Oct. 2023).[2] Evaluating § 922(g)(1) in light of *Bruen*, the court noted that the earliest version of the statute prohibiting those convicted of crimes punishable by more than one year of imprisonment, from 1938, "applied only to *violent* criminals." *Id.* at 104 (emphasis in original). It found no "relevantly similar" analogue to imposing lifetime disarmament upon those who committed nonviolent crimes. *Id.* at 103–05.

In addition to the distinction on violence, a felony conviction today is vastly different from what constituted a felony prior to the 20th century, let alone at the time of this country's founding. This is problematic because categorizing crimes as felonies has not only increased, but done so in a manner inconsistent with the traditional understanding of a felony:

[2] Both the United States and Range have asked the Supreme Court to grant certiorari in this case. Brief for Respondent David Bryan Range, No. 23-374 (U.S. 18 Oct. 2023.)

> The need [for historical research] is particularly acute given the cancerous growth since the 1920s of "regulatory" crimes punishable by more than a year in prison, as distinct from traditional common-law crimes. The effect of this growth has been to expand the number and types of crimes that trigger "felon" disabilities to rope in persons whose convictions do not establish any threat that they will physically harm anyone, much less with a gun.

Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y at 697. Notably, the "federal felon disability--barring any person convicted of a crime punishable by more than a year in prison from possessing any firearm--is less than [63] years old." *Id*. at 698. In fact, "one can with a good degree of confidence say that bans on convicts possessing firearms were unknown before World War I." *Id.* at 708. On this point alone, the Government has not proven that such a ban is consistent with this country's history and tradition.

This is not the only provision of § 922 to have come under fire in light of *Bruen*. The Fifth Circuit recently held that § 922(g)(8), which applies to possession of a firearm while under a domestic violence restraining order, was unconstitutional because such a "ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.'" *United States v. Rahimi*, 61 F.4th 443, 461 (5th Cir. 2023) (citation omitted), *cert. granted*, 143 S. Ct. 2688 (2023). Notably, Rahimi was "involved in five shootings" and pleaded guilty to "possessing a firearm while under a domestic violence restraining order." *Id.* at 448–49.

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 450 (citing *Bruen*, 142 S. Ct. at 2129–30). Therefore, the Government bears the burden of justifying its regulation. *Id.*

Second, it 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 (citing *Heller*, 554 U.S. at 635). Based on historical precedent, there are certain groups "whose disarmament the Founders 'presumptively' tolerated or would have tolerated." *Id.* at 452 (citing *Heller*, 554 U.S. at 627 n.26). 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 of a nonviolent offense. *Id.*

Third, *Rahimi* found the Government failed to show "§ 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 Nation's historical tradition of firearm regulation did not include violent offenders who pled guilty to an agreed-upon domestic violence restraining order violation, then it similarly does not include that barring MSgt Denney from *ever* possessing firearms for a nonviolent offense.

In addition to *Rahimi*, the Fifth Circuit has found that § 922(g)(3)—which bars firearm possession for unlawful drug users or addicts—is unconstitutional. *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). In *Daniels*, the appellant was arrested for driving without a license, but the police officers found marijuana butts in his ashtray. *Id.* at 340. He was later charged and convicted of a violation of § 922(g)(3). *Id.* In finding § 922(g)(3) unconstitutional, the Fifth Circuit's bottom line was:

> [O]ur history and tradition may support some limits on an intoxicated person's right to carry a weapon, but it does not justify disarming a sober citizen based exclusively on his past drug usage. Nor do more generalized traditions of disarming dangerous persons support this restriction on nonviolent drug users.

Id. The reasoning in both *Rahimi* and *Daniels* further supports the limited scope of relevant historical firearms regulation.

In light of *Bruen*, § 922(g)(1) is unconstitutional as applied to MSgt Denney.

2. This Court may order correction of the EOJ.

In *United States v. Lepore*, citing to the 2016 Rules for Courts-Martial (R.C.M.), this Court held, "the 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.

Six months after this Court's decision in *Lepore*, the CAAF decided *United States v. Lemire*. The CAAF granted Sergeant Lemire's petition, affirmed the Army Court of Criminal Appeals' (ACCA) 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) (decision without published opinion). This disposition stands in tension with *Lepore*.

