IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

JORGE A. ARIZPE,
Major (O-4),
United States Air Force,
Appellant.

USCA Dkt. No. 25-____/AF

Crim. App. Dkt. No. ACM 40507

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other

ISSUES PRESENTED

I.

Whether the finding of guilty to conduct unbecoming an officer is legally and factually sufficient where the words resulting in the conviction are protected under the First Amendment.

II.

As applied to Major Arizpe, whether 18 U.S.C. § 922 is constitutional in light of recent precedent from the Supreme Court of the United States.

III.

Whether this Court should reassess its holding in *United States v. Anderson*.[1]

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).[2] This Court has jurisdiction to review this case pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

Statement of the Case

On January 13, 2023, a panel of officer members sitting as a general court-martial convicted Major (Maj) Jorge Arizpe, Appellant, contrary to his pleas, of one charge and specification of violating Article 120, UCMJ, 10 U.S.C. § 920, and one

[1] *United States v. Anderson*, 83 M.J. 291 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024). Appellant raises this issue for preservation purposes.

[2] Unless otherwise noted, all references to the UCMJ and the Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

charge and specification of violating Article 133, UCMJ, 10 U.S.C. § 933. R. at 1006; Entry of Judgment (EOJ). The panel found Maj Arizpe not guilty of one charge and specification of violating Article 92, UCMJ, 10 U.S.C. § 892. *Id.* The military judge sentenced Maj Arizpe to a reprimand, to forfeit $1,200.00 of his pay per month for two months, and to thirty-five days of confinement for the Article 120, UCMJ, charge and specification alone. R. at 1045; EOJ. The convening authority took no action on the findings or sentence and denied Maj Arizpe's request for deferment of all adjudged forfeitures until the EOJ. Convening Authority Decision on Action. On February 14, 2023, after the military judge signed the EOJ, the Government determined Maj Arizpe qualified for a firearm prohibition under 18 U.S.C. § 922 by marking "Y" on "Firearm Prohibition Triggered" on the Staff Judge Advocate's indorsement to the EOJ. 1st Ind., EOJ. The Staff Judge Advocate's indorsement was not an attachment listed on the EOJ, but a separate document that became the third page of the EOJ. *Id.*; EOJ. Maj Arizpe filed a notice of direct appeal with the AFCCA on July 14, 2023. That court docketed the case on August 14, 2023.

Maj Arizpe appealed his conviction pursuant to 10 U.S.C. § 866(b)(1)(A). At the AFCCA, Maj Arizpe raised whether the firearm bar contained in his record of trial was constitutional as applied to him. Br. on Behalf of Appellant at 14-18; *United States v. Arizpe*, No. ACM 40507, slip op. at 2 (A.F. Ct. Crim. App. Mar. 19, 2025) (Appendix A). He argued the AFCCA had jurisdiction under Article 66, UCMJ, to

review this issue and asked the AFCCA to correct the EOJ. Br. on Behalf of Appellant at 14-18. On March 19, 2025, the AFCCA affirmed the findings as correct in law and fact and denied relief on the firearm issue. Appendix A at 2.

While not raised at trial, Maj Arizpe raised on appeal[3] the issue of whether his constitutional rights were violated by being convicted of offenses with no requirement that the court-martial panel (the functional equivalent of the jury) vote unanimously for guilt. Br. on Behalf of Appellant at 2. While delivering findings instructions, the military judge informed the members, "The concurrence of at least three-fourths of the members present when the vote is taken is required for any finding of guilty. Since we have 8 members, that means 6 members must concur in any finding of guilty." R. at 994. It is unknown and unknowable whether the convictions were unanimous.

Statement of Facts

On July 24, 2021, Maj Arizpe hosted a dinner at his house for a few work friends. R. at 658-59, 720. LW along with three other people attended. *Id.* Maj Arizpe and LW attended group hangouts together in the past and regularly hugged goodbye. R. at 655-56, 704. At the end of the night, Maj Arizpe hugged LW. R. at 667. LW alleged Maj Arizpe used his left hand to grab her right buttocks over the phone that was in her back jean pocket. R. at 668, 675. Maj Arizpe was found guilty

[3] This issue was preserved pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of one specification of abusive sexual contact, in violation of Article 120, UCMJ. R. at 609.

In July 2021, Maj Arizpe worked in the same medical group as SM, a civilian employee. R. at 794. SM was a dependent of an active-duty member. R. at 798. SM regularly shared personal details with Maj Arizpe. R. at 798. SM viewed Maj Arizpe as a father figure. *Id.* On September 13, 2021, SM shared her weekend plans with Maj Arizpe. R. at 800. A couple hours later, Maj Arizpe came back to SM's desk and said "[SM], I love you" to which SM said, "What do you want," because she believed that "when someone says that to you, they want something from you." R. at 803. Maj Arizpe responded, "Oh, you know me so well." *Id.* Maj Arizpe was going to be in a meeting until lunchtime, so he gave SM's number to another person in the clinic in case he needed anything. *Id.* SM indicated that was okay. *Id.* SM testified that the conversation shifted and Maj Arizpe said, "'[SM], I'm going to tell you something that may make you uncomfortable,' or 'look at me differently or cringe, but you are the type of girl I usually go after. But I know there's this line here.'" R. at 803-04. SM said Maj Arizpe then indicated with his hands that he was drawing a line and then added, "and I know not to cross it." R. at 804. SM stared at her computer at that point not making eye contact. R. at 805-06. Maj Arizpe then allegedly said, "See, I knew I shouldn't have said anything because now you won't even look at me." R. at 805. SM then went to the sergeant at the front desk and told her what was said. R. at 807-08.

The sergeant told SM, "[SM], that's reportable." R. at 808. Under Article 133, UCMJ, the Government charged Maj Arizpe with becoming unduly familiar with SM, "a subordinate married woman, by making unwanted and inappropriate comments to her in the workplace, including: 'I love you,' and 'You are the type of girl I usually go after,' or words to that effect, which conduct was unbecoming an officer and a gentleman."[4] Charge Sheet; R. at 941. Maj Arizpe argued the charged language was protected speech under the First Amendment. Appellant's Reply Br. at 5-7.

Reasons to Grant Review

This Court should grant review to provide guidance to the field on what the Government is required to prove in order to satisfy the "direct and palpable" connection requirement for free speech cases. In *United States v. Wilcox*, 66 M.J. 442, 447-48 (C.A.A.F. 2008), this Court held that (1) if the speech involved was protected under the First Amendment for civilians and (2) the speech had a direct and palpable connection to the military mission or environment, then (3) a balancing test needed to be done. This three-part test was reaffirmed in *United States v. Grijalva*, 84 M.J. 433, 436 (C.A.A.F. 2024). Despite significant guidance on the first prong, there is little guidance on the second and third prongs. This case provides this Court the opportunity to clarify these prongs. C.A.A.F. R. 21(b)(5)(A).

[4] Section 542 of the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 542(a), 135 Stat. 1709 (2021), amended Article 133, UCMJ, to remove the words "and a gentleman."

This Court should also grant review of this case as a trailer to *United States v. Johnson*. Order Granting Review, *United States v. Johnson*, 85 M.J. 147 (C.A.A.F. 2024) (mem.).

Issue I.

The finding of guilty to conduct unbecoming an officer is legally and factually insufficient where the words resulting in the conviction are protected under the First Amendment.

The AFCCA affirmed Maj Arizpe's conviction of conduct unbecoming an officer despite Maj Arizpe challenging that conviction as unconstitutional under the First Amendment. The subject speech was made by Maj Arizpe while in uniform and in the workplace but was not speech that had a direct and palpable impact on the military war-fighting mission, like that discussed in *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972), or *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996). This Court should clarify this unsettled question of law. C.A.A.F. R. 21(b)(5)(A).

"Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. "Issues of legal sufficiency and whether a statute is constitutional as applied are reviewed de novo." *United States v. Smith*, No. 23-0207, __ M.J. __, 2024 CAAF LEXIS 759, at *1 (C.A.A.F. 2024). The Supreme Court of the United States (SCOTUS) stated in *Parker v. Levy* that "members of the military are not excluded from the protection granted by the First Amendment" but that a different application of those protections is required due to the military mission and character of the military

community. 417 U.S. 733, 758 (1974). This general proposition remains true.

In light of this, this Court established a three-step balancing test for deciding free speech cases involving military members. *United States v. Grijalva*, 84 M.J. 433, 436 (C.A.A.F. 2024). Military courts ask two threshold questions before applying a balancing test: (1) is the speech involved protected under the First Amendment for civilians; and (2) if so, does the speech have a direct and palpable connection to the military mission or environment? *Id.* (citing *United States v. Wilcox*, 66 M.J. 442, 447-48 (C.A.A.F. 2008)). If the first threshold question is found in the negative and the speech is not protected, then the analysis ends—even criminalizing unprotected speech does not violate the First Amendment. *Smith*, 2024 CAAF LEXIS 759, at *9-10. If the first threshold question is answered in the affirmative, courts move to the second threshold question. *Grijalva*, 84 M.J. at 436. If the second question is answered in the negative, the speech may not be criminalized as it is protected by the First Amendment and may not be criminalized. *Id.* If the second question is answered in the affirmative, then courts conduct a balancing test. *Wilcox*, 66 M.J. at 449. The AFCCA conducted no analysis under *Wilcox* or *Grijalva*. If it had, it would have been clear that Maj Arizpe's speech was constitutionally protected.

As to the first question, categories of unprotected speech "include (1) incitement to imminent lawless action; (2) obscenity; (3) defamation; (4) speech integral to criminal conduct; (5) fighting words; (6) child pornography; (7) fraud; (8) true threats;

and (9) speech presenting some grave and imminent threat the Government has the power to prevent." *Smith*, 2024 CAAF LEXIS 759, at *10 (citing *United States v. Alvarez*, 567 U.S. 709, 717 (2012)). None of these unprotected categories apply to Maj Arizpe's charged speech of "I love you" or "You are my type of girl I usually go after." Charge Sheet; EOJ. As such, the speech is protected under the First Amendment.

