No. _____

IN THE

Supreme Court of the United States

JAMES W. RICHARDS, IV,
Petitioner,

v.

MATTHEW P. DONOVAN,
ACTING SECRETARY OF THE AIR FORCE,

COLONEL BRIAN S. GREENROAD,
COMMANDER, AIR FORCE SECURITY FORCES CENTER,

COLONEL CAROLINE K. HORTON,
COMMANDANT, U.S. DISCIPLINARY BARRACKS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

MARK C. BRUEGGER
Counsel of Record
Air Force Legal Operations Agency
1500 West Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4782
mark.c.bruegger.civ@mail.mil

Counsel for Petitioner

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

James W. Richards IV,
Appellant

USCA Dkt. No. 19-0093/AF
Crim.App. No. 2018-07

v.

O R D E R

Deborah Lee James,
Secretary of the United States Air Force,

Brian S. Greenroad, Colonel, Commander,
Air Force Security Forces Center,

and

D.L. Hinton,
Colonel, Commandant,
United States Disciplinary Barracks,
Appellees

On consideration of Appellant's motion for reconsideration of this Court's order issued January

31, 2019, it is, by the Court, this 1st day of March, 2019,

ORDERED:

That the petition for reconsideration is hereby denied.

For the Court,*

/s/ Joseph R. Perlak
Clerk of the Court

---

* While captioned as a motion for reconsideration, the pleading invokes C.A.A.F. R.31, Petition for Reconsideration, and has been construed by the Court as such.

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (McCammon)
Appellate Government Counsel (Payne)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
Washington, D.C.

James W. Richards IV,
Appellant

v.

Deborah Lee James,
Secretary of the United States Air Force,

Brian S. Greenroad, Colonel, Commander,
Air Force Security Forces Center,

and

D.L. Hinton,
Colonel, Commandant,
United States Disciplinary Barracks,
Appellees

USCA Dkt. No. 19-0093/AF
Crim.App. No. 2018-07

O R D E R

On consideration of the writ-appeal petition, it is, by the Court, this 31st day of January, 2019,

ORDERED:

That the writ-appeal petition is hereby dismissed for lack of jurisdiction.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (McCammon)
Appellate Government Counsel (Payne)

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

Misc. Dkt. No. 2017–04

James W. RICHARDS, IV
Lieutenant Colonel (O-5), U.S. Air Force, *Petitioner*

v.

Deborah Lee JAMES
Secretary of the Air Force

Brian S. GREENROAD
Colonel (O-6), United States Air Force
Commander, Air Force Security Forces Center

D. L. HILTON
Colonel (O-6), United States Army
Commandant, United States Disciplinary Barracks
Respondents

Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus

Decided 19 October 2018

Military Judge: Mark L. Allred.

Approved sentence: Dismissal, confinement for 17 years, and forfeiture of all pay and allowances. Sentence adjudged 21 February 2013 by GCM convened at Tyndall Air Force Base, Florida.

For Petitioner: Lieutenant Colonel Nicholas W. McCue, USAF; Lieutenant Colonel Shane A. McCammon, USAF. [1]

For Respondent: Colonel Katherine E. Oler, USAF; Lieutenant Colonel Joseph J. Kubler, USAF; Mary Ellen Payne, Esquire.

Before MAYBERRY, HARDING, and MINK, *Appellate Military Judges*.

Senior Judge HARDING delivered the opinion of the court, in which Chief Judge MAYBERRY and Judge MINK joined.

This is an unpublished opinion and, as such, does not serve as precedent under AFCCA Rule of Practice and Procedure 18.4.

---

[1] Petitioner's initial petition was filed pro se.

HARDING, Senior Judge:

Petitioner submitted a Petition for Extraordinary Writ in the Nature of a Writ of Mandamus alleging that Respondent's calculation of Petitioner's good conduct time (GCT) confinement credits violates Article I, Section 9, Clause 3 of the United States Constitution—the *Ex Post Facto* Clause. To remedy the alleged *ex post facto* application of the rule for GCT calculations, Petitioner requests that this court issue a writ of mandamus ordering Respondent to calculate his GCT credits in accordance with a prior and more favorable rule. For the reasons set forth below, we deny the petition.

I. BACKGROUND

Contrary to his pleas, Petitioner was convicted of one specification of possession of child pornography and five specifications of indecent acts with a male under sixteen years of age, both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934; and four specifications of failing to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892. Important to the resolution of this petition for relief, the earliest of Petitioner's offenses were committed by him on or about 10 June 2005. On 21 February 2013, a military judge, sitting alone, sentenced Petitioner to a dismissal, seventeen years confinement, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence. This court affirmed the findings and sentence. *United States v. Richards*, No. ACM 38346,

2016 CCA LEXIS 285 (A.F. Ct. Crim. App. 2 May 2016) (unpub. op.), *aff'd*, 76 M.J. 365 (C.A.A.F. 2017), *cert. denied*, ___U.S.___, 138 S. Ct. 2707 (2018).

On 26 March 2013, Petitioner was transferred to the United States Disciplinary Barracks (USDB) at Fort Leavenworth, Kansas. Petitioner's Minimum Release Date (MRD), as determined by USDB officials on 1 July 2015, is 1 January 2026. Petitioner's MRD was determined in part by the application of GCT credits to his sentence to confinement at a rate of five days per month. Petitioner contends that using the rate of five days per month was an *ex post facto* application of a rule changed after the dates of his offenses and adjudged sentence. Petitioner asserts that his MRD should have been determined by using a GCT rate of ten days per month. As the effective dates of the military regulations establishing and changing the rules for GCT calculations are essential to evaluating Petitioner's claim, we will briefly trace the history of Air Force policy on this matter.

In 1964, the Air Force issued Air Force Regulation 125-30, *Apprehension and Confinement, Military Sentences to Confinement* (6 Nov. 1964) [retitled Armed Forces Joint Instruction (AFJI) 31–215, *Military Sentences to Confinement* (1964)], which directed GCT for sentences adjudged on or after 31 May 1951 at a rate of [t]en days for each month of the sentence for a sentence of 10 years or more, excluding life." *Id*. ¶ 13.

In 2001, the Department of Defense (DoD) issued Department of Defense Instruction (DoDI) 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (17 Jul. 2001). This issuance provided in pertinent part that for sentences of ten years or more, prisoners would receive ten days of credit for each month of the sentence served. *Id.* ¶ E26.1.1.5. This instruction applied to all DoD components to include the Department of the Air Force. *Id.* ¶ 2.

In 2004, the Air Force issued Air Force Instruction (AFI) 31–205, *The Air Force Corrections System* (7 Apr. 2004), which governed confinement and sentences in the Air Force. For the determination of GCT, the Air Force implemented DoDI 1325.7 as follows:

> The accurate computation of inmate sentences ensures proper administration. It is also an essential element in protecting inmate legal rights. The confinement officer or designated corrections staff member computes sentence and Good Conduct Time (GCT) according to DoDI 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* and AFJI 31–215, *Military Sentences to Confinement.*

AFI 31–205, ¶ 5.7.

On 23 June 2004, a little over two months after the issuance of AFI 31–205, the Under Secretary of Defense for Personnel and Readiness (USD (P&R)) issued, a directive-type memorandum (DTM), *Change to DoD Policy on Abatement of Sentences to Confinement*, amending DoDI 1325.7. Under this DTM, GCT would "be awarded at a rate of 5 days for each month of confinement . . . regardless of sentence or multiple sentence length." Id. ¶ A2.2.1. This change applied only to findings of guilt for offenses which occurred after 1 October 2004, when the DTM became effective. *Id*. ¶ A2.2.2.

On 17 September 2004, the USD (P&R) released another DTM, *Clarification of DoD Policy on Abatement of Sentences to Confinement*. This September DTM clarifies paragraph A2.2.2. from the June DTM by amending it as follows: "[w]ith respect to sentences adjudged prior to January 1, 2005, GCT shall be awarded at the rates specified in DoD Instruction 1325.7, enclosure 26"—a rate of 10 days per month for sentences of 10 years or more. This change would be incorporated in the next version of DoDI 1325.7. *Id*.

In March 2013, the DoD reissued DoDI 1325.7 as DoDI 1325.07, *Administration of Military Correctional Facilities and Clemency and Parole Authority* (11 Mar. 2013). The reissued DoDI superseded and cancelled the two USD (P&R) DTMs issued on 23 June and 17 September 2004, but maintained the rule that prisoners whose sentences were adjudged after 31 December 2004 would earn

GCT at a rate of five days per month. DoDI 1325.07, Enclosure 2, Appendix 3 ¶ 2.b.(2).