The CAAF's decision in *Lemire* reveals three things. First, the CAAF has the power to correct administrative errors in promulgating orders.[3] Second, the CAAF believes that Courts of Criminal Appeals (CCAs) have the power to address collateral consequences under Article 66 as well since it "directed" the ACCA to fix—or have fixed—the erroneous requirement that Sergeant Lemire register as a sex offender. Third, if the CAAF and the CCAs 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.

Moreover, *Lepore* relates to a prior version of the Rules for Courts-Martial—"[a]ll references in this opinion to the UCMJ and [R.C.M.] are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at n.1. In the 2019 *MCM*, both the Statement of Trial Results (STR) and the Entry of Judgment (EOJ) contain "[a]ny additional information . . . required under regulations prescribed by the Secretary concerned." R.C.M. 1101(a)(6), 1111(b)(3)(F). Under DAFI 51-201, *Administration of Military Justice*, dated 14 April 2022, ¶ 29.32, the STR and EOJ must include whether the offenses trigger a prohibition under § 922. As such, this Court's analysis in *Lepore* is no longer controlling since the R.C.M. now requires—by incorporation—

[3] While a promulgating order was at issue in *Lemire*, the same should apply to the EOJ, which replaced the promulgating order as the "document that reflects the outcome of the court-martial." *Manual for Courts-Martial, United States* (2019 ed.), App. 15 at A15-22.

a determination on whether the firearm prohibition is triggered.[4] Thus, this Court can rule in MSgt Denney's favor without taking the case en banc. If this Court disagrees, MSgt Denney offers the above argument to overrule *Lepore* under Joint Rule of Appellate Procedure 27(d).

WHEREFORE, MSgt Denney respectfully requests this Court hold § 922(g)'s firearm prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearm prohibition applies in his case.

Respectfully submitted,

[redacted]
MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

[4] *See also United States v. Robertson*, No. 202000281, 2021 CCA LEXIS 531 (N.M. Ct. Crim. App. 18 Oct. 2021) (unpub. op.) (ordering correction of an STR because it incorrectly stated § 922 did not apply); *United States v. Moreldelossantos*, ARMY 20210167, 2022 CCA LEXIS 164 (17 Mar. 2022) (unpub. op.) (ordering correction of the STR to change the Section 922(g)(1) designator to "No").

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 16 November 2023.

[redacted]

MATTHEW L. BLYTH, Maj, USAFR
Appellate Defense Counsel
Air Force Appellate Defense Division
[redacted]

14 December 2023

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' ANSWER TO ASSIGNMENTS OF ERROR
v.	)	No. ACM 40360
Master Sergeant (E-7) **MATTHEW R. DENNEY**, USAF, *Appellant.*	)	Panel No. 2

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

ISSUE PRESENTED

WHETHER, AS APPLIED TO MSGT DENNEY, 18 U.S.C. §922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF NON-VIOLENT OFFENSES?

STATEMENT OF THE CASE

Appellant's statement of the case is accepted.

STATEMENT OF FACTS

According to the parties' Stipulation of Fact, which the Military Judge accepted (R. at 19)[2], the facts for which Appellant was convicted are as follows: He registered for a Kik account on 3 May 2019 and, on 6 May 2019, Appellant uploaded a video depicting a female minor touching and penetrating her genitals with her hand to a group chat named "14+ post or ban." (Pros. Ex. 1)[3] At the time he uploaded the video, Appellant knew it contained child pornography, that child

[1] N.Y State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2130 (2022).

[2] The transcript record from citations in this Answer are in Volume II of the record of trial (ROT).

[3] Documents cited in this Answer are in Volume 1 of the ROT.

pornography was illegal to distribute, and that he had not legal justification for distributing the video. Appellant's upload of the child pornography video to the Kik group chat was of a nature to bring discredit to the armed forces.

The maximum punishment for Distribution of Child Pornography is forfeiture of all pay and allowances, confinement for 20 years, and a dishonorable discharge. Manual for Courts-Martial (MCM), pt. IV, ¶ 94.d(3) (2023 ed.)