Moving to the second question, the Government was required to prove a direct and palpable connection to the military mission or environment for First Amendment cases. 84 M.J. at 436 (citing *Wilcox*, 66 M.J. at 447-48). This is true even in close cases where speech may not be protected. *Grijalva*, 84 M.J. at 438 (interpreting *Wilcox*, 66 M.J. at 447). In *Wilcox*, the appellant identified himself as a servicemember multiple times both on his online profile and during several conversations with an undercover agent. 66 M.J. at 450, 445-46. The appellant also said he was as a "Pro-White activist" and stated, "[we] must secure the existence of our people and a future for white children." *Id.* at 445 (alteration in original). This Court held there was no direct and palpable connection to the military environment or mission because the speech was not directed at servicemembers. *Id.* at 450.

In two cases preceding *Wilcox*, *Priest*[5] and *Brown*,[6] this Court held that the

[5] 45 C.M.R. 338.
[6] 45 M.J. 389.

appellants' speech was directed to servicemembers and therefore had a direct and palpable impact on the military mission. *Wilcox*, 66 M.J. at 450. The speech in *Priest* included the publishing of a newsletter calling for desertion from the military as well as a violent revolution against the United States during the Vietnam War. *Priest*, 45 C.M.R. at 342. The appellant's actions in *Brown* included the organization of a strike to promote better living conditions in a combat zone, which jeopardized the orderly accomplishment of the warfighting mission during the Gulf War. *Brown*, 45 M.J. at 392-93, 395.

Here, SM was a civilian dependent spouse who worked in the 58th Medical Group; she was not a servicemember. R. at 790. Maj Arizpe's speech did not in any way call for action directly related to service, such as the type at issue in *Priest* and *Brown*. The Government did not prove that Maj Arizpe's speech had a direct and palpable impact on the military mission. As such, the balancing test under *Wilcox* is mooted. *Wilcox*, 66 M.J. at 449.

This Court should grant review to provide guidance on the left and right bounds of what qualifies as a "direct and palpable connection to the military mission or environment," which is an unsettled question of law. C.A.A.F. R. 21(b)(5)(A).

Issue II.

As applied to Maj Arizpe, 18 U.S.C. § 922 is unconstitutional in light of recent precedent from the Supreme Court of the United States.

This Court should grant review of this case as a trailer to *United States v. Johnson*, which is considering the same firearm prohibition issue along with preliminary questions of jurisdiction and standing. Order Granting Review, *Johnson*, 85 M.J. 147. Maj Arizpe's case involves all the same questions, which remain unresolved by the AFCCA and this Court after *United States v. Williams*, 85 M.J. 121 (C.A.A.F. 2024).

The AFCCA had jurisdiction[7] to consider the post-trial processing error under Article 66(d)(2), UCMJ, which provides that the AFCCA "may provide appropriate relief if the accused demonstrates error . . . in the processing of the court-martial after the judgment was entered into the record . . . ." Raising and correcting the firearm prohibition error is possible because of the timing and presence of the 18 U.S.C. § 922 prohibition in the EOJ. Unlike the Army, the Air Force completes its final 18 U.S.C. § 922 indexing after the EOJ, which it then incorporates into the judgment itself (Article 60c, UCMJ, 10 U.S.C. § 860c). Department of the Air Force Instruction

[7] Jurisdiction to review a case has two separate but related parts: first, whether there is jurisdiction over the case, and second, whether there is authority to act. *Williams*, 85 M.J. at 124. The jurisdictional question here concerning the AFCCA is focused on authority to act.

(DAFI) 51-201, *Administration of Military Justice*, ¶¶ 20.41, 29.32, 29.33 (Apr. 14, 2022) (Appendix B). As a result, Maj Arizpe's case is factually distinct from *Williams*. *Cf. Williams*, 85 M.J. at 126-27 (discussing how the Army's firearm prohibition indexing precedes the EOJ because it is only in the Statement of Trial Results (STR)). Because the firearm prohibition occurred after the EOJ, the AFCCA had the authority to act and provide appropriate relief for the error Maj Arizpe raised.

However, the AFCCA denied any relief. Appendix A at 2. This denial seems to rest on the AFCCA's determination that it does not have jurisdiction to review this issue. *See, e.g.*, *United States v. Vanzant*, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024) (citing case law founded in Article 66(d)(1), UCMJ, in determining a firearm prohibition is beyond its authority to review). The AFCCA's determination that it does not have jurisdiction to review the application of 18 U.S.C. § 922 conflicts with this Court's decision in *Williams.* *Williams*, 85 M.J. at 126-27; C.A.A.F. R. 21(b)(5)(B)(i). This Court should grant review to clarify the AFCCA's authority to act under Article 66(d)(2), UCMJ.

Because the AFCCA denied relief on Maj Arizpe's claim that 18 U.S.C. § 922 was constitutionally inapplicable to him, this Court has jurisdiction to review and act upon the firearm prohibition in the EOJ. Article 67(c)(1)(B), UCMJ. This is because the first indorsement containing the firearm prohibition is part of the military judge's judgment (the EOJ) as required by statute, the R.C.M.s, and regulation. Article 60c,

UCMJ; R.C.M. 1111(b)(3)(F); DAFI 51-201, at ¶¶ 20.41, 29.32. And by denying relief, the AFCCA "affirmed" the judgment. Article 67(c)(1)(B), UCMJ.

As this Court determined in *Williams*, this Court can act on the STR in the EOJ. *Williams*, 85 M.J. at 125. Like the STR, the firearm prohibition in the indorsement is a required part of the EOJ. *Id*. (citing Article 60c(a)(1)(A), UCMJ); DAFI 51-201, at ¶ 20.41. Thus, like the STR in *Williams*, the indorsement here is in the judgment, which this Court can act upon under Article 67(c)(1)(B), UCMJ. Because this Court independently has jurisdiction and authority to act, this Court should grant review because the Government's indexing violates the Second Amendment. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022); C.A.A.F. R. 21(b)(5)(B)(ii).

Specifically, the Government has not demonstrated how permanently barring Maj Arizpe from ever owning a firearm is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The historical tradition took a narrower view of firearm regulation for criminal acts than that reflected in 18 U.S.C. § 922: "[A]ctual 'longstanding' precedent in America and pre-Founding England suggests that a firearms disability can be consistent with the Second Amendment to the extent that . . . its basis credibly indicates a present *danger that one will misuse arms against others and the disability redresses that danger*." C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun*, 32 HARV. J.L. & PUB. POL'Y 695, 698 (2009) (emphasis added). Prior to 1961, "the original [Federal Firearms Act] had a narrower

basis for a disability, limited to those convicted of a 'crime of violence.'" *Id.* at 699. Earlier, the Uniform Firearms Act of 1926 and 1930 stated that "a person convicted of a 'crime of violence' could not 'own or have in his possession or under his control, a pistol or revolver.'" *Id*. at 701. 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 (cleaned up). Maj Arizpe's offenses fall short of these.

This case never involved a threat with a weapon, was devoid of any procedural protection at the time the firearm prohibition was imposed, and the firearm prohibition under 18 U.S.C. § 922(g)(1) (the only possible applicable category) will last forever. Ultimately, the Supreme Court itself noted the limited nature of its holding: "[W]e conclude only this: An individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *United States v. Rahimi*, 602 U.S. 680, 702 (2024). Such a narrow holding cannot support the broad restriction encompassed here. This Court should grant review so it can correct this error of constitutional magnitude. C.A.A.F. R. 21(b)(5)(A).

Maj Arizpe has standing to raise this issue. The injury, deprivation of his constitutional right to bear arms, is caused by the Government's unconstitutional indexing in the National Instant Criminal Background Check System (NICS) that is

promulgated by the indorsement in the EOJ and prevents him from purchasing or possessing firearms. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (discussing standing requires (1) injury, (2) causation and (3) redressability). NICS is used nationwide by federal firearm licensees (FFL) to determine if someone is eligible to obtain a firearm. ABOUT NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/about-nics (last visited Apr. 29, 2025). The Air Force reporting that Maj Arizpe cannot possess firearms would cause NICS to issue a "denied" response when Maj Arizpe attempts to acquire a firearm from an FFL. 28 C.F.R. § 25.6(c). This denial due to indexing has the practical effect of depriving Maj Arizpe of his right to bear arms. A finding that 18 U.S.C. § 922 does not apply to him would correct the erroneous NICS report because the Air Force is required to update NICS following an appeal. Department of the Air Force Manual (DAFMAN) 71-102, at ¶ 4.4.3.1 (July 21, 2020) (incorporating guidance memorandum from Sept. 10, 2024), https://static.e-publishing.af.mil/production/1/saf_ig/publication/afman71-102/afman71-102.pdf (last visited Apr. 29, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Apr. 29, 2025) (noting it is the contributing agency's responsibility to remove an individual from NICS Indices if their prohibitor is no longer valid). Following this correction, NICS would not show Maj Arizpe's convictions as qualifying under 18 U.S.C. § 922, even though his convictions remain.

He could then purchase and possess firearms. Therefore, correction of the erroneous indexing on the indorsement has a significant likelihood of securing the requested relief. *Utah v. Evans*, 536 U.S. 452, 464 (2002).

Issue III.

This Court should reassess its holding in *United States v. Anderson.*[8]

The standard for determining whether this Court should grant an appellant's petition for review is "good cause shown." UCMJ art. 67(a)(3), 10 U.S.C. § 867(a)(3). Appellant raises this issue for preservation purposes.

CONCLUSION

This case presents (1) an important question of law concerning the First Amendment; (2) an appropriate trailer case to *Johnson*; and (3) an issue previously denied certiorari by the SCOTUS, but which Appellant maintains that Court should review. Accordingly, this Court should grant the petition.