In June 2015, the Air Force issued AFI 31–105, *Air Force Corrections System* (15 Jun. 2015), which superseded AFI 31–205, dated 7 April 2004, and contained specific provisions for sentence computation and GCT calculations:

> For sentences adjudged on 26 Jul 2004 or before, contact the USDB or AFSFC/SFC [Air Force Security Forces Center, Corrections Division] where copies of the AFJI 31–215, Armed Forces Joint Instruction, *Military Sentences to Confinement*, dated 1964 are maintained for those under its jurisdiction. For sentences adjudged on 27 Jul 2004 or after, IAW DoDI 1325.07, use DoD 1325.7-M, DoD Sentence Computation, Chapter 2, to calculate sentences. In either case, use the DD Form 2710–1, *Inmate Sentence Information*, or a computer-generated equivalent to show math work on sentence calculations.
>
> NOTE: The paragraphs contained in 5.6.1. – 5.6.8.1.4. below provide a quick reference to the format. For more in depth information, refer to the DoDI and DoDM [DoD Manual] which take precedence.

Id. ¶ 5.6.

AFI 31–105 continues: "GCT is awarded at a rate of **5 days** for each month of confinement, and for that portion of any sentence to confinement not expressed in full years and months (1 day for each 6-day portion of a month, see Table 5.1.), **regardless of sentence** or multiple sentence length." *Id*. ¶ 5.6.2.3.

As noted above, Petitioner's MRD was calculated on 1 July 2015 using the GCT rate of five days per month for each month of confinement. In calendar year 2016, Petitioner variously requested that the Commander of the Air Force Security Forces Center, the Commander of the Air Force Installation and Support Center, and the Air Force Clemency and Parole Board grant him relief from what he asserted was an inaccurate calculation of his GCT. Petitioner's requests, whether presented as an Article 138, UCMJ, 10 U.S.C. § 938, complaint, or a clemency request, were uniformly denied.

II. DISCUSSION

At the outset we note that Petitioner does not directly challenge the legality or appropriateness of his approved sentence in this petition. Rather, as he did in his requests to other Air Force authorities on this matter, he takes issue with the calculation of his MRD by prison officials using a GCT credit rate of five days per month instead of ten days per month. As the issue Petitioner raises concerns a matter not directly connected to the legality or appropriateness of the

approved sentence, we must first determine whether we have jurisdiction to review this petition for an extraordinary writ.

A. Jurisdiction

Jurisdiction is a question of law we review de novo. *Randolph v. HV*, 76 M.J. 27, 29 (C.A.A.F. 2017) (quoting *LRM v. Kastenberg*, 72 M.J. 364, 367 (C.A.A.F. 2013)).[2] "The burden to establish

---

[2] In addition to arguing that military courts do not have jurisdiction to review GCT matters on direct review under Article 66(c), UCMJ, 10 U.S.C. § 866(c), and thus do not have authority to issue extraordinary writs for GCT matters, the Respondent raises two additional jurisdictional bases to dismiss the petition. Citing to *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990), Respondent posits that this court does not have jurisdiction to address this writ while the case is pending at the United States Court of Appeals for the Armed Forces (CAAF) or the United States Supreme Court. We note that as of 13 July 2017, Petitioner's case was no longer pending at CAAF, and on 28 June 2018 the United States Supreme Court denied certiorari. Citing to this court's opinions in *Chapman v. United States*, 75 M.J. 598 (A.F. Ct. Crim. App. 2016), and *Sutton v. United States*, ___ M.J. ___, Misc. Dkt. No. 2018-01, 2018 CCA LEXIS 349 (A.F. Ct. Crim. App. 13 Jul. 2018), the Respondent argues that since Petitioner's court-martial has completed direct review under Article 71, UCMJ, 10 U.S.C. § 871, and as of 27 August 2018—the date the Secretary of the Air Force ordered Petitioner's dismissal executed the case is final under Article 76, UCMJ, 10 U.S.C. § 876,—this court lacks jurisdiction to address or grant Petitioner's request for extraordinary relief. We note that as of 4 June 2018 this petition was docketed with this court, Respondent answered the petition on 21 June 2018, and Petitioner replied on 27 July 2018—all before Petitioner's case was final under Article 76, UCMJ. We decline to dismiss the petition on either of these

jurisdiction rests with the party invoking the court's jurisdiction." *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (citation omitted).

"The All Writs Act, 28 U.S.C. § 1651(a), grants this court authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction." *Chapman v. United States*, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016) (citing *Loving v. United States,* 62 M.J. 235, 246 (C.A.A.F. 2005)). "However, the Act does not enlarge our jurisdiction, and the writ must be in aid of our existing statutory jurisdiction." *Id*. (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534–35 (1999)). "The courts of criminal appeals [(CCAs)] are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). Thus to determine whether we have authority to grant this extraordinary writ, we must determine whether the matter of GCT is within our existing statutory jurisdiction under Article 66(c), UCMJ, 10 U.S.C. § 866(c).

The scope and meaning of Article 66(c), UCMJ, is a matter of statutory interpretation, which, as a question of law, is reviewed de novo. *See United States v. Schloff,* 74 M.J. 312, 313 (C.A.A.F. 2015) (citations omitted). Article 66(c), UCMJ, establishes the jurisdiction of a CCA as follows:

---

jurisdictional grounds and instead deny the petition on the merits.

> In a case referred to it, the [CCA] may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

10 U.S.C. § 866(c).

The CAAF has recognized that the calculation of good time credit is primarily a matter for confinement officials. In *United States v. Spaustat*, where the parties agreed the appellant was entitled to five days of credit per month, but disagreed as to how it should be computed, CAAF stated:

> We need not resolve the disagreements about the computation of good time. The UCMJ and the Manual for Courts-Martial make no provision for good time credit. The responsibility for determining how much good time credit, if any, will be awarded is an administrative responsibility, vested in

> the commander of the confinement facility.

57 M.J. 256, 263 (C.A.A.F. 2002) (citations omitted).

The CAAF further explained "[j]udicial review of disputes about good time credit occurs only upon application for an extraordinary writ, not on direct review of the sentence." *Id.* (citations omitted).

In *United States v. Pena*, 64 M.J. 259 (C.A.A.F. 2007), an appellant challenged the authority of the DoD to establish the Mandatory Supervised Release program wherein he was required to participate in the program during the time from his MRD until his maximum release date. In deciding that case, the CAAF noted that "[o]n direct appeal, the scope of our review does not extend to supervision of all aspects of the confinement and release process." *Id.* at 264 (citing *United States v. Towns*, 52 M.J. 830, 833 (A.F. Ct. Crim. App. 2000)). The CAAF further explained:

> Our review of post-trial confinement and release conditions on direct appeal is limited to the impact of such conditions on the findings and the sentence. Accordingly, our review in the present appeal focuses on whether the post-trial conditions at issue: (1) constituted cruel or unusual punishment or otherwise violated an express prohibition in the UCMJ; (2) *unlawfully increased*

> *Appellant's punishment*; or (3) rendered his guilty plea improvident.

Id. (emphasis added) (citations omitted); *see also United States v. White*, 54 M.J. 469, 472 (C.A.A.F. 2001) (a CCA has the "authority to ensure that the severity of the adjudged and approved sentence has not been unlawfully increased by prison officials . . . ." (citation omitted)).

Applying the narrow framework of *Pena*, we note Petitioner has not asserted the calculation of GCT in his case constitutes cruel or unusual punishment or a violation of an express prohibition of the UCMJ. Further, Petitioner pleaded not guilty so the providence of a guilty plea is not at issue. Petitioner, however, framing the GCT calculation as a violation of the *Ex Post Facto* Clause, has raised an issue as to whether the GCT credit is being calculated in a manner that has *unlawfully increased* Petitioner's punishment.

Were this petition merely about whether or not prison officials had abused their discretion in denying Petitioner some amount of GCT credit due to their determination that Petitioner had violated confinement rules, for example, we might well agree with Respondent that such a dispute would lie outside of our jurisdiction. However, as the gravamen of this petition is that Petitioner's MRD of 1 January 2026 was wrongly determined by prison officials and that the determination adds 1020 days to the total number of days of confinement to be served by Petitioner, we

conclude that we have the authority to review whether Petitioner's approved sentence to confinement is being unlawfully increased.