Pursuant to a plea agreement (App. Ex. III), Appellant pleaded guilty to one specification of Distribution of Child Pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), and one specification of Possession of Child Pornography was dismissed. (Entry of Judgment, 22 August 2022; ROT, Vol. 1.) The Military Judge sentenced Appellant to a reprimand, which the Convening Authority disapproved, 12 months of confinement, and reduction to the grade of E-4. (Id.) The Staff Judge Advocate's first indorsement to the Entry of Judgment and Statement of Trial Results in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Id.)

ARGUMENT

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE WHETHER THE FIREARM PROHIBITION IN THE GUN CONTROL ACT OF 1968, 18 U.S.C. § 922, IS CONSTITUTIONAL BECAUSE IT IS A COLLATERAL ISSUE NOT SUBJECT TO REVIEW UNDER ARTICLE 66, UCMJ. EVEN IF THIS COURT DID POSSESS JURISDICTION TO REVIEW THIS ISSUE, THE STATEMENT OF TRIAL RESULTS AND ENTRY OF JUDGMENT CORRECTLY ANNOTATED THAT APPELLANT'S CONVICTION, A VIOLENT OFFENSE, REQUIRED THAT HE BE CRIMINALLY INDEXED PER THE FIREARM PROHIBITION UNDER 18 U.S.C. § 922.

Law and Analysis

Appellant asserts that 18 U.S.C. § 922 is unconstitutional as applied to him because, in his opinion, he was convicted of a non-violent offense. (App. Br. at 3-7.) Appellant asserts that any prohibitions on the possession of firearms imposed because of a non-violent offense runs afoul of the Second Amendment, U.S. CONST. amend. II, and the Supreme Court's interpretation of that amendment in N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022) (analyzing New York's concealed carry regime). Appellant's constitutional argument is without merit.

The Gun Control Act of 1968, 18 U.S.C. § 922, makes it unlawful for any person, *inter alia*, "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year" to possess a firearm. Id. at § 922(g)(1). Appellant was found guilty of Distribution of Child Pornography, in violation of Article 134, UCMJ, which is a crime punishable by imprisonment for a term exceeding one year.[4]

A. This Court lacks jurisdiction to determine whether Appellant should be indexed in accordance with 18 U.S.C. § 922, because that requirement is not part of the findings or sentence.

This Court lacks jurisdiction under Article 66, UCMJ, to order the correction of the Statement of Trial Results or Entry of Judgment on the grounds requested by Appellant. In United States v. Lepore, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021), this Court held that it "lacks authority under Article 66, UCMJ, to direct correction of the 18 U.S.C. § 922(g) firearms prohibition" in a court-martial order. Yet Appellant argues here that, because the Court of Appeals for the Armed Forces (CAAF) in United States v. Lemire, 82 M.J. 263, n.* (C.A.A.F. 9 March

[4] Persons *accused* of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial, also may not possess a firearm. *See* Department of the Air Force Instruction (DAFI) 51-201, dated 14 April 2022, para. 29.30.8 (citing 18 U.S.C. § 922(n)).

2022) (decision without published opinion), ordered the Army to correct a promulgating order that annotated an appellant as a sex offender, this Court now has the authority to modify his Statement of Trial Results and Entry of Judgment. (App. Br. at 7-8). Appellant argues that CAAF's decision in Lemire reveals three things: (1) That CAAF has the authority to correct administrative errors in promulgating orders; (2) by extension, CAAF believes that the service courts of criminal appeal (CCAs) have power to correct administrative errors under Article 66, UCMJ; and (3) CAAF believes both appellate courts have the authority to address constitutional errors in promulgating orders even if they amount to collateral consequences of a conviction. (Id.)

Appellant bases his argument solely on an asterisk footnote to a summary decision without a published opinion issued by CAAF that contained no analysis or reasoning why correction was a viable remedy in that case. *See* Lemire, 82 M.J. 263, n.*. This Court has previously declined to rely on such an incomplete analysis. In Lepore, 81 M.J. at 762, this Court even declined to rely on its own past opinion in United States v. Dawson, 65 M.J. 848 (A.F. Ct. Crim. App. 2007), because that opinion contained no jurisdictional analysis when the Court summarily ordered the correction of the promulgating order. Appellant asks this Court to follow a mere footnote in a decision without a published opinion, which contains no analysis of jurisdiction and no language indicating that correction of a Statement of Trial Results or Entry of Judgment is proper.

