

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

UNITED STATES,

Appellee,

v.

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

Appellant.

**SUPPLEMENT TO THE
PETITION FOR
GRANT OF REVIEW**

Crim. App. No. 40464

USCA Dkt. No. 24-____/AF

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

Issue Presented

**WHETHER THE GOVERNMENT CAN PROVE THAT 18
U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO
APPELLANT WHEN HE WAS CONVICTED OF A NON-
VIOLENT OFFENSE.**

Statement of Statutory Jurisdiction

The Air Force Court of Criminal Appeals (hereinafter “Air Force Court”) reviewed this case under Article 66(d), Uniform Code of Military Justice (UCMJ),¹ 10 U.S.C. § 866(d). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

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

Statement of the Case

On January 23, 2023, at Beale Air Force Base, California, a military judge sitting as a general court-martial convicted Staff Sergeant (SSgt) Brian W. Gubicza, consistent with his pleas, of one specification of possession of child pornography and one specification of distribution of child pornography, in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934. R. at 19, 68; Charge Sheet. The military judge sentenced SSgt Gubicza to a reprimand, reduction to the grade of E-1, 36 months' confinement, and a dishonorable discharge. R. at 95-96. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action. Pursuant to a plea agreement, the convening authority deferred all automatic forfeitures "from 6 February 2023 until the date the military judge signs the Entry of Judgment" and waived all automatic forfeitures for a period of six months or release from confinement or expiration of term of service, whichever is sooner, with the waiver commencing on February 6, 2023. *Id.*; *see* Appellate Exhibit III at 2. On March 16, 2023, a newly detailed military judge entered the above findings and sentence in the entry of judgment. Entry of Judgment (EoJ).

SSgt Gubicza raised the issue presented before the Air Force Court. *See* Appendix A at 2. The Air Force Court affirmed the findings and sentence. Appendix A.

Statement of Facts

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

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

Reasons to Grant Review

SSgt Gubicza’s case involves a question that is in dispute between the service courts of criminal appeals—whether this Court has jurisdiction to direct modification of the 18 U.S.C. § 922 prohibition noted on the post-trial. *See, e.g., United States v. Macias*, No. 202200005, 2022 CCA LEXIS 580, at *2 (N.M. Ct. Crim. App. Oct. 13, 2022) (correcting erroneous firearm ban notation on Statement of Trial Results);

United States v. Shaffer, ARMY 20200551, 2021 CCA LEXIS 682, at *1 n.2 (A. Ct. Crim. App. Dec. 15, 2021) (same).

Further, this Court should grant review to answer whether the government can prove 18 U.S.C. § 922 is constitutional, as applied to SSgt Gubicza, “by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation,”² when he was convicted of a non-violent offense. For these reasons, this Court should grant review of this issue as a trailer to *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. Jan. 24, 2024) (granting review of a challenge to 18 U.S.C. § 922), which it has done in multiple cases.³

² *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 24 (2022).

³ *United States v. Stanford*, No. 24-0130/AF, 2024 CAAF LEXIS 254 (C.A.A.F. May 7, 2024); *United States v. Fernandez*, No. 24-0101/AF, 2024 CAAF LEXIS 239 (C.A.A.F. Apr. 26, 2024); *United States v. Johnson*, No. 24-0004/SF, 2024 CAAF LEXIS 199 (C.A.A.F. Mar. 29, 2024); *United States v. Denney*, No. 24-0111/AF, 2024 CAAF LEXIS 197 (C.A.A.F. Mar. 29, 2024); *United States v. Lampkins*, No. 24-0069/AF, 2024 CAAF LEXIS 105 (C.A.A.F. Feb 22, 2024); *United States v. Maymi*, No. 24-0049/AF, 2024 CAAF LEXIS 91 (C.A.A.F. Feb. 16, 2024).

Argument

THE GOVERNMENT CANNOT PROVE THAT 18 U.S.C. § 922 IS CONSTITUTIONAL AS APPLIED TO APPELLANT WHEN HE WAS CONVICTED OF A NON-VIOLENT OFFENSE.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270; *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

Law and Analysis

This Court should grant review for four reasons. First, this Court has granted review on this issue in *United States v. Williams*, No. 24-0015/AR, 2024 CAAF LEXIS 43 (C.A.A.F. Jan. 24, 2024). This Court should grant review as a trailer to *Williams*.