B. Writ of Mandamus

Petitioner seeks relief through a writ of mandamus. A writ of mandamus is used, *inter alia*, "to compel [officers and commanders] to exercise [their] authority when it is [their] duty to do so." *Dew v. United States*, 48 M.J. 639, 648 (A. Ct. Crim. App. 1998) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). To prevail on a writ of mandamus, the petitioner "must show that: (1) there is no other adequate means to attain relief; (2) the right to issuance of the writ is clear and indisputable; and (3) the issuance of the writ is appropriate under the circumstances." *Hasan v. Gross*, 71 M.J. 416, 418 (C.A.A.F. 2012) (citing *Cheney v. United States Dist. Court*, 542 U.S. 367, 380–381 (2004)). The Respondent has not raised failure to exhaust as a reason to deny the petition. We are satisfied that Petitioner has exhausted his administrative options and has sufficiently shown there is no other adequate means to attain relief.[3] Whether Petitioner's right to issuance

[3] We do not mean to infer that this court is Petitioner's only option for relief. The Supreme Court has stated that the federal district courts have jurisdiction over habeas corpus petitioners who are imprisoned as a result of court-martial convictions: "The federal civil courts have jurisdiction over such applications. By statute, Congress has charged them with the exercise of that power." *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (footnote omitted).

of the writ is clear and indisputable and the writ is appropriate under the circumstances depends on whether a violation of the *Ex Post Facto* Clause occurred.

C. Ex Post Facto

The *Ex Post Facto* Clause provides: "No . . . ex post facto Law shall be passed." U.S. CONST. art I, § 9, cl. 3. "The *ex post facto* prohibition forbids the Congress and the States to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (footnotes omitted) (citations and internal quotation marks omitted).

In *Weaver*, the Supreme Court addressed post-sentencing changes to formulas for calculating "gain time" confinement credit and found that such changes were unconstitutional as an *ex post facto* law when applied to that petitioner, whose crime was committed before the statute was enacted. *Id.* at 28–36. In finding a violation, the Court noted "two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 29 (footnotes omitted) (citations omitted).

The linchpin of Petitioner's claim is that the application of GCT credits to his sentence to confinement at a rate of five days per month is

retrospective. Petitioner puts forth a multi-faceted argument to advance this claim. First, Petitioner argues that Congress specifically delegated authority to regulate the confinement of military prisoners, to include prescribing policy for the administration of GCT, to the Secretaries of the Armed Forces, not the Secretary of Defense (SECDEF), and therefore asserts the 2004 DTMs were effectively *ultra vires* and *void ab initio*. Building on the conclusion that Air Force policy regarding GCT was the exclusive province of the Air Force, Petitioner argues that the Air Force rules in effect on 10 June 2005, the time of his earliest offense, determine Petitioner's GCT. As of 10 June 2005, AFI 31–205, dated 7 April 2004, was in force and implemented both DoDI 1325.7 and AFJI 31–215, both of which included a provision awarding GCT at a rate of ten days per month as of the issuance date of AFI 31–205.

Petitioner argues that this rate of ten days per month could only be changed by the Air Force, not by the DTMs. Thus, according to Petitioner, GCT at a rate of ten days per month should be applied to his sentence—the rate in effect at the time of his earliest offense and the date of his adjudged sentence. Petitioner asserts his GCT is instead being calculated using AFI 31–105, dated 15 June 2015, and that this violates the *Ex Post Facto* Clause as applied to him. Petitioner argues in the alternative that the 2004 DTMs, even if controlling, are facially

unconstitutional in violation of the *Ex Post Facto* Clause. [4]

Petitioner's arguments, although not identical, bear a striking resemblance to ones made by the petitioner in *Valois v. Commandant, USDB—Fort Leavenworth*, No. 13-3029-KHV, 2015 U.S. Dist. LEXIS 137046 (D. Kan. 2015). Like Petitioner, Valois was court-martialed by the Air Force, convicted, received a lengthy sentence to confinement, and transferred to the USDB to serve his sentence. *Id.* at *2–4. Valois' offenses, like those of Petitioner, occurred after the DTMs were in effect. *Id.* Valois filed a pro se petition for a writ of habeas corpus with the United States District Court for the District of Kansas challenging the amount of GCT that would be administratively deducted from his sentence. *Id.* at *1. Valois, like Petitioner, contended he was entitled to GCT credit of ten days rather than five days per month. *Id.* at *3– 4. Specifically, Valois also contended that the Secretary of the Air Force (SECAF) had the exclusive authority to determine the award of GCT, did so, and that earlier Air Force publications indicating a rate of ten days per month controlled in his case. *Id.* Valois argued that later amendments or modifications to those Air Force publications,

[4] We have considered and reject this argument, which neither requires additional analysis nor warrants relief. *See United States v. Matias*, 25 M.J. 356, 363 (C.M.A. 1987). ("[W]e are aware of no requirement of law that appellate courts in general or a court of military review in particular must articulate its reasoning on every issue raised by counsel." (citation omitted)).

specifically the 2004 DTMs, were either invalid or had expired. *Id.* After an exhaustive trek through what the District Court described as a "military labyrinth of regulations" and application of the deferential framework provided by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), [5] to its review of the DoD and Air Force regulations at issue, the District Court reached a succinct conclusion:

---

[5] In *Chevron*, the Supreme Court stated:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

467 U.S. at 843–44 (alteration in original) (footnotes omitted) (internal quotation omitted).

> In sum, the military's view that the 2004 DTM is still valid is a reasonable interpretation by the DoD within its statutory authority to administer military correctional facilities. Since this interpretation is not clearly erroneous or arbitrary, this Court finds that the 2004 DTM and the Air Force's deference to DoDI 1325.7, now DoDI 1325.07, remains valid and that any potential GCT for Valois is limited to five days per month.

Valois, 2015 U.S. Dist. LEXIS 137046, at *7, *27.

We are persuaded by the analysis underpinning the District Court's conclusions that: (1) the 2004 DTMs directing that GCT would "be awarded at a rate of 5 days for each month of confinement . . . regardless of sentence or multiple sentence length," remained in full force until superseded in March 2013 when DoDI 1325.07 was issued and incorporated the rule; (2) the Air Force's deference[6] to the DoD publications remained valid; and (3) any potential GCT for Valois was limited to five days per month.

---

[6] The District Court characterized the Air Force's adherence to the DTMs as "deference." *Valois*, 2015 U.S. Dist. LEXIS 137046, at *27. We unequivocally state that the Air Force was obliged to follow the DTMs.

In reaching its conclusions regarding the enduring validity[7] and applicability of the 2004 DTMs to the Air Force, the District Court found no statutory basis to conclude that GCT policy was or is expressly reserved to the Service Secretaries and that existing statutes did "not prohibit the DoD from establishing superior corrections policy" which the component service would be required to implement. *Id.* at *18–19.

In order to avoid the application of the DTMs to his case, Petitioner asserts that the authority regarding the establishment, organization, and administration of military correctional facilities and parole has been expressly reserved by statute to the individual Service Secretaries and not the SECDEF. Thus, Petitioner argues, the statutory authority to establish GCT rules for Air Force offenders belongs solely to the SECAF, and therefore, the DTM changes, without timely action taken by the SECAF to adopt them, do not apply to him. We disagree.

---

[7] Although not raised by Petitioner, we note that *Valois* also addressed whether or not the DTMs were continuously in effect because they were not incorporated into a DoD issuance within 180 days as required by DoD policy. *Id.* at *25–26. The District Court concluded "[t]he military's regulatory scheme did not void DTMs after 180 days. Rather, as a matter of administrative procedure, it established a policy that DTMs be incorporated into regulations to assist in internally updating DoD issuances." *Id.* at *26. We agree.

The statutory provisions cited by Petitioner do not directly address GCT.[8] Further, even assuming GCT were directly addressed, the statutes cited provide only permissive authorities and do not expressly reserve the authorities to a Service Secretary. The provisions cited by Petitioner must be interpreted in light of the whole of the statute. In pertinent part, we note that the SECDEF "is the principal assistant to the President in all matters relating to the Department of Defense" and "[s]ubject to the direction of the President . . . he has authority, direction, and control over the Department of Defense." 10 U.S.C. § 113(b). Unless preempted by the President, the SECDEF has plenary authority over all DoD matters. While the statutes cited by Petitioner do provide express authority to individual Service Secretaries, they do not divest the SECDEF of plenary authority over the DoD. "Subject to the authority, direction, and control of the Secretary of Defense . . . the Secretary of the Air Force is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Air Force . . . ." 10 U.S.C. § 8013(b). As stated in *Valois,* given the statutory hierarchy defining the relationship between the Air Force and the DoD, "as a matter of law, the Air Force is obligated to follow the policies and procedures of the DoD." *Valois*, 2015 U.S. Dist. LEXIS 137046, at *18.