Rule 30.4(a) of this Court's Rules of Practice and Procedure states:

> 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.

Because the Lemire decision from CAAF does not call attention to a rule of law or procedure and does not provide any rationale, it does not qualify as "precedent" and should not be followed. In

any event, Lemire involved sex offender registration, not firearms prohibitions. CAAF indeed ordered removal of the designation for sex offender registration from a promulgating order, but its decision did not adjudicate the constitutional question posed here, which is unrelated to the actual findings and sentence in the case. This Court should therefore not read Lemire as requiring an evaluation of the constitutionality of firearms prohibitions for convicted Airmen, or the propriety of the Air Force's regulations requiring indexing.

This Court's jurisdiction is defined entirely by Article 66, UCMJ, which specifically limits its authority to only act with "respect to the finding and sentence" of a court-martial "as approved by the convening authority." Lepore, 81 M.J. at 762 (citing 10 U.S.C. § 866(c)); *see generally* United States v. Arness, 74 M.J. 441 (C.A.A.F. 2015) (discussing that CCAs are courts of limited jurisdiction, defined entirely by statute). Article 66, UCMJ, provides no statutory authority for this Court to act on the collateral consequences of conviction. In Lepore, this Court noted the many times it has held that it lacked jurisdiction where appellants sought relief for "alleged deficiencies unrelated to the legality or appropriateness of the court-martial findings or sentence." 81 M.J. at 762 (citations omitted). This Court should reach the same conclusion here.

Although this Court has the authority to modify errors in an entry of judgment under R.C.M. 1111(c)(2), the authority is limited to modifying errors *in the performance of its duties and responsibilities*, so that authority does not extend to determining the constitutionality of a collateral consequence. Further, the question Appellant asks this Court to determine is fundamentally different from the situations in which our sister courts have corrected errors on promulgating orders. For example, in United States v. Pennington, 2021 CCA LEXIS 101, at *5 (A. Ct. Crim. App. 2 March 2021) (unpub. op.), the Army Court of Criminal Appeals ordered modification of the statement of trial results in that case to correct erroneous dates, the wording in charges, the

reflection of pleas the appellant entered, and other such clerical corrections. The errors corrected in Pennington are the types of errors that R.C.M. 1111(c)(2) is in place to correct.

Moreover, both the Navy-Marine Corps and the Air Force Courts of Criminal Appeal have held that matters outside the UCMJ and MCM, such as Defense Incident-Based Reporting System (DIBRS) codes and indexing requirements under 18 U.S.C. § 922, are outside their authority under Article 66, UCMJ. *See* United States v. Baratta, 77 M.J. 691 (N-M. Corps. Ct. Crim. App. 2018); Lepore, 81 M.J. at 763. Both courts reasoned that they only possessed jurisdiction to act with respect to the findings and sentence as approved by the convening authority. Id. But here, even under the updates made to Article 66(d), UCMJ, this Court's jurisdiction is still limited to acting "with respect to the findings and sentence as entered into the record." 10 U.S.C. § 866(d). The annotation on the first indorsements to the Entry of Judgment and Statement of Trial Results is simply not a part of the finding or sentence entered into the record. Nor does R.C.M. 918 list the firearm prohibition requirements from 18 U.S.C. § 922(g) as part of a court-martial finding. Thus, 18 U.S.C. § 922(g)'s firearm prohibitions and the indexing requirements that follow that statute are well outside the scope of this Court's jurisdiction.

B. Appellant's reliance on his conviction being other than a violent offense is misplaced, because it was a "crime of violence."

