

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

<b>UNITED STATES</b>	)	<b>SUPPLEMENT TO PETITION</b>
<i>Appellee,</i>	)	<b>FOR GRANT OF REVIEW</b>
	)	
v.	)	USCA Dkt. No. 24-XXXX/AF
	)	
Master Sergeant (E-7)	)	Crim. App. Dkt. No. ACM 40360
<b>MATTHEW R. DENNEY,</b>	)	
United States Air Force	)	March 14, 2024
<i>Appellant</i>	)	

**Issue Presented**

**WHETHER 18 U.S.C. § 922 CAN CONSTITUTIONALLY  
APPLY TO APPELLANT, WHO STANDS CONVICTED  
OF A NONVIOLENT OFFENSE, WHERE THE  
GOVERNMENT CANNOT DEMONSTRATE THAT  
BARRING HIS POSSESSION OF FIREARMS IS  
“CONSISTENT WITH THE NATION’S HISTORICAL  
TRADITION OF FIREARM REGULATION” UNDER  
*N.Y. STATE RIFLE & PISTOL ASS’N V. BRUEN*, 142 S.  
CT. 2111 (2022).**

**Statement of Statutory Jurisdiction**

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case pursuant to Article 66(d), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(d).<sup>1</sup> This Honorable Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

---

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

### **Statement of the Case**

On July 7, 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, UCMJ, 10 U.S.C. § 934 (2018). (R. at 18, 69; Entry of Judgment (EOJ), Aug. 22, 2022.) The military judge sentenced Appellant 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 findings, disapproved the reprimand, and waived automatic forfeitures for the benefit of Appellant's dependent child. (Convening Authority Decision on Action, Jul. 22, 2022.) On March 8, 2024, the AFCCA affirmed the findings and sentence. Appendix A.

### **Statement of Facts**

Appellant 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 an online chat group, and a military judge accepted his guilty plea to that single distribution. (R. at 69; Pros. Ex. 1 at 1.) After his conviction, the Government determined that Appellant qualified for a firearms prohibition under 18 U.S.C. § 922. (EOJ.)

Appellant challenged this restriction before the AFCCA, which rejected the challenge without providing a justification. Appendix A.

### **Reasons to Grant Review**

The Second Amendment states that “the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II. Yet here the Government decided that a lifetime firearms ban applies to Appellant without “demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct. at 2130. Appellant stands convicted of a child pornography offense, but now must face the same lifetime firearms ban as violent criminals. This is impermissible under *Bruen*. 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 on application of another § 922 subsection), as it already has in two other cases to date.<sup>2</sup>

---

<sup>2</sup> *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

### **Standard of Review**

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019); *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017).

### **Law and Analysis**

#### ***1. This Court should grant review in light of the ongoing reevaluation of permissible Second Amendment restrictions.***

The Supreme Court has granted certiorari and heard oral arguments on firearms prohibitions under 18 U.S.C. § 922. *Rahimi*, 61 F.4th 443 (5th Cir. 2023), *argued*, 143 S. Ct. 2688 (Nov. 7, 2023). Furthermore, federal appellate courts are also deciding this issue in a variety of contexts. *See, e.g., 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) (holding § 922(g)(1) unconstitutional as applied to an appellant with a conviction for making a false statement to obtain food stamps); *United States v. Daniels*, 77 F.4th 337, 340 (5th Cir. 2023) (holding § 922(g)(3) unconstitutional for barring firearms possession based on past drug use). This Court should grant review because Appellant's case raises similarly constitutionally weighty issues, and he should get the benefit of any

changes to the law while on direct appeal. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019).

***2. The CCAs have the power to correct this issue yet the AFCCA believes it cannot.***

While the AFCCA did not provide a rationale for rejecting Appellant's assignment of error, it has previously stated that correcting a firearms prohibition "relates to a collateral matter and is beyond the scope of our authority under Article 66." *United States v. Lepore*, 81 M.J. 759, 760 (A.F. Ct. Crim. App. 2021). But *Lepore's* rationale is not applicable to this case given updates to the *MCM*.

In *Lepore*, the AFCCA made clear that "[a]ll references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2016 ed.)." 81 M.J. at 760 n.1. The AFCCA then emphasized "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." *Id.* at 763 (emphasis added).

Yet since 2019, the Rules have stated that both the Statement of Trial Results (STR) and the EOJ contain "[a]ny additional

information . . . required under regulations prescribed by the Secretary concerned.” R.C.M. 1101(a)(6); 1111(b)(3)(F). Under the applicable Air Force regulation, this information was required. Department of the Air Force Instruction 51-201, *Administration of Military Justice*, dated April 8, 2022, ¶ 13.3 (requiring the STR to include “whether the following criteria are met: . . . firearm prohibitions”). As such, the AFCCA’s analysis in *Lepore* is no longer relevant since the Rules now require—by incorporation—a determination on firearms prohibitions.