---

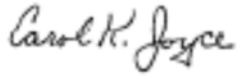
[8] "The Secretaries concerned may provide for the establishment of such military correctional facilities as are necessary for the confinement of offenders . . . ." 10 U.S.C. § 951(a). The "Secretary concerned may provide a system of parole for offenders . . . ." 10 U.S.C. § 952(a).

When the 2004 DTMs changed the calculation of GCT from ten days to five days per month effective 1 October 2004, the change applied to the Air Force. On 10 June 2005, the earliest date of Petitioner's offenses, and to the present date, DoD and Air Force policy was and is that GCT "is awarded at a rate of 5 days for each month of confinement . . . regardless of sentence or multiple sentence length." This rule change was not applied retrospectively to Petitioner and thus did not violate the *Ex Post Facto* Clause. Petitioner has failed to show the right to issuance of the writ is clear and indisputable and appropriate under the circumstances.

III. CONCLUSION

Accordingly, the petition for extraordinary relief in the nature of a writ of mandamus is hereby **DENIED**.

FOR THE COURT



CAROL K. JOYCE
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES
Appellee

v.

James W. RICHARDS IV, Lieutenant Colonel
United States Air Force, Appellant

No. 16-0727
Crim. App. No. 38346

Argued March 15, 2017—Decided July 13, 2017

Military Judge: Mark L. Allred

For Appellant: *William E. Cassara,* Esq. (argued); *Major Johnathan D. Legg, Major Thomas A. Smith*, and *Captain Patrick A. Clary*.

For Appellee: *Major Mary Ellen Payne* (argued); *Colonel Katherine E. Oler* and *Gerald R. Bruce,* Esq. (on brief).

Judge SPARKS delivered the opinion of the Court, in which Chief Judge ERDMANN, and Judges STUCKY, RYAN, and OHLSON, joined.

Judge SPARKS delivered the opinion of the Court.

This case arises out of the conviction of Lieutenant Colonel James W. Richards IV (Appellant), contrary to his pleas, of one specification of possession of child pornography and five specifications of indecent acts with a male under sixteen years of age, both in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934 (2012); and four specifications of failing to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2012). A military judge, sitting alone, sentenced Appellant to a dismissal, seventeen years confinement, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

Appellant raised numerous issues before the United States Air Force Court of Criminal Appeals and, on May 2, 2016, the lower court affirmed the findings and sentence. Appellant then filed a petition for review with this Court. We granted review on the issue of whether the November 9, 2011, search authorization was overly broad in failing to limit the dates of communications being searched.[1]

---

[1] **Without briefs, the Court granted review of an issue addressing the constitution of the lower court. That issue is moot per our holding in *United States v. Dalmazzi*, 76 M.J. 1, 3 (C.A.A.F. 2016).** The exact issue granted was:

> Whether the 9 November 2011 search authorization was overbroad in failing to limit the dates of the communications being searched, and if so, whether the error was harmless.

Upon review of this issue, we agree with the lower court that the November 9, 2011, search authorization was sufficiently particularized and that investigators did not exceed the scope of that authorization in searching the electronic devices in question.[2]

Facts

In April 2011, the Air Force Office of Special Investigations (AFOSI) at Tyndall Air Force Base in Florida initiated an investigation into Appellant based on notification from the National Center for Missing and Exploited Children that one of Appellant's former "little brothers"[3] from the Big Brothers Big Sisters program had alleged Appellant sexually abused him between 1993 and 1997, prior to Appellant joining the Air Force. Several months into their investigation, agents received permission to place a GPS tracking device on Appellant's car, through which they learned that on a number of occasions he had signed a seventeen-year-old boy onto Tyndall Air Force Base.

---

[2] On May 11, 2017, Appellant filed two additional motions requesting that the Court consider whether Appellant's counsel was ineffective in failing to file in a timely manner Appellant's additional issues pursuant to *United States v. Grostefon,* 12 M.J. 431 (C.M.A. 1982). These motions are denied. On May 24, 2017, Appellant filed a motion for leave to correct errata in a previous motion. This motion is granted. On May 24, 2017, and May 25, 2017, Appellant filed two separate motions for leave to supplement the record. These motions are denied.

[3] Children in the Big Brothers Big Sisters program are commonly referred to as "little brothers" and "little sisters."

Agents interviewed the boy, AP, who told them he and Appellant had met online, developed a sexual relationship, and continued to communicate online as their relationship evolved. Several weeks later AP recanted the portion of his statement about himself and Appellant having a sexual relationship.

AFOSI coordinated with the local sheriff's office who assumed the primary investigative role in Appellant's relationship with AP. However, AFOSI agents did utilize information from AP's statement to obtain a search authorization for Appellant's residence and person for items used to electronically communicate with AP, requesting the seizure of "[a]ll electronic media and power cords for devices capable of transmitting or storing online communications." The affidavit accompanying the search request stated that AFOSI, in tandem with the Bay County Sherriff's Office, was investigating Appellant's violation of a Florida statute "Computer Pornography; Traveling to meet a minor."[4] The affidavit detailed the investigation into Appellant's relationship with AP, including the fact that the sexual relationship had been ongoing since approximately April 2011 with sexually explicit online communications starting about a year earlier.

---

[4] The lower court summarized the relevant section of the Florida statute as follows:

> The Florida state statute defines "traveling to meet a minor" as, inter alia, a person who travels within the state in order to engage in an illegal sexual act with a child under the age of 18 years after using a computer online or Internet service to seduce, solicit, lure or entice the child to do so.

The affidavit did not mention Appellant's history or any potential allegations connected with the Big Brothers Big Sisters program.[5] On November 9, 2011, agents seized a number of electronic devices from Appellant's home. The following day, the Bay County Sherriff's Office arrested Appellant and seized all electronic devices on his person. Among the items seized from Appellant himself was a personal laptop, which was handed over to AFOSI on November 24, 2011.

AFOSI agents sent the electronic devices they had collected to the Defense Computer Forensic Laboratory (DCFL) so that DCFL could extract data to be searched. The DCFL application form required submission of both case background information and a copy of the search authority documentation. The case background information provided by AFOSI agent Sara Winchester included the accusations of the former "little brother" which formed the genesis of the investigation and detailed how this led to the identification of an investigation into Appellant's relationship to AP and the subsequent seizure of the electronic materials. Agent Winchester requested that DCFL:

> Search SUBJECT's Cell Phones, laptop computers, digital cameras and memory

[5] At one point, Special Agent Nishioka testified that he was searching for communication between Appellant and AP or the "little brothers." However, there was no mention of communication with "little brothers" in the warrant or affidavit.

> cards for all videos, images and possible online communication. To include, but not limited to the following: any and all information saved or maintained on SUBJECT's cellular telephones, laptop computers or hard drives; all associated SIM cards, components, peripherals or other data, relating to the matter being investigated.

Unfortunately, SA Winchester's request did not clarify that the "matter being investigated" was Appellant's communication with AP between 2010 and 2011, not the earlier accusation by the "little brother." DCFL created a mirror image of the data on the devices and placed that data on a forensic data extraction (FDE). As Mr. Kleeh, the forensics examiner, described the extraction process, "it goes through the image – the mirrored copy of the drive, it looks for those files, pictures, chat logs, Word documents, Internet history, and it pulls them all out and throws them into a directory on a new drive."

The first batch of extracted data (FDE #1) was returned to AFOSI on December 23, 2011, and around January 4, 2012, Special Agent Nishioka conducted a search of the data. FDE #1 contained materials found on Appellant's personal laptop as well as from two seized loose hard drives. Agent Nishioka described in his statement that "DCFL simply dumped all pictures and online chats from these drives onto one big drive for review." Agent Nishioka plugged the FDE into a stand-alone laptop and, utilizing a graphic user inter-

face or GUI, opened the FDE in which all the materials extracted were arranged in folders and subfolders. He testified that he worked through the FDE folders in the order they were listed, beginning with the "pictures" folder. Agent Nishioka stated that he started by going through the "attributable" folder. He then moved on to the folders of "unattributable" material. It appears that by using the term "unattributable" Agent Nishioka was referring to what Mr. Kleeh testified to as unallocated or deleted material. Mr. Kleeh testified that unallocated materials are deleted files that remain in the system but potentially without dates and times attached.