Appellant's argument presumes, incorrectly, that his crime was not a violent offense. However, we submit that Distribution of Child Pornography is a violent offense. The Federal Bail Reform Act, 18 U.S.C. § 3156(a)(4)(C), defines the term "crime of violence" to include Distribution of Child Pornography; that is, a felony under Chapter 110 of the U.S. Code, including 18 U.S.C. § 2252A. Also, 18 U.S.C. § 3142, which governs the detention or release of a defendant pending trial in Federal court, puts those charged with child pornography crimes squarely in the

same class of dangerousness as those accused of drug trafficking, firearms offenses, and terrorism. See Section 3142(e)(3)(E) (establishing statutory presumption of danger to the community).

C. The Statement of Trial Results and Entry of Judgment were prepared correctly in accordance with the applicable Air Force Instruction.

Even if this Court has jurisdiction to review this issue, Appellant is not entitled to relief. The SJA followed the appropriate Air Force regulations in signing the first indorsement to the Statement of Trial Results and Entry of Judgment. Appellant received a conviction for a qualifying offense under 18 U.S.C. § 922(g)(1). *See* DAFI 51-201, dated 14 April 2022, paragraph 29.32.

Furthermore, paragraph 29.30. to that DAFI, which applies in this case, shows the SJA correctly annotated the firearm prohibition on the first indorsement:

> If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved.

Paragraph 29.30.1.1.

> Persons who have been discharged from the Armed Forces under dishonorable conditions . . . This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List … This prohibition does not take effect until after the discharge is executed.

Paragraph 29.30.5.

Appellant's conviction and sentence qualified him for criminal indexing per 18 U.S.C. § 922(g)(1), and the first indorsements to the Entry of Judgment and Statement of Trial Results properly annotated the prohibition in accordance with DAFI 51-201.[5] Thus, there is no error for this Court to correct.

[5] While the Statement of Trial Results and Entry of Judgment Indorsements indeed annotate the firearm prohibition, they are not what legally mandates the indexing. DAFI 51-201 is the

D. The Firearm Possession Prohibitions in the Gun Control Act of 1968 are Constitutional.

In Bruen, the Supreme Court held the standard 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.

142 S. Ct, at 2129-2130. In his concurrence, Justice Kavanaugh noted the Supreme Court established in both District of Columbia v. Heller, 554 U.S. 570 (2008) (finding that the Second Amendment is an individual, not collective, right), and McDonald v. City of Chicago, 561 U.S. 742 (2010) (applying that right to the states), that the Second Amendment "is neither a regulatory straight jacket nor a regulatory blank check." Id. at 2162 (Kavanaugh, J., concurring) (citations omitted). Accordingly, the proper interpretation of the Second Amendment allows for a "variety" of gun regulations. Id. (citing Heller, 554 U.S. at 636).

The majority opinions in Heller and McDonald also stand for the principle that the right secured by the Second Amendment is not unlimited:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose …. *[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons* and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 573 (emphasis added).

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regulation that requires indexing and contains the detailed requirements that mandate notification to relevant law enforcement agencies. Appellant's challenge here is thus misplaced.

Appellant acknowledges that both Bruen and Heller limit the application of the Second Amendment to "law abiding, responsible citizens." (App. Br. at 21.) Even so, Appellant nonetheless cites to United States v. Rahimi, 61 F.4th 443 (5th Cir. 2023), for the proposition that the Government cannot prove that Appellant's firearm prohibition for a non-violent offense is in keeping with the United States' historical tradition of firearm regulation. (Id.) But this is contrary to what the Fifth Circuit in Rahimi held. That court concluded that the term "law abiding, responsible citizens," was "shorthand in explaining that [Heller's] holding … should not 'be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill[.]" Rahimi, 61 F.4th at 451 (citing Heller, 554 U.S. at 626-627). The Rahimi court went on to assert that Bruen's reference to "ordinary, law abiding" citizens was no different than Heller—it was meant to exclude "from the Court's discussion groups that have historically been stripped of their Second Amendment Rights[.]" Id. The Court determined that defendant Rahimi did not fall into that category of felons prohibited from owning a firearm at the time he was convicted of violating the firearm prohibition under 18 U.S.C. § 922(g)(8), since Rahimi was only subject to an agreed-upon domestic violence restraining order at the time he was convicted. Id. at 452. Thus, he did not have a felony conviction at the time he was charged with illegal possession of a firearm. Id. The Fifth Circuit thus found that the Government had not shown that 18 U.S.C. § 922(g)(8)'s restriction of his Second Amendment rights "fit [] within our Nation's historical traditional of firearm regulation." Id. at 460.