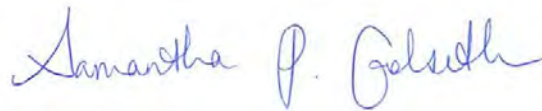
Second, given the updates to the *MCM* and the realities of trial and appellate practice, the conclusion that a firearms prohibition is a “collateral consequence” is now a legal fiction.

Third, this Court has identified and ordered that promulgating orders be corrected when said documents included erroneous collateral consequences. *United States v. Lemire*, 82 M.J. 263, at n.* (C.A.A.F. 2022) (decision without published opinion).

Fourth, SSgt Gubicza faces undue prejudice: A lifetime firearms ban for a crime that was committed *without* a firearm. This disability goes against the text, history, and tradition of firearm regulation in this country. *See Bruen*, 597 U.S. at 24.

WHEREFORE, SSgt Gubicza respectfully requests this Honorable Court grant review.

Respectfully submitted,



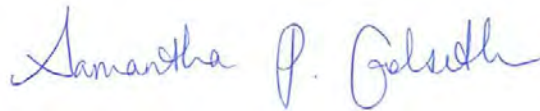
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Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on August 23, 2024.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH
RULES 21(b), 24(d), and 37**

1. This supplement complies with the type-volume limitation of Rule 21(b) because it contains 990 words.
2. This supplement complies with the typeface and typestyle requirements of Rule 37 because it has been prepared in a proportional typeface, Times New Roman, in 14-point typeface.

Respectfully submitted,



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Appendix A

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

No. ACM 40464

UNITED STATES

Appellee

v.

Brian W. GUBICZA

Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 July 2024

Military Judge: Colin P. Eichenberger; Dayle P. Percle (entry of judgment).

Sentence: Sentence adjudged 23 January 2023 by GCM convened at Beale Air Force Base, California. Sentence entered by military judge on 16 March 2023: Dishonorable discharge, confinement for 36 months, reduction to E-1, and a reprimand.

For Appellant: Major Samantha P. Golseth, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; First Lieutenant Deyana F. Unis, USAF; Mary Ellen Payne, Esquire.

Before ANNEXSTAD, DOUGLAS, and MASON, *Appellate Military Judges*.

**This is an unpublished opinion and, as such, does not serve as
precedent under AFCCA Rule of Practice and Procedure 30.4.**

PER CURIAM:

A military judge sitting as a general court-martial convicted Appellant, in accordance with his pleas and pursuant to a plea agreement, of one specification of wrongful possession of child pornography and one specification of

wrongful distribution of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.¹ The military judge sentenced Appellant to a dishonorable discharge, confinement for 36 months, reduction to the grade of E-1, and a reprimand. The convening authority took no action on the findings but deferred all automatic forfeitures until the military judge signed the entry of judgment, and waived automatic forfeitures for six months.

Appellant raises one issue on appeal: whether as applied to this case, reference to 18 U.S.C. § 922 in the staff judge advocate's indorsement to the entry of judgment is unconstitutional because the Government cannot demonstrate that barring his possession of firearms is "consistent with the nation's historical tradition of firearm regulation"² when he stands convicted of possession and distribution of child pornography. We have carefully considered this issue and find Appellant is not entitled to relief. *See United States v. Lepore*, 81 M.J. 759, 763 (A.F. Ct. Crim. App. 2021) (en banc) (holding a Court of Criminal Appeals lacks the authority to direct modification of the 18 U.S.C. § 922(g) prohibition noted on the staff judge advocate's indorsement); *see also United States v. Vanzant*, __ M.J. __, No. ACM 22004, 2024 CCA LEXIS 215, at *24 (A.F. Ct. Crim. App. 28 May 2024) (concluding "[t]he firearms prohibition remains a collateral consequence of the conviction, rather than an element of findings or sentence, and is therefore beyond our authority to review").

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d). Accordingly, the findings and sentence are **AFFIRMED**.



FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

¹ All references to the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.).

² Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

Appendix B

United States v. Lemire

United States Court of Appeals for the Armed Forces

March 9, 2022, Decided

No. 22-0037/AR.

Reporter

2022 CAAF LEXIS 182 *; 82 M.J. 263

U.S. v. Matthew D. Lemire.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: CCA 20190129 [*1] .

Opinion

On consideration of Appellant's petition for grant of review of the decision of the United States Army Court of Criminal Appeals, it is ordered that said petition is granted, and the decision of the United States Army Court of Criminal Appeals is affirmed.*

End of Document

* It is directed that the promulgating order be corrected to delete the requirement that Appellant register as a sex offender.

United States v. Macias

United States Navy-Marine Corps Court of Criminal Appeals

October 13, 2022, Decided

No. 202200005

Reporter

2022 CCA LEXIS 580 *

UNITED STATES, Appellee v. NATHANIEL R. MACIAS, Lance Corporal (E-3), U.S. Marine Corps, Appellant

Notice: THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

Prior History: Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: John P. Norman. Sentence adjudged 21 September 2021 by a special court-martial convened at Twentynine Palms, California, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-1, confinement for one-hundred-and-fifty days, and a bad-conduct discharge.¹ [*1] .

Counsel: For Appellant: Lieutenant Megan E. Horst, JAGC, USN.

Judges: Before DEERWESTER, HACKEL, and KIRKBY Appellate Military Judges.

Opinion

PER CURIAM:

Appellant was convicted, consistent with his pleas, of conspiracy to disobey a lawful general order, failure to obey a lawful general order, and assault consummated by battery in violation of [Articles 81](#), [92](#), and [128](#), Uniform Code of Military Justice [UCMJ].² Appellant does not assert any assignments of error (AOEs). However, on 23 August 2022, Appellant submitted a Motion to Correct Error in the Record arising from an alleged error regarding firearm possession in the Statement of Trial Results, which we granted. We take action arising from Appellant's motion in our decretal paragraph.

¹ Appellant was credited with one-hundred-and-eighty-three days of pretrial confinement credit.

² [10 U.S.C. §§ 881, 892, 982](#).

I. BACKGROUND

The [Gun Control Act of 1968](#) [GCA] governs the impact of criminal convictions on the ability to possess firearms and ammunition.³ Under [*2] [section 922\(g\) of the GCA](#), it becomes unlawful for a person to receive, possess, ship, or transport firearms or ammunition if that person has been convicted of any offense punishable by imprisonment for a term exceeding one year.⁴ The prohibition also extends to persons who receive a dishonorable discharge or dismissal at a general court-martial, as well as any person convicted of a domestic violence offence; unlawful users of controlled substances; and fugitives from justice.⁵ Under the statute, convictions adjudicated by a special court-martial do not count as offenses punishable by imprisonment for a term exceeding one year because of the jurisdictional limitations attached to that forum.⁶

II. DISCUSSION

A. Record Correction Pursuant to *United States v. Crumpley*

Whether a record of trial is accurate and complete is a question we review de novo.⁷ An appellant is entitled to have the official record accurately reflect what happened in the proceedings.⁸ Appellant submits that the Statement of Trial Results in his case does not accurately reflect the proceedings because it incorrectly indicates that he is subject to the ban effectuated by the GCA. The Government concedes that "section G of [*3] the Statement of Trial Results incorrectly states that Appellant's case triggers a firearm possession prohibition in accordance with [18 U.S.C. § 922](#)."⁹

Because Appellant was convicted by a special-court martial, received a bad conduct discharge (vice a dishonorable discharge), and was not convicted of one of the aforementioned triggering offenses under the GCA, we agree that the Statement of Trial

³ [18 U.S.C. § 921 et seq.](#), as amended.

⁴ [18 U.S.C. § 922\(g\) \(2022\)](#).

⁵ *Id.*

⁶ [27 C.F.R. § 478.11 \(2022\)](#).

⁷ [United States v. Crumpley](#), 49 M.J. 538 (N-M Ct. Crim. App. 1998).

⁸ [Crumpley](#), 49 M.J. at 539.