While searching the unallocated pictures, Agent Nishioka encountered an image that appeared to be child pornography. He stopped his search and sought an additional authorization to search for child pornography. A search of the remainder of FDE #1, pursuant to the additional authorization, turned up thousands of suspected child pornography images. The discovery of child pornography on these devices formed the basis for additional search authorizations, turning up more images which led to the charges of possessing child pornography and indecent acts of which Appellant was ultimately convicted.

At trial, Appellant moved to suppress the evidence derived from the November 9, 2011, search authorization because it was overbroad. The military judge denied Appellant's motion. The scope and propriety of that initial search authorization is now at issue in this appeal.

Discussion

"A military judge's decision to admit evidence is reviewed for an abuse of discretion." *United States v. Hills*, 75 M.J. 350, 354 (C.A.A.F. 2016). "An abuse of discretion occurs when we determine that the military judge's findings of fact are clearly erroneous or that he misapprehended the law." *United States v. Clayton*, 68 M.J. 419, 423 (C.A.A.F. 2010). When we review a decision on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party. *United States v. Cowgill*, 68 M.J. 388, 390 (C.A.A.F. 2010). We review de novo questions regarding whether a search authorization is overly broad. *United States v. Maxwell*, 45 M.J. 406, 420 (C.A.A.F. 1996). "Evidence derivative of an unlawful search, seizure, or interrogation is commonly referred to as the 'fruit of the poisonous tree' and is generally not admissible at trial." *United States v. Conklin*, 63 M.J. 333, 334 (C.A.A.F. 2006) (citing *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

A search authorization, whether for a physical location or for an electronic device, must adhere to the standards of the Fourth Amendment of the Constitution. The Fourth Amendment states that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. This insistence on particularity is a defining aspect of search and seizure law.

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.

Maryland v. Garrison, 480 U.S. 79, 84 (1987). "The Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings." *United States v. Carey*, 172 F.3d 1268, 1272 (10th Cir. 1999).

Despite the importance of preserving this particularity requirement, considerable support can be found in federal law for the notion of achieving a balance by not overly restricting the ability to search electronic devices.

> The prohibition of general searches is not to be confused with a demand for precise ex ante knowledge of the location and content of evidence .... The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation.

United States v. Richards, 659 F.3d 527, 541 (6th Cir. 2011) (alteration in original) (quoting *United States v. Meek,* 366 F. 3d 705, 716 (9th Cir. 2004)); *see id.* at 540–42 (court allowing the search of an entire server known to contain websites harboring child pornography). "[I]t is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives." *United States v. Burgess*, 576 F.3d 1078, 1094–95 (10th Cir. 2009) (court upholding a warrant to search "all computer records" for evidence of drug trafficking). Instead of attempting to set out bright line rules for limiting searches of electronic devices, the courts have looked to what is reasonable under the circumstances. "As always under the Fourth Amendment, the standard is reasonableness." *United States v. Hill*, 459 F.3d 966, 974–77 (9th Cir. 2006) (court upholding an off-site search of all of the defendant's computer storage media for evidence of child pornography).[6]

Searches of electronic devices present distinct issues surrounding where and how incriminating evidence may be located. While we support the notion that "warrants for computer searches must affirmatively limit the search to evidence of specific federal crimes or specific types of material," *United States v. Riccardi*, 405 F.3d 852, 862 (10th Cir. 2005), we also recognize the dangers of too narrowly limiting where investigators can go. As stated by the United

[6] Obviously, what is reasonable in one instance may not be so in another.

States Court of Appeals for the Seventh Circuit, "[u]nlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents." *United States v. Mann*, 592 F.3d 779, 782 (7th Cir. 2010). "[I]n the end, there may be no practical substitute for actually looking in many (perhaps all) folders and sometimes at the documents contained within those folders, and that is true whether the search is of computer files or physical files. It is particularly true with image files." *Burgess*, 576 F.3d at 1094; *see also United States v. Williams*, 592 F.3d 511, 521–22 (4th Cir. 2010) (positing an implied authorization for officers to open each file on the computer and view its contents, at least cursorily, to determine whether it falls within the scope of the warrant's authorization. "To be effective, such a search could not be limited to reviewing only the files' designation or labeling, because the designation or labeling of files on a computer can easily be manipulated to hide their substance"). Of course our reluctance to prescribe ex ante limitations or require particular search methods and protocols does not render them immune from an ex post reasonableness analysis. *See, e.g., United States v. Christie*, 717 F.3d 1156, 1167 (10th Cir. 2013) ("[E]ven if courts do not specify particular search protocols up front in the warrant application process, they retain the flexibility to assess the reasonableness of the search protocols the government actually employed in its search after the fact, when the case comes to court, and in light of the totality of the circumstances.").

In charting how to apply the Fourth Amendment to searches of electronic devices, we glean from our reading of the case law a zone in which such searches are expansive enough to allow investigators access to places where incriminating materials may be hidden, yet not so broad that they become the sort of free-for-all general searches the Fourth Amendment was designed to prevent.

> On one hand, it is clear that because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a broad, expansive search of the hard drive may be required.... On the other hand, ... granting the Government a *carte blanche* to search *every* file on the hard drive impermissibly transforms a "limited search into a general one."

United States v. Stabile, 633 F.3d 219, 237 (3d Cir. 2011) (citations omitted).

Appellant argues that the November 9, 2011, authorization was overbroad because it did not contain a temporal limitation when that information was available and known to investigators. Applying the above Fourth Amendment law, we conclude that the authorization did not require a date restriction because it was already sufficiently particularized to prevent a general search. Though a temporal limitation is one possible method of tailoring a search authorization, it is by no means a requirement. Here, the authorization

and accompanying affidavit did not give authorities carte blanche to search in areas clearly outside the scope of the crime being investigated. They were entitled to search Appellant's electronic media for any communication that related to his possible violation of the Florida statute in his relationship with AP.

We also conclude that the authorization allowed for a search of the unallocated space and through potential communications materials that did not have an immediately clear date associated with them. The precise extraction process utilized by Agent Kleeh and the accessibility of metadata on unallocated materials was not fleshed out in trial or anywhere on the record. However, we deduce from Mr. Kleeh's testimony that metadata for unallocated materials often does not exist or is difficult to extract. We conclude that the possibility that relevant communications could have existed among the unallocated materials provided sufficient basis to subject those materials to an authorized and particularized search.

The record also does not disclose the origin of the first image of child pornography encountered by Agent Nishioka. Though he indicates he saw it in the folder of unallocated or unattributable materials, we do not know whether the specific image was drawn from the laptop or one of the two external hard drives. A list of images compiled by the Government as potential Rule for Courts-Martial 404(b) evidence indicates that child pornography from both the laptop and one of the external hard drives appeared in the unallocated folder viewed around January 4, 2012. This is supported by

testimony from Mr. Kleeh. Neither Agent Nishioka nor trial counsel indicated any obvious delineation between materials found on individual devices in their description of what was contained on FDE #1. The issue of the shutdown dates of the two loose hard drives was raised during oral argument and addressed by both parties in subsequent motions. The FDE lists the shutdown dates for the hard drives as 2006 and 2008, years before Appellant initiated his relationship with AP. Assuming the shutdown dates were indicative of the timing of their last use, these materials were outside the scope of the search authorization, which described criminal activity dating no earlier than approximately April 2010. However, because images of child pornography from the laptop, with a last shutdown date in 2011, appeared in the unallocated materials Agent Nishioka searched, we conclude that he either did discover or inevitably would have discovered child pornography that validly lay within the scope of the search regardless of the significance of the shutdown dates on the two loose hard drives.

Agent Nishioka's discovery of the child pornography images within the folder of unallocated materials was consistent with *Horton v. California* and the plain view exception to the Fourth Amendment. 496 U.S. 128 (1990). Under *Horton*, in order for the plain view exception to apply: (1) the officer must not violate the Fourth Amendment in arriving at the spot from which the incriminating materials can be plainly viewed; (2) the incriminating character of the materials must be immediately apparent; and (3) the officer must have lawful access to the object itself. *Id.* at 136–37. Here,

Agent Nishioka was lawfully searching through the extracted files based on what we have determined to be a valid authorization when he encountered what appeared to be child pornography among the unallocated materials. Upon spotting the child pornography, he properly stopped his search and obtained a new authorization that allowed him to search specifically for child pornography.