Respectfully submitted,

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[8] *Anderson*, 83 M.J. 291.

Certificate of Compliance with Rules 21(b), and 37

This supplement complies with the type-volume limitation of Rule 21(b) because it contains 3,495 words. This supplement complies with the typeface and type style requirements of Rule 37.

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Certificate of Filing and Service

I certify that I electronically filed a copy of the foregoing with the Clerk of Court on May 6, 2025, and that a copy was also electronically served on the Air Force Government Trial and Appellate Operations Division at af.jajg.afloa.filng.workflow@us.af.mil on the same date.

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Appendix A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40507

UNITED STATES
Appellee

v.

Jorge A. ARIZPE
Major (O-4), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary[1]

Decided 19 March 2025

Military Judge: Lance R. Smith.

Sentence: Sentence adjudged on 13 January 2023 by GCM convened at Royal Air Force Lakenheath, United Kingdom. Sentence entered by military judge on 14 February 2023: Confinement for 35 days, forfeiture of $1,200.00 pay per month for 2 months, and a reprimand.

For Appellant: Major Heather M. Bruha, USAF.

For Appellee: Lieutenant Colonel J. Pete Ferrell, USAF; Lieutenant Colonel Jenny A. Liabenow, USAF; Major Brittany M. Speirs, USAF; Captain Jocelyn Q. Wright, USAF; Mary Ellen Payne, Esquire.

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

Senior Judge ANNEXSTAD delivered the opinion of the court, in which Judge GRUEN and Judge MASON joined.

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[1] 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* (2024 ed.).

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

ANNEXSTAD, Senior Judge:

A general court-martial consisting of officer members convicted Appellant, contrary to his pleas, of one specification of abusive sexual contact in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, and one specification of conduct unbecoming an officer and a gentleman in violation of Article 133, UCMJ, 10 U.S.C. § 933.[2,3] The military judge sentenced Appellant to confinement for 35 days, forfeiture of $1,200.00 pay per month for two months, and a reprimand. The convening authority took no action on the findings or the sentence.

Appellant raised four issues on appeal which we have rephrased: (1) whether Appellant's convictions are legally and factually sufficient; (2) whether the post-trial processing of Appellant's case was improperly completed when the staff judge advocate found 18 U.S.C. § 922 applied to Appellant's conviction of a nonviolent offense; (3) whether Appellant was deprived of his right to a unanimous verdict; and (4) whether unlawful command influence tainted the preferral process in Appellant's case.[4] We also consider another issue not raised by Appellant: (5) whether Appellant was subjected to unreasonable post-trial delay.

We have carefully considered issue (2) and find it does not warrant discussion or relief. *See United States v. Vanzant*, 84 M.J. 671, 681 (A.F. Ct. Crim. App. 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review), *rev. granted*, __ M.J. __, No. 24-0182, 2024 CAAF LEXIS 640 (C.A.A.F. 17 Oct. 2024).

As to issue (3) Appellant is not entitled to relief. *See United States v. Anderson,* 83 M.J. 291, 302 (C.A.A.F. 2023) (holding that a military accused does

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[2] All references to the punitive articles of the UCMJ are to the *Manual for Courts-Martial, United States* (2019 ed.). All other references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2024 ed.).

[3] Appellant was acquitted of one specification of failure to obey a lawful order in violation of Article 92, UCMJ, 10 U.S.C. § 892.

[4] Issues (3) and (4) were personally raised by Appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

not have a right to a unanimous verdict under the Sixth Amendment,[5] the Fifth Amendment's due process clause, or the Fifth Amendment's component of equal protection[6]), *cert. denied*, 144 S. Ct. 1003 (2024).

We have also carefully considered issue (4) and find it does not require discussion or relief. *See United States v. Guinn*, 81 M.J. 195, 204 (C.A.A.F. 2021) (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)).

Therefore, we only address issue (1), and issue (5) as raised by the court, *infra*. Finding no error that materially prejudiced Appellant's substantial rights, we affirm the findings and sentence.

I. BACKGROUND

A. Abusive Sexual Contact

On Saturday, 24 July 2021, Appellant invited some of his coworkers from the medical group to his house for a casual barbeque. The attendees included LW, Captain (Capt) BA, and Major (Maj) SC. All attendees were active duty servicemembers. LW had drunk only two glasses of wine, and noticed Appellant, who also had been drinking wine, was slurring his words. Around 2100, Maj SC left the barbeque due to fatigue from the workweek. LW testified at trial that not long after Maj SC left, Appellant began making crude sexually charged jokes she felt were directed towards her as the only female present, and his actions and comments made her feel uncomfortable. Capt BA also witnessed Appellant's conduct and testified that Appellant was making him feel uncomfortable as well. He stated that after making eye contact with LW, they decided it was time to leave Appellant's residence.

Before they left, LW and Capt BA helped Appellant carry the dinner dishes back into the kitchen. As Capt BA was washing his hands at the kitchen sink with his back turned away from Appellant and LW, Appellant initiated a hug with LW. While Appellant was hugging her, he "grabbed [her] right butt cheek" with his "left hand." LW stated that she immediately "pushed Appellant off with both hands" and told him, "[T]hat's enough." She then stated Appellant laughed and said, "You know I just had to try," and came in for a second hug. Capt BA testified that he did not see the initial hug, but overheard Appellant's response which was consistent with LW's testimony. LW then described that she froze during the second hug and that Appellant "nuzzled" her neck. Capt BA witnessed the second hug and could see that LW was uncomfortable with Appellant's behavior.

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[5] U.S. CONST. amend. VI.

[6] U.S. CONST. amend. V.

On the way home, LW told Capt BA that she did not like the version of Appellant when he was "drunk," and that Appellant had grabbed her buttocks during the first hug. The following Monday, LW made a restricted sexual assault report, and subsequently changed it to an unrestricted sexual assault report. LW testified that Appellant's conduct made her feel like she was "a piece of meat" and worthless.

These facts formed the basis of the one specification of abusive sexual contact in violation of Article 120, UCMJ, of which a panel of officer members convicted Appellant.

B. Conduct Unbecoming an Officer and a Gentleman

In January 2021, SM, a dependent spouse of an active duty servicemember, began working as a licensed practical nurse at the base medical facility. She met Appellant in July 2021 when he was assigned as her flight commander. In August 2021, SM was the only technician assigned to the flight and worked closely with Appellant on a daily basis. During work, they engaged in both personal and professional conversations. SM testified that at the time she viewed Appellant as a "father figure." This all changed in September 2021.

On Monday, 13 September 2021, shortly after arriving to work, Appellant and SM had a brief discussion about what they did over the weekend before beginning their patient rounds. Approximately two hours later, Appellant approached SM and said, "I love you." SM stated that she took the comment to mean that he wanted something from her. SM testified that Appellant then said, "[SM], I'm going to tell you something that may make you look at me differently or cringe, but you are the type of girl I usually go after, but I know there is this line here and I know not to cross it." SM stated that while Appellant was making these comments, she did not make eye contact with him and just stared at her computer. Seeing her body language, Appellant told her, "See, I knew I shouldn't have said anything because now you won't even look at me." Subsequently, Appellant laughed and walked away.

SM testified that Appellant's comments confused her and made her "shut down." She testified that she immediately reported his behavior, including the comments, to three coworkers and her husband. One of the individuals she told about the incident was her previous flight commander, Lieutenant Colonel SA, who testified that SM was upset and "very uncomfortable" when telling her about Appellant's professed feelings. At trial, SM explained that Appellant's comments bothered her because he was her supervisor and someone that she was required to work for and converse with every day. Later that same day, Appellant tried to reengage SM in a conversation. SM tried to keep her interaction with Appellant short, and Appellant, after recognizing that she still would not make eye contact with him, told her, "See you are still not looking

at me." SM was transferred to a different clinic so she would not have to work with Appellant.

These facts formed the basis of the one specification of conduct unbecoming an officer and a gentleman, of which a panel of officer members convicted Appellant.

II. DISCUSSION

A. Legal and Factual Sufficiency

In his appeal, Appellant challenges the legal and factual sufficiency of both convictions. As to the abusive sexual contact offense, Appellant argues that he had a reasonable mistake of fact as to consent, and that the Government failed to prove the required intent element—that the contact was to gratify his sexual desire. As to the conduct unbecoming an officer and a gentleman offense, Appellant generally argues that his actions did not rise to the level of conduct unbecoming an officer and a gentleman. We disagree with both arguments and find his convictions legally and factually sufficient.

1. Law

We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002) (citation omitted). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citing *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993)).

"The test for legal sufficiency is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Robinson*, 77 M.J. 294, 297–98 (C.A.A.F. 2018) (citation omitted). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001) (citations omitted). As a result, "[t]he standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019) (alteration in original) (citation omitted). "This deferential standard impinges upon the factfinder's discretion only to the extent necessary to guarantee the fundamental protection of due process of law." *United States v. Mendoza*, ___ M.J.___, No. 23-0210, 2024 CAAF LEXIS 590, at *9 (C.A.A.F. 7 Oct. 2024) (internal quotation marks and citation omitted).

The National Defense Authorization Act for Fiscal Year 2021 significantly changed how service Courts of Criminal Appeals (CCAs) conduct factual sufficiency reviews. Pub. L. No. 116-283, § 542(b)(1)(B), (c), 134 Stat. 3388, 3611–

12 (1 Jan. 2021). "Congress undoubtedly altered the factual sufficiency standard in amending the statute, making it more difficult for a [CCA] to overturn a conviction for factual sufficiency." *United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023), *set aside on other grounds*, ___ M.J.___, No. 23-0239, 2024 CAAF LEXIS 502 (C.A.A.F. 6 Sep. 2024). Previously, the test for factual sufficiency required the court, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, to be convinced of the appellant's guilt beyond a reasonable doubt before it could affirm a finding. *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). "In conducting this unique appellate role, we [took] 'a fresh, impartial look at the evidence,' applying 'neither a presumption of innocence nor a presumption of guilt' to 'make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt.'" *United States v. Wheeler*, 76 M.J. 564, 568 (A.F. Ct. Crim. App. 2017) (second alteration in original) (quoting *Washington*, 57 M.J. at 399).