The appellant in Rahimi was in a fundamentally different position than Appellant here. In this case, Appellant has been convicted of an offense punishable by well over a year of confinement (*i.e.*, a felony). He is thus prohibited from owning a firearm under 18 U.S.C. § 922(g)(1). Both the Supreme Court and the Fifth Circuit acknowledge that felony convictions are

part of the United States' longstanding tradition on firearm prohibitions. Moreover, these cases do not distinguish between violent and non-violent felonies—prior to Bruen, the Fifth Circuit opined, "[i]rrespective of whether [an] offense was violent in nature, a felon has shown manifest disregard for the rights of others. He may not justly complain of the limitation on his liberty when his possession of firearms would otherwise threaten the security of his fellow citizens." United States v. Everist, 368 F.3d 517, 519 (5th Cir. 2004). The Court found that limiting a felon's ability to keep and possess firearms was not inconsistent with the "right of Americans generally to individually keep and bear their private arms as historically understood" in the United States. Id.; accord Folajtar v. Attorney General of the United States, 980 F.3d 897 (3rd Cir. 2020) (upholding the constitutionality of 18 U.S.C. § 922(g)(1) as applied to felons—including non-violent felons—based upon the Second Amendment's history and tradition). Thus, whether Appellant's crime constituted a violent or non-violent offense would not matter for purposes of restricting Appellant's ability to own a firearm.

Appellant also cites to United States v. Daniels, 77 F.4th 337 (5th Cir. 2023). However, Daniels is distinguishable from Appellant's case for several reasons. First, the defendant was charged as an "unlawful user" of a controlled substance in possession of a firearm, in violation of 18 U.S.C. § 922(g)(3), id. at 340; whereas the documents in Appellant's case noted the firearm possession prohibition based on a felony conviction pursuant to 18 U.S.C. § 922(g)(1). Second, while there is no ambiguity whether Appellant was convicted of a crime punishable by more than one year of imprisonment, the Fifth Circuit noted the insufficiency of the facts supporting the conclusion that Daniels was an "unlawful user" at the time he was found in possession of the firearm. That is, although Daniels admitted to smoking marijuana multiple days per month and was found in possession of a small quantity of marijuana in the form of "butts" in his ashtray, there

was insufficient evidence presented to prove the last time he used marijuana or that he was under the influence of controlled substances at the time of the stop and seizure. Id. at 339-40.[6] Third, the Fifth Circuit made clear the limitation of its decision in Daniels: "We conclude only by emphasizing the narrowness of that holding. We do not invalidate the statute in all its applications, but, importantly, only as applied to Daniels." Id. at 355.

We note that several courts have been quick to reject the reasoning and/or application of Daniels and, instead, continue to find Section 922(g)(3) constitutional. In United States v. Espinoza-Melgar, 2023 U.S. Dist. LEXIS 144847 (D. Utah 16 August 2023), in rejecting the defendant's claim that Section 922(g)(3) is unconstitutional, the District Court analyzed all 28 district court cases on point since the Bruen decision and found 26 of them found Section 922(g)(3) to remain constitutional. Id. at *9. The court went on to address the Daniels opinion, "This court is not persuaded by the Daniels court's decision because that court sought to find in the historical record not a 'well-established and representative historical *analogue'* to Section 922(g)(3), but rather a 'historical *twin'* -- *t*hereby imposing a 'regulatory straightjacket [sic]' on Congress that vastly exceeds what the Supreme Court requires." Id. at *10.

In United States v. Ledvina, 2023 U.S. Dist. LEXIS 143224 (N.D. Iowa 16 August 2023) (unpub. op.), the district court rejected the defendant's constitutional challenge to Section 922(g)(3) and stated:

> [The Daniels] decision is not only not binding on this Court, but [this court] also respectfully disagrees with that court's reasoning and treatment of analogues in that case. This narrow reading and demand for near perfect analogues -- despite acknowledging *Bruen*'s pronouncement analogues need not be perfect -- is too severe and places too great an emphasis on the

[6] In the Fifth Circuit, an "unlawful user" is someone who uses illegal drugs regularly and in some temporal proximity to the gun possession. Daniels, 77 F.4th at 340 (internal citation omitted).