We hold that the November 9, 2011, search authorization was sufficiently particularized to avoid any violation of Appellant's Fourth Amendment rights and uphold the military judge's decision not to suppress evidence derived from the fruits of that authorization.

Decision

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

IN THE UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

JAMES W. RICHARDS, IV Lieutenant Colonel (O-5) United States Air Force Petitioner,	)	No. _____
vs.	)	
DEBORAH LEE JAMES Secretary of the Air Force	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
BRIAN S. GREENROAD Colonel (O-6) Commander Air Force Security Forces Center	)	
D.L. HILTON Colonel (O-6) Commandant United States Disciplinary Barracks	)	

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

PREAMBLE

The Petitioner, *pro se*, respectfully requests this Honorable Court order the Respondents to comply with the applicable Air Force regulation concerning the Petitioner's court-martial sentence to confinement. The requested action represents a clear and indisputable requirement on the part of the Respondents to perform a nondiscretionary ministerial function. As such, because this matter is in-aid of this Court's jurisdiction under Article 66, U.C.M.J., this Court has the power to issue the requested writ. Furthermore, because the Petitioner has exhausted all administrative avenues to address this matter, the requested writ is both necessary and appropriate to protect the Petitioner's constitutional rights.

Previous History

The Petitioner was tried by general court-martial composed of a military judge sitting alone. Contrary to his pleas, the Petitioner was convicted of all charges and specification not dismissed by the military judge prior to trial. The Petitioner was sentenced to 17 years confinement, forfeiture of all pay and allowances, and a dismissal. The conviction was appealed to this Court, which denied the Petitioner's appeal on 2 May 2016. The Petitioner requested reconsideration of that decision, which request was denied on 14 July 2016. On 14 October 2016, the Petitioner filed a Petition for Review to the Court of Appeals for the Armed Forces. No decision on that petition has been made as of the date of this petition. The matters raised herein have not previously been brought before any court.

Facts

The Petitioner was court-martialed at Tyndall Air Force Base (AFB) between 5 September 2012 and 21 February 2013 by order of the Commander, Air Education and Training Command. (*United States v. Richards*, 2016 CCA LEXIS 285 (A.F.C.C.A. 2016). On 21 February 2013, the Petitioner was sentenced to a term of confinement of 17 years. *Id.* The earliest date of offense for which the Petitioner was sentenced was 10 June 2005. *Id.* After being initially confined by the Air Force at Tyndall AFB, the Petitioner was transfer to the United States Disciplinary Barracks (USDB) on 26 March 2013. *Id.* He has been confined at the USDB continuously since that date. Based on a Prisoner Sentence Computation report dated 29 June 2015, the Petitioner, as of that date, was scheduled to be released from confinement on Mandatory Supervised Release (MSR) on

1 January 2026, his Minimum Release Date (MRD). (Appendix G)[1]. His MRD is based, in part, on the application of GCT credits to his sentence to confinement at a rate of 5 days per month. *Id.*

On 7 April 2004, the Secretary of the Air Force (SecAF) promulgated AFI 31-205, *Air Force Corrections System*. This instruction, according to its terms, is applicable to *all* Air Force personnel serving court-martial sentences. Colonel Bargery, Commander (prior), Air Force Security Forces Center, in a response to a Request for Redress filed by the Petitioner, confirmed that AFI 31-205 dated 7 April 2004, "is the applicable AF instruction, given your earliest confining offense of 10 June 2005 and your adjudged date of 21 Feb 2013." (Appendix A).

SecAF, through AFI 31-205, articulated the procedures concerning how GCT credits are to be calculated and applied to sentences of all Air Force prisoners. Specifically, paragraph 5.7 provides that GCT "shall" be computed "according to DoDI 1325.7, *Administration of Military Correctional Facilities and Clemency and Parole Authority* **and** [emphasis added] AFJI 31-215, *Military Sentences to Confinement*."[2] Paragraph 5.7.1.2.1 further provides that GCT "shall" be computed at a rate of:

> Five days for each month of the sentence, if the sentence is less than one year. For sentences over one year, refer to **DoDI 1325.7, E26.1.1** [emphasis added]. (Appendix H).

DoDI 1325.7, Enclosure 26, paragraph E26.1.1.5, provides that GCT credit "shall" be credited at a rate of "ten days per month of sentence, if the sentence is 10 years or more." (Appendix J). Virtually the same language can be found in AFJI 31-25, section

---

[1] All appendix references are to the accompanying brief in support of this petition.
[2] The applicable DoDI is dated 17 July 2001, incorporating Change 1 dated 10 June 2003. AFJI 31-215 is the predecessor regulation to AFI 31-205. The last version of AFJI 31-215 is dated November 1964. AFJI 31-215 was replaced by AFR 125-30, which was replaced by AFI 31-205.

III, paragraph 13(e), which provides that GCT credit "shall" be credited at a rate of "ten days for each month of the sentence for a sentence of 10 years or more, excluding life." (Appendix K).

AFI 31-205 was changed on 6 July 2007. That change did not affect the language contained in paragraph 5.7 and the rules applicable to computing GCT credits. (Appendix H). Furthermore, on 28 April 2011, SecAF certified AFI 31-205 as being current. *Id.* Finally, on 27 January 2014, HQ USAF A4/7 issued Air Force Guidance Memorandum (AFGM) 2014-1 to AFI 31-205. (Appendix I). AFGM 2014-1 made no changes to the rules applicable to the calculation of GCT credits.

On 15 June 2015, SecAF replaced AFI 31-205 with AFI 31-105. *Air Force Corrections System.*

Statement of the Issues

ISSUE I: Whether this Court has Jurisdiction to Review the Petition for Extraordinary Relief in the Nature of a Writ of Mandamus?

ISSUE II: Whether the Right to Requested Writ is Clear and Indisputable?

Specific Relief Sought

The Petitioner prays that this Court will issue a Writ of Mandamus ordering the Respondents to comply with AFI 31-205, paragraph 5.7, and apply GCT credits to the Petitioner's sentence to confinement at a rate of 10 days per month for each month of the approved sentence to confinement, which is directed by DoDI 1325.7, Enclosure 26, and AFJI 31-215.

Reasons for Granting Writ

As is more fully discussed in the brief in support of this petition, the relief sought is mandated by Air Force regulation in conjunction with applicable provisions of the U.S. Constitution and the Supreme Court holding in *Weaver v. Graham*, as well as by Congress through the enactment of 10 U.S.C. §§951-952 and 10 U.S.C. §8013.

This Court has jurisdiction to hear this matter since it is in-aid of this Court's jurisdiction over court-martial sentences under Article 66, U.C.M.J. The relief sought represents a clear and indisputable requirement on the part of the Respondents to perform a nondiscretionary ministerial function. The failure of the Respondents to perform a mandatory function as dictated by Air Force regulation to the detriment of the Petitioner's constitutional liberty interest is the kind of miscarriage of justice that the extraordinary writ process is designed to prevent. Additionally, this matter gives rise to significant constitutional issues including the *ex post facto* prohibition, the separation of powers doctrine, and the delegation of constitutional authority by Congress to regulate the military.

Finally, as outline in the accompanying brief, the Petitioner has exhausted all available administrative channels in an attempt to resolve this matter without court intervention. Those attempts have been unsuccessful. Therefore, the issuance of the writ is necessary and appropriate to resolve this issue.

Jurisdictional Basis

Jurisdiction is alleged under 28 U.S.C. §1651(a).

Appellate Counsel

Petitioner respectfully requests the appointment of appellate counsel to assist him with this filing.

Respondents' Addresses

Deborah Lee James
Secretary of the Air Force
Air Force Pentagon
Washington. D.C. 20330-1660

Colonel Brian S. Greenroad
AFSFC/CC
1517 Billy Mitchell Blvd., Bldg 954
Lackland AFB TX 78236-0119

Colonel D.L. Hilton
Commandant. USDB
1301 N. Warehouse Rd.
Ft. Leavenworth. KS 66027

Respectfully submitted.