The current version of Article 66(d)(1)(B), UCMJ, FACTUAL SUFFICIENCY REVIEW, states:

> (i) In an appeal of a finding of guilty under subsection (b), the Court may consider whether the finding is correct in fact upon a request of the accused if the accused makes a specific showing of a deficiency of proof.
>
> (ii) After an accused has made a showing, the Court may weigh the evidence and determine controverted questions of fact subject to—
>
> (I) appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence; and
>
> (II) appropriate deference to findings of fact entered into the record by the military judge.
>
> (iii) If, as a result of the review conducted under clause (ii), *the Court is clearly convinced that the finding of guilty was against the weight of the evidence*, the Court may dismiss, set aside, or modify the finding, or affirm a lesser finding.

10 U.S.C. § 866(d)(1)(B) (emphasis added).

"[T]he requirement of 'appropriate deference' when a CCA 'weigh[s] the evidence and determine[s] controverted questions of fact' . . . depend[s] on the nature of the evidence at issue." *United States v. Harvey*, ___ M.J.___, No. 23-0239, 2024 CAAF LEXIS 502, at *8 (C.A.A.F. 6 Sep. 2024) (second and third alterations in original). It is within this court's discretion to determine what level of deference is appropriate. *Id.*

"[T]he quantum of proof necessary to sustain a finding of guilty during a factual sufficiency review is proof beyond a reasonable doubt, the same as the quantum of proof necessary to find an accused guilty at trial." *Id.* at *10 (internal quotation marks omitted).

For this court "to be 'clearly convinced that the finding of guilty was against the weight of the evidence,' two requirements must be met." *Id.* at *12. First, we must decide that evidence, as we weighed it, "does not prove that the appellant is guilty beyond a reasonable doubt." *Id.* Second, we "must be clearly convinced of the correctness of this decision." *Id.*

a. Abusive Sexual Contact

To convict Appellant of abusive sexual contact without consent, the Government was required to prove the following two elements beyond a reasonable doubt: (1) that Appellant committed sexual contact upon LW, and (2) that Appellant did so without LW's consent. *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 60.b.(4)(d).

"Sexual contact" includes "touching or causing another person to touch, either directly or through the clothing, the . . . buttocks of any person, with an intent to . . . gratify the sexual desire of any person." *MCM*, pt. IV, ¶ 60.a.(g)(2).

"'[C]onsent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(A). "All the surrounding circumstances are to be considered in determining whether a person gave consent." *MCM*, pt. IV, ¶ 60.a.(g)(7)(C).

"[I]t is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." Rule for Courts-Martial (R.C.M.) 916(j)(1). If the mistake goes to an element requiring general intent, it "must have existed in the mind of the accused and must have been reasonable under all the circumstances." *Id.* "Therefore, an honest and reasonable mistake that the victim consented to the charged sexual contact is an affirmative defense to abusive sexual contact as it is to other sexual offenses." *Rodela*, 82 M.J. at 526 (citations omitted). "Once raised, the Government bears the burden to prove beyond a reasonable doubt that the defense does not exist." *Id.* (citing R.C.M. 916(b)(1)) (additional citation omitted).

b. Conduct Unbecoming an Officer and a Gentleman

To convict Appellant as charged of conduct unbecoming an officer and a gentleman, the Government was required to prove the following two elements beyond a reasonable doubt: (1) that Appellant did a certain act, to wit: become

unduly familiar with SM—a subordinate and married woman—by making unwanted and inappropriate comments to her in the workplace, including communicating the words "I love you," and "You are the type of girl I usually go after," or words to that effect; and (2) that, under the circumstances, the act constituted conduct unbecoming an officer and gentleman. *MCM,* pt. IV, ¶ 90.b.

Conduct in violation of Article 133, UCMJ, is

> action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.

MCM, pt. IV ¶ 90.c.(2).

> An officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133, UCMJ. The gravamen of the offense is that the officer's conduct disgraces him personally . . . . Clearly, then, the appropriate standard for assessing criminality under Article 133 is whether the conduct or act charged is dishonorable and compromising as hereinbefore spelled out—this notwithstanding whether or not the act otherwise amounts to a crime.

United States v. Lofton, 69 M.J. 386, 388–89 (C.A.A.F. 2011) (quoting *United States v. Schweitzer*, 68 M.J. 133, 137 (C.A.A.F. 2009)).

The offense of conduct unbecoming an officer and a gentleman includes actions which are "indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty." *MCM*, pt. IV, ¶ 90.c.(2).

> Though it need not amount to a crime, [the conduct] must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.
>
> . . . If the act, though ungentlemanlike, be of a trifling character, involving no material prejudice to individual rights, or offence against public morals or decorum, it will not in general properly be viewed as so affecting the reputation of the officer or the credit of the service as to be made the occasion of a prosecution under [Article 133, UCMJ].

United States v. Brown, 55 M.J. 375, 382 (C.A.A.F. 2001) (ellipsis in original) (quoting William Winthrop, MILITARY LAW AND PRECEDENTS 711–12 (2d ed. 1920 reprint)). "The conduct must impugn the honor or integrity of the officer or subject him to social disgrace. . . . Article 133[, UCMJ,] is reserved for serious delicts of officers and should not be demeaned by using it to charge minor derelictions." *United States v. Murchison*, No. ACM 32412, 1997 CCA LEXIS 442, at *5 (A.F. Ct. Crim. App. 20 Aug. 1997) (unpub. op.) (citations omitted). "'Unbecoming' . . . is understood to mean not merely inappropriate or unsuitable, . . . but *morally* unbefitting and unworthy." *Id.* at *5–6 (ellipses in original) (citations omitted); *see also United States v. Rogers*, 54 M.J. 244, 255–56 (C.A.A.F. 2000) (holding "conduct morally unfitting and unworthy, rather than merely inappropriate or unsuitable, misbehavior which is more than opposed to good taste or propriety").

Conduct unbecoming an officer and a gentleman under Article 133, UCMJ, is a general intent crime. "[G]eneral intent merely requires [t]he intent to perform [the actus reus] *even though the actor does not desire the consequences that result*. . . . [A] general intent mens rea would require only that [the a]ppellant *intended* to commit the conduct alleged in each specification . . . ." *United States v. Voorhees*, 79 M.J. 5, 16 (C.A.A.F. 2019) (first, second, and third alterations in original) (citations omitted). The subjective motivation of an accused is relevant to a charge under Article 133, UCMJ. *United States v. Diaz*, 69 M.J. 127, 136 (C.A.A.F. 2010).

"The test for a violation of Article 133, UCMJ, is 'whether the conduct has fallen below the standards established for officers.'" *Id.* at 135 (quoting *United States v. Conliffe*, 67 M.J. 127, 132 (C.A.A.F. 2009) (additional citation omitted)). A determination of whether the conduct charged is unbecoming of an officer and a gentleman includes "taking all the circumstances into consideration." *Id.* at 136 (citation omitted). "Such circumstances incorporate the concept of honor." *Id.* "[E]vidence of honorable motive may inform a factfinder's judgment as to whether conduct is unbecoming an officer." *Id.*

Before an officer can be convicted of an offense under Article 133, UCMJ, "[d]ue process requires 'fair notice' that an act is forbidden and subject to criminal sanction." *United States v. Vaughan*, 58 M.J. 29, 31 (C.A.A.F. 2003) (citing *United States v. Bivins*, 49 M.J. 328, 330 (C.A.A.F. 1998)); *see also United States v. Anderson*, 60 M.J. 548, 554 (A.F. Ct. Crim. App. 2004) ("[T]he issue is whether a reasonable military member would know that his or her conduct was service-discrediting (and, therefore, punishable under the Article)."). The question is whether a "reasonable military officer would have no doubt that the activities charged . . . constituted conduct unbecoming an officer." *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1994) (footnote omitted) (citing *Parker v. Levy*, 417 U.S. 733, 757 (1974)).

2. Analysis

Regarding the abusive sexual contact offense, we find the Government presented convincing evidence of Appellant's guilt beyond a reasonable doubt. LW's testimony specifically described how Appellant initiated a hug and "used his left hand and grabbed [her] right butt cheek" without her consent. LW then described how she immediately pushed him away, and that Appellant told her "[he] just had to try." On appeal, Appellant argues that if the "butt touch happened" that it was only done to assess LW's interest in Appellant and was not done to gratify his sexual desires. We find that a rational trier of fact could conclude the fact that Appellant's decision to initiate a hug and to grab a part of LW's body—her buttocks, which is considered a private area—to gauge her romantic interest is in itself evidence that could be used to establish that he touched LW's buttocks to gratify his sexual desire. The factfinders, *i.e.*, the officer members, in this case also had the benefit of Capt BA's testimony concerning Appellant's behavior before the sexual contact occurred and his impressions of the effect that Appellant's behavior had on LW. Here, Capt BA's testimony on both points is consistent with LW's testimony. Furthermore, we find nothing in the evidence demonstrated that Appellant would have had a reasonable belief that LW consented to being inappropriately touched by him. Moreover, we find it unreasonable for Appellant to think he had consent to grab the buttocks of another person who had expressed no romantic interest in him.