⁹ Government's Consent Motion for Leave to File and Motion to Correct Error in the Record at 2.

Results is inaccurate. We find that the inclusion of this error in the post-trial processing paperwork did not affect Appellant's substantive rights at trial, since no prejudice was alleged or is apparent.¹⁰ However, we take action in our decretal paragraph to ensure that this administrative error does not affect Appellant's rights in the future.

III. CONCLUSION

After careful consideration of the record, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.¹¹

However, the record of trial does not accurately reflect the disposition of Appellant's court-martial.¹² Although we find no prejudice, Appellant is entitled to have court-martial records that correctly reflect the content of his proceeding.¹³ In accordance [*4] with Rule for Courts-Martial 1111(c)(2), we modify section G of the Statement of Trial Results and direct that the erroneous indication that Appellant is subject to the ban imposed by the GCA be removed and section G be corrected to accurately reflect that Appellant is **not** subject to the weapons and ammunition controls imposed by the GCA.

The findings and sentence are **AFFIRMED**.

End of Document

¹⁰ [Crumpley, 49 M.J. at 539](#).

¹¹ [Articles 59 & 66](#), Uniform Code of Military Justice, [10 U.S.C. §§ 859, 866](#).

¹² The record of trial contains two charge sheets. The first, preferred on March 2, 2021 and referred on April 1, 2021, has been erroneously included and should be removed.

¹³ [Crumpley, 49 M.J. at 539](#).

United States v. Shaffer

United States Army Court of Criminal Appeals

December 15, 2021, Decided

ARMY 20200551

Reporter

2021 CCA LEXIS 682 *

UNITED STATES, Appellee v. Sergeant SHAWN E. SHAFFER, United States Army,
Appellant

Prior History: [*1] Headquarters, 82d Airborne Division. Amy S. Fitzgibbons, Military Judge. Colonel Jeffrey S. Thurnher, Staff Judge Advocate.

Counsel: For Appellant: Colonel Michael C. Friess, JA; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Andrew R. Britt, JA (on brief and reply brief).

For Appellee: Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Major Mark T. Robinson, JA; Captain Jennifer A. Sundook, JA (on brief).

Judges: Before BURTON, FLEMING, and PARKER, Appellate Military Judges.

Opinion

DECISION

Per Curiam:

On consideration of the entire record, we hold the findings of guilty and the sentence, as entered in the Judgment, correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.¹²

¹ Appellant claims the government's dilatory post-trial processing of his case warrants relief. We disagree. The total numbers of days from adjournment to docketing was 277 days. The government provides no explanation for the delay in processing a 143-page transcript. Although we do not condone the government's lack of diligence in the post-trial processing of appellant's case, we do not find the delay warrants relief as appellant has not demonstrated prejudice. See *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972) (establishing the four-factor balancing test to determine whether post-trial delay constitutes [*2] a due process violation); see also *Toohey v. United States*, 60 M.J. 100, 102 (C.A.A.F. 2004) (adopting the *Barker* four-factor balancing test). Furthermore, we find the sentence to be appropriate as adjudged. *Article 66(d), UCMJ*, *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002). Staff Judge Advocates are reminded of the need for an explanation when they have failed to comply with post-trial processing timelines. See *United States v. Brown*, 81 M.J. 507, 511 (Army Ct. Crim. App. 2021) ("We reiterate that, just as it was under the old procedures, staff judge advocates are advised to explain post-trial processing delays in excess of the 150-day standard adopted in this opinion.")

End of Document

² The Statement of Trial Results is corrected as follows: 1) Block 29, concerning DNA processing in accordance with [10 U.S.C. §1565](#), is changed to reflect "Yes;" 2) Block 31, concerning [18 U.S.C. § 922 \(g\)\(1\)](#), is changed to reflect "No;" and 3) the "Findings" section is amended to add Charge III, alleging an offense under [Article 112a](#), Uniform Code of Military Justice, with a specification which reads, "In that [appellant], U.S. Army, did, at or near Fort Bragg, North Carolina, on or about 31 May 2020, wrongfully possess some cocaine," and with the Plea as "Not Guilty" and the Finding/Disposition as "Dismissed."