JAMES W. RICHARDS. Lt Col. USAF
Petitioner
1300 N. Warehouse Rd.
Ft. Leavenworth. KS 66027

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

James W. RICHARDS IV	)	
Lieutenant Colonel (O-5)	)	
U.S. Air Force,	)	
Petitioner*, *Pro Se	)	**Misc. Dkt. No.**
	)	**2017-04**
v.	)	
	)	**ORDER**
Deborah Lee JAMES	)	
Secretary of the Air Force	)	
	)	
Brian S. Greenroad	)	
Colonel (O-6)	)	
U.S. Air Force	)	
Commander	)	
Air Force Security Forces Center	)	
	)	
D.L. HILTON	)	
Colonel (O-6)	)	
U.S. Army	)	
Commandant	)	
U.S. Disciplinary Barracks,	)	**Panel 3**
	)	
Respondents	)	

A petition for Extraordinary Relief in the nature of a Writ of Mandamus received by this court on 6 June

2017, was filed by Petitioner, pro se, under the All Writs Act, 28 U.S.C.§ 1651. In his petition, Petitioner requested the appointment of appellate counsel and seeks this court to order Respondents to comply with Air Force Instruction (AFI) 31-205, dated 7 April 2004, and apply ten days of Good Conduct Time (GCT) credit per month against Petitioner's approved sentence to confinement.

On 15 June 2016, the United States filed a motion for leave to file and a motion to dismiss the petition for extraordinary relief as well as a motion to submit documents, to wit: the certificate of service and declaration of Sergeant KS establishing the attempt to serve Petitioner with their motion for leave to file and motion to dismiss.

Analysis

Petitioner was convicted, contrary to his pleas, by a general court-martial composed of a military judge sitting alone, of one specification of possessing digital images of minors engaging in sexually explicit conduct, six specifications of committing an indecent act with a male under 16 years of age, and four specifications of failing to obey a lawful order, in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. The military judge sentenced Appellant to a dismissal, confinement for 17 years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged. On 2 May 2016, we affirmed the findings and sentence. *United States v. Richards*, No. ACM 38346 (A.F. Ct. Crim. App. 2 May 2016) (unpub. op).

On 14 July 2016, we denied a motion for reconsideration and reconsideration en banc. On 7 September 2016 a Petition for Grant of Review was filed with the United States Court of Appeals for the Armed Forces (CAAF). On 15 December 2016, CAAF granted the petition for review (No. 16-0727/AF) and the case is still pending at CAAF.

The All Writs Act, 28 U.S.C. § 1651(a), grants this court authority to issue extraordinary writs necessary or appropriate in aid of its jurisdiction. *Loving v. United States*, 62 M.J. 235, 246 (C.A.A.F. 2005) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999)). However, the Act does not enlarge our jurisdiction, and the writ must be in aid of our existing statutory jurisdiction. *Clinton*, 526 U.S. at 534–35. "The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). Therefore, the preliminary question is whether this court has jurisdiction to consider a writ petition from a petitioner whose case is docketed with our superior court.

In *Moore v. Akins*, 30 M.J. 249 (C.M.A. 1990), our superior court held that once a case was certified for review to that court, a Court of Criminal Appeals is "divested of further authority over the case, unless subsequently the case was remanded to it. However, after the decision was certified to our Court, we have authority under the All Writs Act to enter suitable orders dealing with confinement or other pretrial restraint of [a] petitioner." *Id.* at 253.

Accordingly, it is by the court on this 16th day of June, 2017,

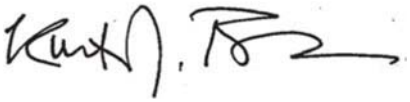
ORDERED:

That the motions for leave to file and to submit documents are GRANTED; and

That the Petition is DENIED for lack of jurisdiction; and

That the Petitioner is hereby notified that this court does not possess the authority under either Article 70, UCMJ, 10 U.S.C. § 870, or A.F. COURT OF CRIM. APP. R. PRAC. AND PROC. 11 (19 May 2017) to appoint appellate defense counsel to him. In accordance with the provisions of Article 70, UCMJ, and Rule 11, any appointment of appellate defense counsel would be determined by The Judge Advocate General of the Air Force.

FOR THE COURT



KURT J. BRUBAKER
Clerk of the Court

29 August 2018

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

Lieutenant Colonel (O-5) JAMES W. RICHARDS, IV, USAF *Petitioner*,	)	MOTION TO SUBMIT DOCUMENT AND MOTION FOR LEAVE TO
v.	)	FILE MOTION TO DISMISS
UNITED STATES *Respondent.*	)	Misc. Dkt. 2017-04
	)	Panel 3

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

Pursuant to Rule 23(b) of the United States Air Force Court of Criminal Appeals Rules of Practice and Procedure, the United States respectfully moves to submit the following document:

- Action of the Secretary of the Air Force, dated 27 August 2018.

This document is relevant to this Court's jurisdiction to address Petitioner's request for extraordinary relief.

On 6 June 2017, Petitioner filed a Pro Se Petition for Extraordinary Relief in the Nature of a Writ of Mandamus with this Court. On 14 June 2017, Respondent filed a Motion to Dismiss the Petition for Extraordinary Relief for a lack of jurisdiction, given that Petitioner's case was then pending on direct review before the Court of Appeals for the Armed Forces (CAAF). On 16 June 2017, this Court denied Petitioner's Petition based on lack of jurisdiction.

On 13 July 2017, CAAF affirmed Petitioner's conviction on direct review. On 14 July 2017, now represented by counsel, Petitioner filed a Motion to Reconsider his Petition for Extraordinary Relief and a Request for Reconsideration En Banc pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

On 20 July 2017, Respondent filed an Opposition to Petitioner's Motion for Reconsideration. However, this Court did not issue a ruling on the Motion for Reconsideration until much later.

On 9 November 2017, on direct review, Petitioner filed a Petition for a Writ of Certiorari with the Supreme Court.

On 30 May 2018, Petitioner filed a Petition for Extraordinary Relief at CAAF asking CAAF to order this Court to act on his Motion for Reconsideration. On 4 June 2018, this Court granted Petitioner's Motion for Reconsideration and issued a Show Cause Order to the United States regarding Petitioner's Extraordinary Writ. On 6 June 2018, Petitioner withdrew his 30 May Petition for Extraordinary Relief from CAAF as being moot in light of this Court's Show Cause Order. On 21 June 2018, after being granted one enlargement of

time, the United States filed its Answer to the Show Cause Order.

Pursuant to Rule 23(d) of this Court's Rules of Practice and Procedure, the United States respectfully moves for leave to file this motion to dismiss Petitioner's Petition for Extraordinary Relief, originally filed on 6 June 2017, for a lack of jurisdiction.

Petitioner's case has completed direct review under Article 71, UCMJ and is final under Article 76, UCMJ. Petitioner's case completed direct review on 28 June 2018, when the Supreme Court denied his petition for certiorari. See Article 71(c)(1)(C)(ii). Furthermore, Petitioner's case became final under Article 76, UCMJ when the Secretary of the Air Force approved Appellant's sentence and ordered the dismissal executed. See Article 71(b), UCMJ; Article 76, UCMJ.

In United States v. Sutton, ___ M.J. _____, Misc. Dkt. No. 2018 (A.F. Ct. Crim. App. 13 July 2018) slip. op. at 6, this Court explained that a convening authority's order that a punitive discharge be executed is sufficient basis to conclude that the case is final under Article 76, UCMJ. Likewise, the Secretary of the Air Force's order that Petitioner's dismissal be executed is a sufficient basis to conclude that Petitioner's case is final under Article 76, UCMJ.

In Sutton, this Court also held it does not have "jurisdiction for writs of prohibition or mandamus when a court-martial has completed direct review under Article 71, UCMJ, and the case is final under Article 76, UCMJ." Sutton, slip op. at 6. This Court similarly lacks jurisdiction to entertain writs of habeas corpus when a court-martial has completed direct review under Article 71, UCMJ, and the case is final

under Article 76, UCMJ. United States v. Chapman, 75 M.J. 598, 600 (A.F. Ct. Crim. App. 2016).

Since Petitioner's court-martial has completed direct review under Article 71, UCMJ and is final under Article 76, UCMJ, this Court lacks jurisdiction to address or grant Petitioner's request for extraordinary relief. Even if his request had been styled as a writ of habeas corpus, this Court would still lack jurisdiction to address it. In addition to the argument that this Court lacks jurisdiction made within this motion, the United States continues to maintain that this Court would not have jurisdiction to address Petitioner's extraordinary writ for other reasons as well, as described in the United States' Answer to Order to Show Cause, dated 21 June 2018.

WHEREFORE, the United States respectfully requests this Court grant this motion to submit document and dismiss Petitioner's Petition.