As to the conduct unbecoming an officer and a gentleman offense, we find the Government again provided convincing evidence of Appellant's guilt beyond a reasonable doubt. Here, the Government provided evidence through the direct testimony of SM, who was married, worked directly for Appellant, and to whom Appellant made unwanted and inappropriate romantic comments at work. She testified about how his behavior and comments made her feel uncomfortable and that she tried not to look at him both during and after he made the unsolicited and unwanted comments. The Government's evidence also included Appellant's own words to demonstrate that he knew his conduct fell below moral attributes required of both an officer and a gentleman. Appellant argues on appeal that this interaction did not rise to the level of severity necessary to prove conduct unbecoming an officer and a gentleman. We disagree. Here, the evidence demonstrated that Appellant told his married subordinate, "I love you" and "that [she] was the type of girl [he] usually goes after," while they were at work. He further acknowledged to SM that he knew that she might find his words "cringy" and also that he "kn[e]w there is this line here and [he] kn[e]w not to cross it," which indicates he understood that his actions and comments were unwanted and inappropriate. We find that based on the evidence presented, a rational trier of fact could find Appellant's actions, in an official capacity, were both dishonorable and disgraceful to Appellant as an

officer, and that his actions seriously compromised Appellant's character as a gentleman.

In conclusion, viewing the evidence in the light most favorable to the Prosecution, we find that a rational trier of fact could have found the essential elements of both offenses beyond a reasonable doubt. *See Robinson*, 77 M.J. at 297–98. As to the factual sufficiency of these offenses, we assume without deciding that Appellant properly made a request for a factual sufficiency review by asserting a specific showing of a deficiency of proof as required under Article 66(d)(1)(B)(i), UCMJ, 10 U.S.C. § 866(d)(1)(B)(i). However, having given appropriate deference to the fact that the court members saw and heard the witnesses and other evidence, the court is not clearly convinced that Appellant's convictions for both offenses were against the weight of the evidence. Thus, the findings are factually sufficient as well.

B. Post-Trial Delay

We consider *sua sponte* whether Appellant is entitled to relief because this court did not render a decision within 18 months of docketing.

1. Additional Background

On 23 December 2022, Congress amended Articles 66 and 69, UCMJ, 10 U.S.C. §§ 866, 869.[7] As amended, Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A), expanded the jurisdiction of the service CCAs to any judgment of a special or general court-martial, irrespective of sentence, that included a finding of guilty.

Appellant was sentenced on 13 January 2023. Appellant's sentence did not meet the jurisdictional requirements for automatic appeal to this court. Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3). On 12 May 2023, Appellant received a notice from Headquarters Third Air Force informing him of his right to appeal his conviction pursuant to Article 66(b)(1)(A), UCMJ. On 14 July 2023, Appellant filed with this court a timely notice of direct appeal pursuant to Article 66(b)(1)(A), UCMJ, and this court docketed his case on 14 August 2023. After the certified verbatim transcript was delivered to this court, Appellant moved for 13 enlargements of time, almost all of which were opposed by the Government. On 14 January 2025, Appellant filed his assignments of error brief with the court. On 12 February 2025, the Government filed their answer brief. Appellant then filed a reply brief on 19 February 2025.

At no time has Appellant made a demand for speedy appellate review, nor has he claimed prejudice regarding the post-trial processing of his appeal.

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[7] National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544, 136 Stat. 2395, 2582–84 (23 Dec. 2022).

2. Law

We review the question of whether an appellant's due process rights are violated because of post-trial delay de novo. *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020).

In *United States v. Moreno,* the United States Court of Appeals for the Armed Forces (CAAF) identified thresholds for facially unreasonable delay during three particular segments of the post-trial and appellate process. 63 M.J. 129, 136 (C.A.A.F. 2006). Specifically, our superior court established a presumption of facially unreasonable delay where: (1) the convening authority did not take action within 120 days of the completion of trial, (2) the record was not docketed with the CCA within 30 days of the convening authority's action, or (3) the CCA did not render a decision within 18 months of docketing. *Id.* at 142.

Where there is a facially unreasonable delay, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice [to the appellant]." *Moreno*, 63 M.J. at 135 (citations omitted). The CAAF identified three types of cognizable prejudice for purposes of an appellant's due process right to timely post-trial review: (1) oppressive incarceration; (2) "particularized" anxiety and concern "that is distinguishable from the normal anxiety experienced by prisoners awaiting an appellate decision;" and (3) impairment of the appellant's grounds for appeal or ability to present a defense at a rehearing. *Id.* at 138–40 (citations omitted).

Where there is no qualifying prejudice from the delay, there is no due process violation unless the delay is so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *United States v. Toohey*, 63 M.J. 353, 362 (C.A.A.F. 2006).

"In the absence of a due process violation, this court considers whether relief for excessive post-trial delay is warranted consistent with this court's authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d)." *Livak*, 80 M.J. at 632; *see also United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002); *United States v. Gay*¸ 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016).

3. Analysis

We consider whether Appellant is entitled to relief because a decision on his appeal was not rendered by this court within 18 months of his case being docketed with this court.

We begin our analysis with the assumption that while the post-trial procedures of Appellant's appeal are different than the appeal procedures in place at the time *Moreno* and its progeny were decided, that the right to speedy appellate review continues under these new procedures. We also determine that the 18-month *Moreno* standard for facially unreasonable delay from docketing with this court to appellate decision still applies to determine if an appellant's due process right to speedy appellate review has been violated. Therefore, since a decision by this court on Appellant's case was not rendered within 18 months of 14 August 2023, a facially unreasonable post-trial delay has been established in Appellant's case.

Finding a facially unreasonable post-trial delay, we now assess whether a due process violation occurred. After considering the four *Barker* factors we conclude that no due process violation occurred and thus no relief is warranted. We do not find the delay in this case so egregious as to "adversely affect the public's perception of the fairness and integrity of the military justice system." *Toohey*, 63 M.J. at 362. Finally, recognizing our authority under Article 66(d), UCMJ, we have also considered whether relief for excessive post-trial delay is appropriate even in the absence of a due process violation. *See Tardif*, 57 M.J. at 225. After considering the factors enumerated in *Gay*, 74 M.J. at 744, we conclude it is not.

III. CONCLUSION

The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant 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

Appendix B

is earlier, via email to the recipients listed on the template memorandum located on the VMJD. If any portion of the punishment is deferred, suspended, set aside, waived, or disapproved, the memorandum must include the terms. A template memorandum can be found on the VMJD.

20.38.2. **24 Hour Memorandum.** If the EoJ is published more than 14 days after the sentence is announced, the SJA of the office that prosecuted the case must send a memorandum within 24 hours after the EoJ via email to the recipients listed on the template memorandum located on the VMJD. If any portion of the punishment is deferred, suspended, set aside, waived, or disapproved, the memorandum must include the terms. A template memorandum can be found on the VMJD.

Section 20I—EoJ (R.C.M. 1111; Article 60c, UCMJ).

20.39. General Provision. The EoJ reflects the results of the court-martial after all post-trial actions, rulings, or orders, and serves to terminate trial proceedings and initiate appellate proceedings. The EoJ must be completed in all GCMs and SPCMs in which an accused was arraigned, regardless of the final outcome of the case. For post-trial processing in an SCM, see **Section 23F.** In any case in which an accused was arraigned and the court-martial ended in a full acquittal, mistrial, dismissal of all charges, or is otherwise terminated without findings, an EoJ must be completed (to include the first indorsement) when the court terminates. For cases resulting in a finding of not guilty by reason of lack of mental responsibility, the EoJ must be completed after the subsequent hearing required by R.C.M. 1111 (e)(1) and R.C.M. 1105.

20.40. Preparing the EoJ.

20.40.1. Minimum Contents. Following receipt of the CADAM and issuance of any other post-trial rulings or orders, the military judge must ensure an EoJ is prepared. **(T-0).** Military judges should wait five days after receipt of the CADAM to sign the EoJ. This ensures parties have five days to motion the military judge to correct an error in the CADAM in accordance with R.C.M. 1104 (b)(2)(B). The EoJ must include the contents listed in R.C.M. 1111(b), and the STR must be included as an attachment. **(T-0).** Practitioners must use the format and checklists for the EoJ that is posted on the VMJD.

20.40.2. Expurgated and Unexpurgated Copies of the EoJ. In cases with both an expurgated and unexpurgated Statement of Trial Results, both an expurgated an unexpurgated EoJ must be prepared and signed by the military judge. In arraigned cases in which the court-martial ended in a full acquittal, mistrial, dismissal of all charges, or is otherwise terminated without findings, refer **to paragraph 20.8** to determine whether an expurgated EoJ is required and the distribution requirements for expurgated and unexpurgated copies.

20.41. First Indorsement to the EoJ. After the EoJ is signed by the military judge and returned to the servicing legal office, the SJA signs and attaches to the EoJ a first indorsement, indicating whether the following criteria are met: DNA processing is required; the accused has been convicted of a crime of domestic violence under 18 U.S.C. 922(g)(9); criminal history record indexing is required under DoDI 5505.11; firearm prohibitions are triggered; and/or sex offender notification is required. See **Chapter 29** for further information on this requirement. Templates are located on the VMJD. The first indorsement is distributed with the EoJ. **Note:** This requirement is not delegable. Only the SJA or other judge advocate acting as the SJA may sign the

first indorsement. In the latter case, the person signing the first indorsement indicates "Acting as the Staff Judge Advocate" in the signature block.

20.42. Distributing the EoJ. The EoJ and first indorsement must be distributed in accordance with the STR/EoJ Distribution List on the VMJD within five duty days of completion.

Section 20J—Post-Trial Confinement

20.43. Entry into Post-Trial Confinement. Sentences to confinement run from the date adjudged, except when suspended or deferred by the convening authority. Unless limited by a commander in the accused's chain of command, the authority to order post-trial confinement is delegated to the trial counsel or assistant trial counsel. See R.C.M. 1102(b)(2). The DD Form 2707, *Confinement Order*, with original signatures goes with the accused and is used to enter an accused into post-trial confinement.