> specific controlled substance [the defendant] used – marijuana – when Section 922(g)(3) regulates unlawful users and addicts of any controlled substance, not specific controlled substances.

Id. *6 and n.2. *See also* United States v. Grubb, 2023 U.S. Dist. LEXIS 188933, at *4 and n.1 (N.D. Iowa 10 October 2023) (unpub. op.) (same).

In United States v. Lewis, 2023 U.S. Dist. LEXIS 170257 (M.D. Tenn. 25 September 2023) (unpub. op.), after citing "the vast majority of courts addressing the issue have found Section 922(g)(3) post-Bruen constitutional," the district court declined to follow the "notable exception" in Daniels, citing the Espinoza-Melgar reasoning, noting Daniels was not binding on the district court because it was another circuit, and emphasizing the limited application of Daniels in any event. Id. at *3-4.

In United States v. Doney, 2023 U.S. Dist. LEXIS 178333 (D. Montana 3 October 2023) (unpub. op.), the district court, in rejecting the defendant's claim that Section 922(n) was unconstitutional, held that Daniels was inapplicable because its holding was narrowly tailored to its facts and that it was bound by Ninth Circuit law, which held Section 922(g)(3)'s prohibition on unlawful drug users possessing firearms is constitutional in light of Bruen. Id. at *2.

Even within the Fifth Circuit, where Daniels is binding precedent, the district court in United States v. Haynes, 2023 U.S. Dist. LEXIS 155633 (W.D. Louisiana 1 September 2023) (unpub. op.), affirmed the constitutionality of the defendant's conviction and distinguished the defendant's facts – including that he was a convicted felon charged under Section 922(g)(1) – from Daniels – which involved Section 922(g)(3), focused on the lack of evidence of current drug use, and emphasized it involved marijuana. Id. at *5. Similarly, Daniels is simply inapplicable to the Appellant in the instant case.

Appellant's conviction for Distribution of Child Pornography proves that he falls squarely into the categories of individuals that should be prohibited from possessing a firearm. Thus, the Indorsements in the Entry of Judgment and Statement of Trial Results correctly annotated that Appellant is subject to 18 U.S.C. 922's prohibitions. Appellant is not entitled to relief.

CONCLUSION

WHEREFORE, this Court should affirm the findings and sentence.

[redacted]
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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 14 December 2023 via electronic filing.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES *Appellee,*	)	**APPELLANT'S REPLY BRIEF**
v.	)	Before Panel No. 2
Master Sergeant (E-7) **MATTHEW R. DENNEY,** United States Air Force *Appellant*	)	No. ACM 40360 21 December 2023

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

Appellant, Master Sergeant (MSgt) Matthew R. Denney, pursuant to Rule 18(d) of this Honorable Court's Rules of Practice and Procedure, files this Reply to the Appellee's Answer, dated 14 December 2023 (Ans.). In addition to the arguments in his opening brief, filed on 16 November 2023 (App. Br.), MSgt Denney submits the following arguments for the issue listed below.

AS APPLIED TO MSGT DENNEY, 18 U.S.C. § 922 IS UNCONSTITUTIONAL BECAUSE THE GOVERNMENT CANNOT DEMONSTRATE THAT BARRING HIS POSSESSION OF FIREARMS IS "CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION"[1] WHEN HE STANDS CONVICTED OF NONVIOLENT OFFENSES.

1. This Court has power to correct the Entry of Judgment.

The Government would have this Court ignore the Court of Appeals for the Armed Forces's (CAAF) summary disposition in *Lemire*,[2] citing instead to this Court's

[1] *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

[2] *United States v. Lemire*, 82 M.J. 263 (C.A.A.F. 2022) (decision without published opinion).