MARY ELLEN PAYNE
Associate Chief, Government Trial and
Appellate Counsel Division
United States Air Force
Air Force Legal Operations Agency
(240) 612-4800

JOSEPH KUBLER, Lt Col, USAF
Deputy Chief, Government Trial and
Appellate Counsel Division
Air Force Legal Operations Agency
United States Air Force
(240) 612-4800

IN THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

In Re, JAMES W. RICHARDS, IV Lieutenant Colonel (0-5) U.S. Air Force, Petitioner v. THE UNTED STATES AIR FORCE COURT OF CRIMINAL APPEALS, Respondent.	PETITION FOR EXTRAORDINARY WRIT IN THE NATURE OF A WRIT OF MANDAMUS U.S.C.A.A.F. No.

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

Preamble

Petitioner, Lieutenant Colonel (Lt Col) James Richards, IV, USAF, respectfully requests this Court issue an extraordinary writ in the nature of a writ of

mandamus, directing the Air Force Court of Criminal Appeals (AFCCA) to timely review his motion for reconsideration and issue an opinion in his case.

I.

History of the Case

On 6 June 2017, Petitioner filed a Pro Se Petition for Extraordinary Relief with the Air Force Court of Criminal Appeals (AFCCA). Appendix A, page 1. On 14 June 2017 the United States filed a motion to dismiss the Petitioner's writ for lack of jurisdiction. Appendix B. The United States was represented by counsel in this filing. The 14 June 2017 appearance of counsel on behalf of the United States triggered Petitioner's right to be represented by appellate defense counsel, thereby entitling Petitioner to be represented by appellate defense counsel in his response to the government's

motion.[1] Under Rule 23(c) of the Joint Courts of Criminal Appeals Rules of Practice and Procedure, the Petitioner had seven days to respond to this motion. When the government attempted to serve Petitioner with a copy of its motion to dismiss, Petitioner refused to sign the certificate of receipt and stated, "This is illegal to serve on me, this has to be served on Counsel." Appendix C.

On 16 June 2017, the AFCCA granted the government's motion to dismiss Petitioner's writ, only two calendar days after receiving it.[2] On 14 July 2017,

---

[1] "Appellate Defense Counsel shall represent the accused ... (2) when the United States is represented by counsel." Article 70, UCMJ, 10 U.S.C. § 870, and A.F. Court of Crim. App. R. Prac. And Proc. 11 (19 May 2017).

[2] Despite the fact the United States responded to Petitioner's writ with Counsel, the AFCCA's order, issued two days later, included the statement that, "the Petitioner is hereby notified that this court does not possess the authority under either Article 70, UCMJ, 10 U.S.C. § 870, or [the AFCCA rules] to appoint appellate defense counsel to him."

Petitioner (now represented by an appellate defense counsel for this matter) filed a motion for reconsideration of the AFCCA's order dismissing his writ for lack of jurisdiction and a motion for reconsideration *en banc*. Appendix D. On 20 July 2017, six days later, the government responded, opposing Petitioner's motion for reconsideration and reconsideration *en banc*. Appendix E. The government argued in its opposition that "Given that Petitioner chose to proceed *pro se* before this Court, he should not be entitled to reconsideration of his petition merely because counsel for the United States filed a response to his *pro se* filing." Appendix E, page 2.

As of this date, the AFCCA has yet to rule on Petitioner's motion for reconsideration and reconsideration *en banc*.

Petitioner's case was previously reviewed by this Court under Article 67(a)(3), UCMJ, and is currently pending a decision on his petition for a writ of certiorari before the Supreme Court of the United States. *United States v. Richards*, 76 M.J. 365 (CAAF 2017); *Richards v. United States*, No. 17-701 (held since conference on 16 February 2018). This Court decided Petitioner's case on 13 July 2017. *Richards*, 76 M.J. at 365.

II

Reasons Relief Has Not Been Sought Below

Petitioner has sought relief from the AFCCA in the form of a writ petition, a motion to reconsider, and a motion to reconsider *en banc*. After ruling on the government's motion to dismiss in two days, Petitioner's motion for reconsideration has now been pending before the Air Force Court for more than ten (10) months.

III

Relief Sought

Petitioner respectfully requests this Court issue an extraordinary writ in the nature of a writ of mandamus, ordering Respondent to consider Petitioner's motion for reconsideration and reconsideration *en banc* and issue a decision within fourteen days, thereby ensuring Petitioner has received the benefit of counsel in responding to a motion where the United States was represented by counsel.

IV

Issue Presented

WHETHER PETITIONER IS ENTITLED TO EXTRAORDINARY RELIEF WHERE HIS MOTION TO RECONSIDER HAS BEEN PENDING BEFORE THE AIR FORCE COURT OF CRIMINAL APPEALS FOR TEN (10) MONTHS.

V

Statement of Facts

As of this filing, the lower court has not issued a decision on Petitioner's motion for reconsideration and reconsideration *en banc*. As of the date of this filing (30 May 2018), it has been 320 days since Petitioner's motion for reconsideration was filed at the lower court. Counsel for Petitioner inquired as to the status of this motion with the lower court's paralegal in October 2017, and was informed on 19 October 2017 that, "When the Recon is decided, which I'm sure will be pretty soon by the judge. I will assure your [sic] notified by e-mail." Appendix F.

VI

Reasons Why Writ Should Issue

WHEN THE UNITED STATES, REPRESENTED BY COUNSEL, MOVED TO DISMISS PETITIONER'S PRO SE

WRIT, PETITIONER BECAME ENTITLED TO RESPOND TO THE GOVERNMENT'S MOTION WITH THE ASSISTANCE OF COUNSEL. THE AFCCA GRANTED THE UNITED STATES' MOTION TWO DAYS AFTER IT WAS FILED, THEREBY DEPRIVING PETITIONER OF HIS RIGHT TO COUNSEL.

"[M]ilitary courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act." *United States v. Denedo*, 556 U.S. 904, 911 (2009). The All Writs Act is not an independent grant of jurisdiction, nor does it expand a court's existing statutory jurisdiction. *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). The All Writs Act requires two determinations: (1) whether the requested writ is in aid of the court's existing jurisdiction; and (2) whether the requested writ is necessary or appropriate. *LRM v. Kastenberg*, 72 M.J. 364,368 (C.A.A.F. 2013).

Petitioner has waited for more than ten months for his motion to reconsider to be reviewed, and an extraordinary writ is now necessary and appropriate.

This Court has previously addressed the right to be assisted by timely and competent appellate counsel. In *United States v. May*, 47 M.J. 478,479 (C.A.A.F. 1998), the Court of Criminal Appeals erred by deciding the case without appellant receiving the assistance of appellate counsel. *Id*. Despite a court order to submit a responsive brief by a specified date, no brief was ever filed by either civilian defense counsel or detailed military defense counsel after two motions for enlargement of time. *Id*. at 480-481. Similarly, in *United States v. Roach*, 66 M.J. 410,419 (C.A.A.F. 2008), this Court remanded the case because the AFCCA failed to follow the procedures required to

ensure that appellant counsel be provided representation under Article 70, UCMJ.

Now in this case, the United States has asserted through counsel that, "Given that Petitioner chose to proceed *pro se* before this Court, he should not be entitled to reconsideration of his petition merely because counsel for the United States filed a response to his *pro s*e filing." This position conflicts with the mandate of Article 70(c)(2), which states, "[a]ppellate defense counsel shall represent the accused before the Court of Criminal Appeals ... (2) when the United States is represented by counsel." Article 70, UCMJ. It is irrelevant under Article 70 whether an appellant had filed his original pleading *pro se*.

Petitioner now asks this Honorable Court to protect his right to counsel by ordering the lower court to consider and rule on his motion to reconsider and

reconsider *en banc*, which was filed by his Article 70 military appellate counsel.

VII

Respondents' Address, Telephone and Facsimile Numbers

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS
1500 W. PERIMETER RED. SUITE 1900
JOINT BASE ANDREWS, MD 20762
(240) 612-5070 (phone)
(240) 612-5088 (facsimile)

Very Respectfully Submitted

NICHOLAS W. MCCUE, Lt Col, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33243
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770

Certificate of Filing and Service

I certify I electronically filed a copy of the foregoing with the Clerk of Court and on the Appellate Government Division and upon the Clerk of Court for the AFCCA on May 30, 2018.

Very Respectfully Submitted

NICHOLAS W. MCCUE, Lt Col, USAF
Appellate Defense Counsel
U.S.C.A.A.F. Bar No. 33243
Air Force Legal Operations Agency
United States Air Force
1500 W. Perimeter Road, Suite 1100
Joint Base Andrews, MD 20762
(240) 612-4770