20.44. Processing the DD Form 2707.

20.44.1. When a court-martial sentence includes confinement, the legal office should prepare the top portion of the DD Form 2707. Only list the offenses of which the accused was found guilty. The person directing confinement, typically the trial counsel, fills out block 7. The SJA fills out block 8 as the officer conducting a legal review and approval. The same person cannot sign both block 7 and block 8. Before signing the legal review, the SJA should ensure the form is properly completed and the individual directing confinement actually has authority to direct confinement.

20.44.2. Security Forces personnel receipt for the prisoner by completing and signing item 11 of the DD Form 2707. Security Forces personnel ensure medical personnel complete items 9 and 10. A completed copy of the DD Form 2707 is returned to the legal office, and the legal office includes the copy in the ROT. Security Forces retains the original DD Form 2707 for inclusion in the prisoner's Correctional Treatment File.

20.44.3. If an accused is in pretrial confinement, confinement facilities require an updated DD Form 2707 for post-trial confinement.

20.44.4. Failure to comply with these procedural processes does not invalidate or prevent post-trial confinement or the receipt of prisoners. See Articles 11 and 13, UCMJ.

20.45. Effect of Pretrial Confinement. Under certain circumstances, an accused receives day-for-day credit for any pretrial confinement served in military, civilian (at the request of the military), or foreign confinement facilities, for which the accused has not received credit against any other sentence. *United States v. Allen*, 17 M.J. 126 (C.M.A. 1984); *United States v. Murray*, 43 M.J. 507 (AFCCA 1995); and *United States v. Pinson*, 54 M.J. 692 (AFCCA 2001). An accused may also be awarded judicially ordered credit for restriction tantamount to confinement, prior NJP for the same offense, violations of R.C.M. 305, or violations of Articles 12 or 13, UCMJ. See e.g., *United States v. Pierce*, 27 M.J. 367 (C.M.A. 1989).

20.45.1. When a military judge directs credit for illegal pretrial confinement (violations of Articles 12 or 13, UCMJ, or R.C.M. 305), the military judge should ensure credit is listed on the STR and EoJ.

20.45.2. Any credit for pretrial confinement should be clearly reflected on the STR, EoJ and DD Form 2707, along with the source of each portion of credit and total days of credit awarded.

Chapter 29

SEX OFFENDER NOTIFICATION, CRIMINAL INDEXING AND DNA COLLECTION

Section 29A—Sex Offender Notification

29.1. General Provision. If the member has been convicted of certain "qualifying offenses" potentially requiring sex offender registration the DAF is required to notify federal, state, and local officials. **(T-0).** As noted in the STR/EoJ Distribution List on the VMJD, a copy of the STR and EoJ, to include attachments and the first indorsements, including any placement of the accused on excess or appellate leave status, must be distributed to the AFSFC, **afcorrections.appellateleave@us.af.mil**, and DAF-CJIC, **daf-cjic@us.af.mil**.

29.2. Qualifying Offenses. See DoDI 1325.07 for a list of offenses which require DAF notification to federal, state, and local officials.

29.2.1. Federal, state and local governments may require an individual to register as a sex offender for offenses that are not included on this list; therefore, this list identifies offenses for which notification is required by the DAF but is not inclusive of all offenses that trigger sex offender registration.

29.2.2. When a question arises whether a conviction triggers notification requirements, SJAs should seek guidance from a superior command level legal office. Questions about whether an offense triggers notification requirements may be directed to the DAF-CJIC Legal Advisor (HQ AFOSI/JA)

29.3. Notification Requirement. The DAF must notify federal, state, and local officials when a DAF member is convicted of a qualifying offense at GCM or SPCM. This requirement applies regardless of whether or not the individual is sentenced to confinement. See DoDI 1325.07, and AFMAN 31-115, Vol 1. The DAF executes this requirement via AF confinement officer/NCO/liaison officer notification to the relevant jurisdictions using the DD Form 2791, *Notice of Release/Acknowledgement of Convicted Sex Offender Registration Requirements*. See AFMAN 71-102, Chapter 3.

29.4. Timing of Notification.

29.4.1. In cases where the member is sentenced to and must serve post-trial confinement, the notification must be made prior to release from confinement. **(T-0). Note:** The member may not be held beyond the scheduled release date for purposes of making the required notifications. This notification is accomplished by the security forces confinement officer, or designee responsible for custody of the inmate, in accordance with the requirements detailed in AFMAN 31-115, Vol 1; AFMAN 71-102; and DoDI 5525.20, *Registered Sex Offender (RSO) Management in Department of Defense*. **(T-0).**

29.4.2. In cases where the offender will not serve post-trial confinement either because (1) no confinement was adjudged, or (2) confinement credit exceeds adjudged confinement, the SJA must notify the servicing confinement NCO/officer or SFS/CC in writing within 24 hours of conviction. Once informed by the SJA that the member was convicted of a qualifying offense, the confinement officer or SFS/CC ensures the notifications are made in accordance with AFMAN 71-102, AFMAN 31-115V1, and DoDI 5525.20.

29.5. Legal Office Responsibilities. SJAs are not responsible for directly notifying federal, state and local law enforcement of qualifying convictions. However, SJAs must ensure their support responsibilities are accomplished in order to ensure the DAF is meeting its obligations under federal law and DoD policy. SJAs facilitate the notification requirement in two ways: (1) completion and distribution of post-trial paperwork in accordance with this instruction and the STR/EoJ Distribution List on the VMJD; and (2) notification of the installation confinement officer/NCO in cases where the offender is convicted but not required to serve post-trial confinement, in accordance with this instruction. See **paragraph 29.6** and **paragraph 29.7** and AFMAN 71-102, Chapter 3.

29.6. STR and EoJ. If a member is convicted of a qualifying offense referred to trial by general or special court-martial on or after 1 January 2019, the appropriate box must be initialed on the first indorsement of the STRs and the EoJ by the SJA. The first indorsement format, and guidance for completion are located on the VMJD.

29.7. Notification to the Installation Confinement Officer/NCO. In cases where the member was convicted of a qualifying offense at a general or special court-martial but no post-trial confinement will be served, the SJA must notify, in writing, the confinement officer (or SFS/CC if no confinement officer/NCO is at that installation) of the conviction and sentence within 24 hours of announcement of the verdict. The corrections officer, or the SFS/CC, as appropriate, ensures that the notifications required in AFMAN 31-115, Vol 1 and AFMAN 71-102 are made.

29.8. Convictions by a Host Country. Service members, military dependents, DoD contractors, and DoD civilians can be convicted of a sex offense outside normal DoD channels by the host nation while assigned overseas. When compliance with **Section 29A** is required in these cases, the SJA notifies the confinement officer or SFS/CC, as required. It is the SJA's responsibility to ensure the offender completes their portion of the DD Form 2791, or equivalent document, upon release from the host nation. The DD Form 2791 and copies of the ROT must be provided to the appropriate federal, state, and local law enforcement in accordance with **paragraph 29.3** and **paragraph 29.4**, and DoDI 1325.07.

Section 29B—Criminal History Record Information (CHRI) and Fingerprint Collection and Submission (28 U.S.C. § 534, Acquisition, preservation, and exchange of identification records and information; appointment of officials; 28 C.F.R. §§ 20.30, et seq., Federal Systems and Exchange of Criminal History Record Information; DoDI 5505.11)

29.9. General Provision. The DAF, through OSI and Security Forces, submits offender CHRI and fingerprints to the FBI when there is probable cause to believe an identified individual committed a qualifying offense. **(T-0).** See AFMAN 71-102; DoDI 5505.11; 28 C.F.R. §§ 20.30, et seq.; and 28 U.S.C. § 534. Such data is submitted to and maintained in the Interstate Identification Index (III), maintained as part of the FBI's National Crime Information Center (NCIC).

29.10. Criminal History Record Information. CHRI reported in accordance with DoDI 5505.11 and AFMAN 71-102 consists of identifiable descriptions of individuals; initial notations of arrests, detentions, indictments, and information or other formal criminal charges; and any disposition arising from any such entry (e.g., acquittal, sentencing, NJP; administrative action; or administrative discharge).

29.11. Identified Individuals.

29.11.1. The DAF submits CHRI and fingerprints on any military member or civilian investigated by a DAF law enforcement agency (OSI or Security Forces) when a probable cause determination has been made that the member committed a qualifying offense.

29.11.2. The DAF submits criminal history data for military service members, military dependents, DoD employees, and contractors investigated by foreign law enforcement organizations for offenses equivalent to those described as qualifying offenses in AFMAN 71-102 and DoDI 5505.1 when a probable cause determination has been made that the member committed an equivalent offense.

29.12. Disposition Data. The DAF, through DAF-CJIC, OSI and Security Forces, is responsible for updating disposition data for any qualifying offense for which there was probable cause. This disposition data merely states what the ultimate disposition of any action (or no action) taken was regarding each qualifying offense. The disposition includes no action, acquittals, convictions, sentencing, NJP, certain administrative actions, and certain types of discharge. Failure to comply with this section will result in inaccurate disposition data, which can have adverse impacts on individuals lawfully indexed in III.

29.13. Qualifying Offenses. Qualifying offenses for fingerprinting requirements constitute either (1) serious offenses; or (2) non-serious offenses accompanied by a serious offense. See 28 CFR. 20.32. A list of offenses that, unless accompanied by a serious offense, do not require submission of data to III is located in AFMAN 71-102, Attachment 5.

29.14. Military Protective Orders. Issuance of an MPO also triggers a requirement for indexing in NCIC. See **paragraph 29.39** and AFMAN 71-102; 10 U.S.C. § 1567a, *Mandatory notification of issuance of military protective order to civilian law enforcement*.