Rules of Practice and Procedure regarding published opinions as authority. (Ans. at 4–5.) But this Court's rules on publishing do not inform whether summary dispositions bind or, at a minimum, inform the analysis. In *LRM v. Kastenberg,* the CAAF reviewed a summary disposition and noted that it "has profited from guidance offered in prior summary dispositions." 72 M.J. 364, 370 (C.A.A.F. 2013) (citing *United States v. Diaz*, 40 M.J. 335, 339–40 (C.A.A.F. 1994); *Hicks v. Miranda*, 422 U.S. 332, 344–45 (1975) (holding that "lower courts are bound by summary decisions by" the Supreme Court)). This Court and its predecessor cite summary dispositions from CAAF and the Court of Military Appeals (CMA) as authority, as well. *See, e.g.*, *United States v. Krempel*, No. ACM S30849, 2006 CCA LEXIS 258, at *5 (A.F. Ct. Crim. App. 18 Oct. 2006) (citing the CAAF's summary disposition in *United States v. Holmes*, 61 M.J. 148, 149 (C.A.A.F. 2006) as support for its decision to find instructional error); *United States v. Miller*, 31 M.J. 798, 801 (A.F.C.M.R. 1990) (citing the CMA's summary disposition in *United States v. Madril*, 26 M.J. 87 (C.M.A. 1988) as authority supporting its holding the case). Even if *Lemire* was a summary disposition, that does not mean this Court can ignore its implications for *Lepore*.[3]

Furthermore, the Government's attempt to distinguish *Lemire* because it involved sex offender registration, and not firearms restrictions, is unpersuasive. (Ans. at 25.) The point is that *Lemire* contemplates Courts of Criminal Appeals correcting the Entry of Judgment (EOJ) and Statement of Trial Results (STR), which is exactly what MSgt Denney seeks here. Also noteworthy is that the Government

[3] *United States v. Lepore*, 81 M.J. 759 (A.F. Ct. Crim. App. 2021).

does not address the argument that revisions to the Rules for Courts-Martial distinguish *Lepore* from this case. (*See* App. Br. at 8–9.)

2. Unrelated federal statutes are not instructive on whether distribution of child pornography is violent.

The Government suggests that distribution of child pornography is a crime of violence. Since distribution of child pornography is plainly not violent, the Government seeks refuge in statutes that categorically identify offenses as violent for a different purpose, even if they are not. (Ans. at 6–7 (citing 18 U.S.C. § 3156(a)(4)(C) (the Bail Reform Act); and then 18 U.S.C. § 3142 (on detention of defendants awaiting trial)).) This focus on other provisions misses the essence of the *Bruen* analysis: What is permissible regulation when viewed through the lens of history and tradition? And as explained in the opening brief, the definition formerly used in the Federal Firearms Act included "committing or attempting to commit murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery, [larceny], burglary, and housebreaking." (App. Br. at 3–4 (citing Uniform Firearms Act of 1926 and 1930).) The question is what the historical tradition will support, not the definition provided in the Bail Reform Act or a statue relating to pretrial detention.

3. A lifetime firearms ban is unconstitutional as applied to MSgt Denney's nonviolent offenses.

The Government devotes several pages to distinguishing *Rahimi*[4] and *Daniels*.[5] (Ans. at 9–12.) MSgt Denney argued that both cases show that 18 U.S.C.

[4] *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

[5] *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023).

§ 922 is under threat, broadly speaking. (App. Br. at 5–7.) But those cases deal with § 922(g)(8) and (g)(3), respectively. The provision at issue here is § 922(g)(1), and the case on point that MSgt Denney cited is *Range v. AG United States*, 69 F.4th 96, 98 (3rd Cir. 2023), which found subsection (g)(1) unconstitutional as applied to a false statement to obtain food stamps. Curiously, the Government does not address *Range* at all, despite it being the strongest case that MSgt Denney cited.

The text, history, and tradition from the founding indicates that § 922(g)(1)'s firearm ban, as applied to MSgt Denney, is not constitutional.

WHEREFORE, MSgt Denney respectfully requests this Court hold § 922(g)(1)'s firearms prohibition unconstitutional as applied to him and order correction of the STR and EOJ to indicate that no firearms prohibition applies in his case.

Respectfully submitted,

[redacted]
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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 21 December 2023.

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