The AFCCA’s decision in *Lepore* also stands in tension with this Court’s decision in *United States v. Lemire*, where this Court 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) (unpub. op.).<sup>3</sup>

### ***3. Section 922’s firearms ban cannot constitutionally apply to Appellant.***

Appellant faces a lifetime firearms ban—despite a constitutional right to keep and bear arms—for distributing child pornography. The

---

<sup>3</sup> 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.” *MCM*, App. 15 at A15-22.

Government cannot demonstrate that such a ban, even if it were limited temporally, is “consistent with the nation’s historical tradition of firearm regulation.” *Bruen*, 142 S. Ct. at 2130.

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 Appellant, who stands convicted of a nonviolent offense. To prevail, the Government would have to show a historical tradition of applying an undifferentiated ban on firearm possession, no matter what the convicted offense, as long as the punishment could exceed one year of confinement. Murder or mail fraud, rape or racketeering, battery or bigamy—all would be painted with the same brush. This the Government cannot show.

The distinction between violent and nonviolent offenses is important and lies deeply rooted in history and tradition. *See* C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009). Prior to 1961, “the original [Federal Firearms Act] had a narrower basis for a disability, limited to those convicted of a ‘crime of violence.’” *Id.* at 699. 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*, 69 F.4th at 98.<sup>4</sup> 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 light of *Bruen* and the application of our Nation’s history and tradition in relation to the Second Amendment, § 922 is unconstitutional as applied to Appellant. This Court should grant review to resolve this important issue in line with *Williams*.

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

Respectfully submitted,



MATTHEW L. BLYTH, Maj, USAFR  
Appellate Defense Counsel

---

<sup>4</sup> 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. Oct. 18, 2023.)

U.S.C.A.A.F. Bar No. 36470  
Appellate Defense Division (AF/JAJA)  
1500 West Perimeter Rd, Ste. 1100  
Joint Base Andrews NAF, MD 20762  
240-612-4770  
matthew.blyth.1@us.af.mil

## **APPENDIX A**

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

---

**No. ACM 40360**

---

**UNITED STATES**

*Appellee*

**v.**

**Matthew R. DENNEY**

Master Sergeant (E-7), U.S. Air Force, *Appellant*

---

Appeal from the United States Air Force Trial Judiciary<sup>1</sup>

Decided 8 March 2024

---

*Military Judge:* Dayle P. Percle.

*Sentence:* Sentence adjudged 7 July 2022 by GCM convened at Shaw Air Force Base, South Carolina. Sentence entered by military judge on 22 August 2022: confinement for 12 months and reduction to E-4.

*For Appellant:* Major Matthew L. Blyth, USAF.

*For Appellee:* Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Major Olivia B. Hoff, USAF; Mary Ellen Payne, Esquire.

Before RICHARDSON, DOUGLAS, and WARREN, *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.**

---

---

<sup>1</sup> Appellant appeals his conviction under Article 66(b)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1)(A), *Manual for Courts-Martial, United States* (2019 ed.) (2019 *MCM*), having been sentenced to more than six months' confinement.

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 distribution of child pornography in violation of Article 134, Uniform of Code Military Justice (UCMJ), 10 U.S.C. § 934.<sup>2</sup> After accepting Appellant's plea, the military judge sentenced Appellant to confinement for 12 months, reduction to the grade of E-4, and a reprimand. The convening authority disapproved the reprimand and, in accordance with the plea agreement, waived automatic forfeitures for six months.

Appellant raises one issue: 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"<sup>3</sup> when he stands convicted of distribution of child pornography. We have carefully considered this issue, and find no discussion or relief is warranted. See *United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356 (C.M.A. 1987)).

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

---

<sup>2</sup> All references to the UCMJ are to the 2019 *MCM*.

<sup>3</sup> Citing *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2130 (2022).

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 1,678 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.



MATTHEW L. BLYTH, Maj, USAFR  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 36470  
Appellate Defense Division (AF/JAJA)  
1500 West Perimeter Rd, Ste. 1100  
Joint Base Andrews NAF, MD 20762  
240-612-4770  
matthew.blyth.1@us.af.mil

## **CERTIFICATE OF FILING AND SERVICE**

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on March 14, 2024.



MATTHEW L. BLYTH, Maj, USAFR  
Appellate Defense Counsel  
U.S.C.A.A.F. Bar No. 36470  
Appellate Defense Division (AF/JAJA)  
1500 West Perimeter Rd, Ste. 1100  
Joint Base Andrews NAF, MD 20762  
240-612-4770  
matthew.blyth.1@us.af.mil