29.15. Qualifying Offenses Investigated by Commander Directed Investigation (CDI). If any qualifying offense was investigated via CDI or inquiry and is subsequently preferred to trial by SPCM or GCM, then CHRI and fingerprints must be submitted to III in accordance with AFMAN 71-102 and DoDI 5505.11. SJAs must ensure they advise commanders as to the requirement to consult with SFS and OSI to obtain and forward CHRI and fingerprints in accordance with that mandate. **Note:** If charges are not preferred, then CHRI and fingerprints are not submitted to III; however, if charges are preferred and later withdrawn, CHRI and fingerprints must be submitted. **(T-0).**

29.16. Probable Cause Requirement. Fingerprints and criminal history data will only be submitted where there is probable cause to believe that a qualifying offense has been committed and that the person identified as the offender committed it. See AFMAN 71-102; DoDI 5505.11. The collection of fingerprints under this paragraph is administrative in nature and does not require a search authorization or consent of the person whose fingerprints are being collected.

29.17. SJA Coordination Requirement. The law enforcement agency (e.g., OSI or Security Forces) coordinates with the SJA or government counsel to determine whether the probable cause requirement is met for a qualifying offense. The SJA or government counsel must ensure they understand the applicable indexing requirements in order to advise OSI or Security Forces for purposes of criminal history indexing. **(T-0).**

29.18. Process for Submission of Criminal History Data. After the probable cause determination is made, the investigating agency (e.g., OSI or Security Forces) submits the required data in accordance with AFMAN 71-102 and DoDI 5505.11.

29.19. Legal Office Final Disposition Requirement.

29.19.1. The final disposition (e.g., conviction at GCM or SPCM, acquittal, dismissal of charges, conviction of a lesser included offense, sentence data, nonjudicial punishment, no action) is submitted by OSI or Security Forces for each qualifying offense reported in III or NCIC. OSI or Security Forces, whichever is applicable, obtains the final disposition data from the legal office responsible for advising on disposition of the case (generally the servicing base legal office). If an accused was arraigned at a court-martial, the final disposition is memorialized on the STR and EoJ. A first indorsement signed by the SJA must accompany the STR and EoJ.

29.19.2. The required format for the first indorsement is located on the VMJD.

29.19.3. The servicing legal office will provide disposition documentation to the local Security Forces, OSI, and DAF-CJIC within five duty days of completion of the documents discussed in paragraphs **29.19.4**-**29.19.7**.

29.19.4. Because the EoJ may differ from the adjudged findings and sentence, both the STR and EoJ must be distributed to the local DAF investigative agency that was responsible for the case (e.g., OSI or Security Forces) and DAF-CJIC within five duty days of completion of the EoJ.

29.19.5. For information regarding final disposition where the final disposition consists of NJP, see DAFI 51-202.

29.19.6. In cases where the allegations involve offenses listed in paragraphs **10.2.1.1**-**10.2.1.3**, and the convening authority decides not to go forward to trial, the GCMCA review must be forwarded to the local OSI detachment and DAF-CJIC in accordance with **paragraph 10.3.2** **Note:** Do not forward the sexual assault legal review, only the convening authority notification memorandum.

29.19.7. For all other final dispositions which must be submitted in accordance with **Section 29E**, AFMAN 71-102, and DoDI 5505.11, the SJA must ensure disposition data is provided to ensure timely and accurate inclusion of final disposition data. See **Section 29E** for further distribution guidance.

29.20. Expungement of Criminal History Data and Fingerprints. Expungement requests are processed in accordance with guidance promulgated in AFMAN 71-102.

Section 29C—DNA Collection (10 U.S.C. §

1565; DoDI 5505.14, DNA Collection and Submission Requirements for Law Enforcement)

29.21. General Provision. The DAF, through OSI and Security Forces, collects and submits DNA for analysis and inclusion in the Combined Deoxyribonucleic Acid Index System (CODIS), through the U.S. Army Criminal Investigations Laboratory (USACIL), when fingerprints are collected pursuant to DoDI 5505.11. **(T-0).** See DoDI 5505.14; 10 U.S.C. 1565; 34 U.S.C. §

40702, *Collection and use of DNA identification information from certain federal offenders*; 28 C.F.R. § 28.12, *Collection of DNA samples*.

29.22. Qualifying Offenses. DNA collection and submission is required when fingerprints are collected pursuant to DoDI 5505.11. DNA is not collected or submitted for the non-serious offenses enumerated in AFMAN 71-102, Attachment 5 unless they are accompanied by a serious offense requiring fingerprint collection in accordance with DoDI 5505.11.

29.23. Probable Cause Requirement. DNA collection occurs only where there is probable cause to believe that a qualifying offense has been committed and that the person identified committed it. The collection of DNA under this paragraph is administrative in nature and does not require a search authorization or consent of the person whose DNA is being collected.

29.24. SJA Coordination Requirement. The law enforcement agency (e.g., OSI or Security Forces) coordinates with the SJA or government counsel prior to submission of DNA for inclusion in CODIS in accordance with AFMAN 71-102. The SJA or government counsel must ensure they understand the applicable indexing requirements in order to advise OSI or Security Forces for purposes of criminal history indexing. **(T-0).**

29.25. Timing of Collection and Forwarding. OSI, Security Forces and Commanders (through collection by Security Forces) collect and expeditiously forward DNA in accordance with the procedures in DoDI 5505.14 and AFMAN 71-102. If not previously submitted to USACIL, the appropriate DAF law enforcement agency (i.e., OSI or Security Forces) will collect and submit DNA samples from service members: against whom court-martial charges are preferred in accordance with RCM 307 of the MCM; ordered into pretrial confinement after the completion of the commander's 72-hour memorandum required by RCM 305(h)(2)(C) of the MCM; and convicted by general or special court-martial.

29.26. STR and EoJ. In cases where specifications alleging qualifying offenses were referred to trial on or after 1 January 2019 and the accused is found guilty of one or more qualifying offenses, the appropriate box must be completed on the first indorsement of the STR and EoJ by the SJA.

29.27. Final Disposition Requirement. As DNA may be forwarded to USACIL at various times during the investigation or prosecution of a case, final disposition of court-martial charges must be forwarded to OSI and Security Forces to ensure DNA is appropriately handled.

29.27.1. The final disposition is memorialized on the following forms: STR and EoJ, whichever is applicable. A first indorsement signed by the SJA must accompany the STR and EoJ.

29.27.2. Formats for the STR, EoJ, and first indorsement are located on the VMJD.

29.27.3. In cases where the allegations involve offenses listed in paragraphs **10.2.1.1**-**10.2.1.3**, and the convening authority decides not to go forward to trial, the GCMCA review must be forwarded to OSI in accordance with **paragraph 29.19.6**.

29.27.4. For all other dispositions, the SJA must ensure disposition data for qualifying offenses is provided to ensure timely and accurate inclusion of final disposition data. Disposition documentation must be distributed to the local OSI detachment, Security Forces and DAF-CJIC within five duty days of completion of the final disposition. See **Section 29E** for further distribution guidance.

29.28. Expungement of DNA. DoD expungement requests are processed in accordance with guidelines promulgated in AFMAN 71-102 and DoDI 5505.14.

Section 29D—Possession or Purchase of Firearms Prohibited (18 U.S.C. § 921-922, Definitions; 27 C.F.R. § 478.11)

29.29. General Provision. 18 U.S.C. § 922, *Unlawful acts*, prohibits any person from selling, transferring or otherwise providing a firearm or ammunition to persons they know or have reasonable cause to believe fit within specified prohibited categories as defined by law. 18 U.S.C. § 922(g) prohibits any person who fits within specified prohibited categories from possessing a firearm. This includes the possession of a firearm for the purpose of carrying out official duties (e.g., force protection mission, deployments, law enforcement). Commanders may waive this prohibition for members of the Armed Forces for purposes of carrying out their official duties, unless the conviction is for a misdemeanor crime of domestic violence or felony crime of domestic violence, prohibited under 18 U.S.C. §§ 922(g)(9) and 922 (g)(1), respectively, as applied by DoDI 6400.06. For further guidance, see AFMAN 71-102. Persons who are prohibited from purchase, possession, or receipt of a firearm are indexed in the National Instant Background Check System (NICS).

29.30. Categories of Prohibition (18 U.S.C. §§ 922(g), 922(n); 27 C.F.R. § 478.11; AFMAN 71-102, Chapter 4).

29.30.1. Persons convicted of a crime punishable by imprisonment for a term exceeding one year.

29.30.1.1. If a service member is convicted at a GCM of a crime for which the maximum punishment exceeds a period of one year, this prohibition is triggered regardless of the term of confinement adjudged or approved. **Note:** This category of prohibition would not apply to convictions in a special court-martial because confinement for more than one year cannot be adjudged in that forum.

29.30.1.2. If a conviction is set aside, disapproved or overturned on appeal, the prohibition under this section is not triggered because the conviction no longer exists. 18 U.S.C. § 922(g)(1).

29.30.2. Fugitives from justice. 18 U.S.C. § 922(g)(12).

29.30.3. Unlawful users or persons addicted to any controlled substance as defined in 21 U.S.C. § 802, *Definitions*. See 18 U.S.C. § 922(g)(3) and 27 C.F.R. 478.11.

29.30.3.1. This prohibition is triggered where a person who uses a controlled substance has lost the power of self-control with reference to the use of a controlled substance or where a person is a current user of a controlled substance in a manner other than as prescribed by a licensed physician. Such use is not limited to the use of drugs on a particular day, or within a matter of days or weeks before, but rather that the unlawful use has occurred recently enough to indicate that the individual is actively engaged in such conduct. See 27 C.F.R. 478.11.

29.30.3.2. An inference of current use may be drawn from evidence of a recent use or possession of a controlled substance or a pattern of use or possession that reasonably covers the present time, e.g., a conviction for use or possession of a controlled substance within

the past year; multiple arrests for such offenses within the past five years if the most recent arrest occurred within the past year; or persons found through a drug test to use a controlled substance unlawfully, provided that the test was administered within the past year. 27 C.F.R. 478.11.

29.30.3.3. For a current or former member of the Armed Forces, an inference of current use may be drawn from recent disciplinary or other administrative action based on confirmed drug use, e.g., court-martial conviction, NJP, or an administrative discharge based on drug use or drug rehabilitation failure. 27 C.F.R. 478.11.

29.30.3.4. Qualifying Prohibitors. See AFMAN 71-102, Chapter 4, for additional information on drug offenses and admissions that qualify for prohibition under 18 USC 922(g)(3).

29.30.4. Any person adjudicated as a mental defective or who has been committed to a mental institution.

29.30.4.1. If a service member is found incompetent to stand trial or not guilty by reason of lack of mental responsibility pursuant to Articles 50a or 76b, UCMJ, this prohibition may be triggered. 18 U.S.C. § 922(g)(4).

29.30.4.2. SJAs should ensure commanders are aware of the requirement to notify DAF-CJIC when a service member is declared mentally incompetent for pay matters by an appointed military medical board. See AFMAN 71-102, Chapter 4.

29.30.4.3. SJAs should ensure commanders are aware of the requirement to notify installation law enforcement in the event any of their personnel, military or civilian, are committed to a mental health institution through the formal commitment process. For further information, see AFMAN 71-102; 18 U.S.C. § 922; 27 C.F.R. 478.11.

29.30.5. Persons who have been discharged from the Armed Forces under dishonorable conditions. 18 U.S.C. § 922(g)(6). This condition is memorialized on the STR and EoJ, which must be distributed in accordance with the STR/EoJ Distribution List on the VMJD. **Note:** This prohibition does not take effect until after the discharge is executed, but no additional notification must be made to the individual at that time. See **paragraph 29.33.2.** The original notification via AF Form 177, *Notification of Qualification for Prohibition of Firearms*, Ammunition, and Explosives, and subsequent service of the Certification of Final Review or Final Order, as applicable, operate as notice to the individual.

29.30.6. Persons who have renounced their United States citizenship. 18 U.S.C. § 922(g)(7).

29.30.7. Persons convicted of a crime of misdemeanor domestic violence (the "Lautenberg Amendment") at a GCM or SPCM. See 18 U.S.C. § 922(g)(9). **Note**: Persons convicted of felony crimes of domestic violence at a GCM or SPCM are covered under 18 U.S.C. § 922(g)(1).

29.30.7.1. A "misdemeanor crime of domestic violence" for purposes of indexing under this section is defined as follows: an offense that— (i)is a misdemeanor under Federal, State, or Tribal law; and (ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or

guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim. Note: Exceptions to this definition can be located at 18 USC § 921(g)(33). See also 27 CFR 478.11.

29.30.7.2. SJAs should look at the underlying elements of each conviction to determine whether it triggers a prohibition under 18 U.S.C. § 922(g)(9). If a conviction is set aside, disapproved or overturned on appeal, the prohibition under this section is not triggered because the conviction no longer exists. The term "qualifying conviction" does not include summary courts-martial or the imposition of NJP under Article 15, UCMJ.

29.30.7.3. Government counsel and law enforcement must look at this prohibition on a case-by-case basis to ensure that the charged offense (e.g., violations of Articles 120, 120b, 128, 128b, 130, UCMJ, etc.) meets the statutory criteria for a "misdemeanor crime of domestic violence." See 10 U.S.C. § 1562; DoDI 6400.07.

29.30.8. Persons accused of any offense punishable by imprisonment for a term exceeding one year, which has been referred to a general court-martial. 18 U.S.C. § 922(n).

29.30.9. Persons who are aliens admitted under a nonimmigrant visa or who are unlawfully in the United States. 18 U.S.C. § 922(g)(5).

29.30.10. Persons subject to a protective order issued by a court, provided the criteria in 18 U.S.C. § 922(g)(8) are met. This prohibition is triggered only by a court order issued by a judge. A military protective order does not trigger this prohibition; but does trigger indexing under **Section 29B.**

29.31. Notification to the Accused of Firearms Prohibition. When a service member becomes ineligible to possess, purchase, or receive a firearm under 18 U.S.C. § 922, the DAF provides notification to that service member of the prohibition. See AFMAN 71-102, Chapter 4.

29.31.1. **Form of Notice.** A service member is notified of the applicability of 18 U.S.C. § 922 via AF Form 177.

29.31.2. **SJA Responsibility to Notify.** In all cases investigated by DAF involving an offense which implicates a firearms prohibition, the SJA must be aware of the nature of the prohibition and the entity responsible for making the notification. See AFMAN 71-102, Table 4.1 and Chapter 4, generally. However, in the following cases, the SJA is responsible for ensuring the notification to the accused is made:

29.31.2.1. Conviction at a GCM of any offense punishable by imprisonment for a term exceeding one year. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.2. Conviction at a GCM, SPCM, or SCM for use or possession of a controlled substance. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.3. Completion of NJP for any person found guilty of wrongful use or possession of a controlled substance. In such cases, the AF Form 177 should be provided to the accused for signature on or before completion of the supervisory SJA legal review.

29.31.2.4. After the accused is adjudicated as not guilty by reason of insanity or not competent to stand trial. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork.

29.31.2.5. Conviction resulting in a sentence including a dishonorable discharge. In such cases, the AF Form 177 may be provided to the accused for completion as part of the post-trial paperwork. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.6. Conviction at a GCM or SPCM for a crime of domestic violence, when the maximum punishment which may be adjudged for the offense in that forum is one year or less. **Note:** If this is a dual basis notification, the paperwork need only be served once, though both applicable prohibitions should be noted on the AF Form 177.

29.31.2.7. Referral of charges to a GCM where any offense carries a possible sentence to confinement in excess of one year. In such cases, the AF Form 177 may be provided to the accused for completion as part of the referral paperwork.

29.31.3. Practitioners are encouraged to deconflict with the local investigating DAF law enforcement agency in cases where law enforcement is also responsible for ensuring notification (i.e., where multiple prohibitions attached and law enforcement may be providing notification of any prohibition).

29.31.4. In cases where the investigating law enforcement agency is a non-DAF agency, these requirements may not apply. Contact DAF-CJIC for further guidance. See AFMAN 71-102.

29.31.5. Any notification made to the accused may be made through the accused's counsel.

29.31.6. If the accused declines to sign, this should be annotated on the form.

29.31.7. After completion of the form, the SJA must provide a copy of the completed AF Form 177 to DAF-CJIC within 24 hours of completion via email: **daf.cjic@us.af.mil**. The SJA will also provide a digital copy to the member's commander and investigating DAF law enforcement. The legal office will forward the original and signed AF Form 177 via mail to DAF-CJIC, where it will be maintained as part of the official record. See AFMAN 71-102, Chapter 4.

29.32. STR and EoJ. In cases where specifications allege offenses which trigger a prohibition under 18 U.S.C. § 922 and the accused is found guilty of one or more such offenses, the appropriate box must be completed on the first indorsements to the STR and EoJ by the SJA. **Note:** If the accused is convicted of a crime of domestic violence as defined in paragraph **29.30.7.1** and **18** U.S.C. § 922, both the "Firearms Prohibition" and "Domestic Violence Conviction" blocks should be marked "yes."

29.33. Final Disposition Requirement. As the findings of a case may change after close of a court-martial, final disposition of court-martial charges must be forwarded to the local OSI detachment, Security Forces, and DAF-CJIC to ensure reporting pursuant to 18 U.S.C. §§ 921-922 is appropriately handled. Because the EoJ may differ from the adjudged findings and sentence, both the STR and EoJ, with accompanying first indorsements, must be distributed to the local

responsible DAF investigative agency and DAF-CJIC within five duty days of completion of the EoJ. Templates for the STR, EoJ, and first indorsement are located on the VMJD. The SJA must ensure disposition data requested by the local OSI detachment and Security Forces unit is provided to ensure timely and accurate inclusion of final disposition data. See **Section 29E** for further distribution guidance.

29.34. SJA Coordination with Commanders. The SJA or designee must inform commanders of the impact of the conviction on the accused's ability to handle firearms or ammunition as part of their official duties; brief commanders on retrieving all Government-issued firearms and ammunition and suspending the member's authority to possess Government-issued firearms and ammunition in the event a member is convicted of an offense of misdemeanor domestic violence (violations of the Lautenberg Amendment); and brief commanders on their limitations and abilities to advise members of their commands to lawfully dispose of their privately owned firearms and ammunition.

Section 29E—Distribution of Court-Martial Data for Indexing Purposes

29.35. General Provision. In order to ensure that indexing requirements pursuant to this chapter are met, SJAs must ensure the following documents are distributed to the applicable local DAF law enforcement agency and DAF-CJIC:

29.35.1. Charge sheets in cases referred to general courts-martial, where any charged offense has a possible sentence to confinement greater than one year;

29.35.2. STR, regardless of verdict or sentence, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.3. EoJ and first indorsement, regardless of verdict or sentence, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.4. In SCMs for drug use or possession that would trigger firearm prohibitions, the final completed DD Form 2329 and first indorsement;

29.35.5. Certification of Final Review in any case where any offense qualifies for any type of indexing discussed in this chapter;

29.35.6. Notification of outcome of any cases as to qualifying offenses litigated at or disposed of via magistrate court;

29.35.7. Order pursuant to Article 73, UCMJ, for a new trial, where any charged offense qualifies for any type of indexing discussed in this chapter;

29.35.8. Order for a rehearing on the findings or sentence of a case, pursuant to Article 63, UCMJ and

29.35.9. Other final disposition documentation in cases not referred to trial where the offense investigated is a qualifying offense under **Sections 29B-D** of this chapter (e.g., decision not to refer certain sexual assault offenses to trial in accordance with **paragraph 10.2**; NJP records in accordance with DAFI 51-202; notification of administrative discharge where the basis is a qualifying offense; approval of a request for resignation or retirement in lieu of trial by court-martial, administrative paperwork for drug use or possession).