Filed March 21, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	**SUPPLEMENT TO THE PETITION**
Appellee,	)	**FOR GRANT OF REVIEW**
v.	)	
	)	
JACQUES D. BENOIT, JR.,	)	Crim. App. Dkt. No. 40508
Staff Sergeant (E-5),	)	
United States Air Force,	)	USCA Dkt. No. 25-0106/AF
Appellant.	)	

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

Issue Presented

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

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

[1] 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*).

Statement of the Case

On January 13, 2023, at Joint Base Charleston, South Carolina, a general court-martial composed of officer and enlisted members convicted Staff Sergeant Jacques D. Benoit Jr. (SSgt Benoit), Appellant, contrary to his pleas, of one specification of reckless operation of a vehicle causing injury, in violation of Article 113, UCMJ, 10 U.S.C. § 913. R. at 609. The military judge sentenced SSgt Benoit to confinement for eight months, reduction to the grade of E-1, and a reprimand. R. at 678. The convening authority took no action on the findings or sentence and the military judged entered the above findings and sentence in the entry of judgment. Convening Authority Decision on Action; Entry of Judgment (EOJ).

SSgt Benoit appealed his conviction pursuant to 10 U.S.C. § 866(b)(1)(A). At the AFCCA, SSgt Benoit raised whether the firearm bar contained in his record of trial was constitutional as applied to him. Br. on Behalf of Appellant at 12-16; Appellant's Reply Br. at 11-15; *United States v. Benoit*, No. ACM 40508, slip op. at 2 (A.F. Ct. Crim. App. Jan. 3, 2025) (Appendix A). He argued the AFCCA had jurisdiction under Article 66, UCMJ, to review this issue and asked for the AFCCA to correct the EOJ. Appellant's Reply Br. at 13-15. On January 3, 2025, the AFCCA affirmed the findings as correct in law and fact and denied relief on the firearm issue. *Id*.

Statement of Facts

On September 14, 2020, SSgt Benoit and his close friend and fellow Airman, RO, were driving in a vehicle called a "Polaris Ranger." *See* R. at 308-09. While driving, an accident occurred, and the vehicle turned onto its passenger side pinning RO under the roll bar of the vehicle. R. at 308. SSgt Benoit tried to help and called for help, but RO died. R. at 275-76, 337. SSgt Benoit was found guilty of one specification of reckless operation of a vehicle causing injury, in violation of Article 113, UCMJ. R. at 609.

On April 13, 2023, after the military judge signed the EOJ, the Government determined SSgt Benoit 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.

Reasons to Grant Review

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, *United States v. Johnson*, No. 24-0004/SF, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024). SSgt Benoit'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[2] 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 (DAFI) 51-201, *Administration of Military Justice*, ¶¶ 20.41, 29.32, 29.33 (Apr. 14, 2022) (Appendix B). As a result, SSgt Benoit's case is factually distinct from *Williams*. *Cf. Williams*, 85 M.J. 121, at *13-15 (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 occurs after the EOJ, the AFCCA had the authority to act and provide appropriate relief for the error SSgt Benoit raised.

However, the AFCCA denied any relief. Appendix A at 2. This denial seems

[2] 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. 121, at *8. The jurisdictional question here concerning AFCCA is focused on authority to act.

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. 121, at *14; 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 whether 18 U.S.C. § 922 was constitutionally applied to SSgt Benoit, 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. 121, at *10. 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 SSgt Benoit 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). SSgt Benoit's offense falls short of these.

The Supreme Court recently addressed the validity of 18 U.S.C. § 922(g)(8)(C)(i), which applies once a court finds a defendant "represents a credible threat to the physical safety" of another and issues a restraining order. *United States v. Rahimi*, 602 U.S. 680, 688 (2024). The Supreme Court concluded that the historical analysis supported the proposition that when "an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id*. at 698.

But the historical analogue breaks down when applied here. In *Rahimi*, the Supreme Court noted that the "surety" and "going armed laws" supporting a restriction involved "whether a particular defendant likely would threaten or had threatened another with a weapon." *Id*. at 699. The Supreme Court also noted that surety bonds were of limited duration, similar to how 18 U.S.C. § 922(g)(8) only applies while a restraining order is in place. *Id*. Additionally, the majority pointed out that 18 U.S.C. § 922(g)(8) "involved judicial determinations," comparable to the historical surety laws' "significant procedural protections." *Id*. at 696, 699.

By contrast, 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

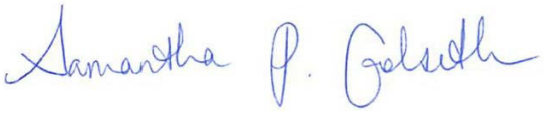
threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Rahimi*, 602 U.S. at 702. Such a narrow holding cannot support the broad restriction encompassed here. This Court should grant review so it can correct this error of constitutional magnitude. C.A.A.F. R. 21(b)(5)(A).

SSgt Benoit 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 Mar. 20, 2025). The Air Force reporting that SSgt Benoit cannot possess firearms would cause NICS to issue a "denied" response when SSgt Benoit 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 SSgt Benoit 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 Jan. 2, 2025); *see* NICS Indices, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/nics/nics-indices (last visited Mar. 20, 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 SSgt Benoit's conviction as qualifying under 18 U.S.C. § 922, even though his conviction remains. 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).

SSgt Benoit respectfully requests this Court grant review.

Respectfully submitted,



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

This supplement complies with the type-volume limitation of Rule 21(b) because it contains 1,890 words. This supplement complies with the typeface and type style requirements of Rule 37.

SSgt Benoit's submission under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), presented in Appendix C, complies with Rule 21A because it is six pages.

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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 March 21, 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 40508

UNITED STATES
Appellee

v.

Jacques D. BENOIT, Jr.
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

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

Decided 3 January 2025

Military Judge: Michael A. Schrama.

Sentence: Sentence adjudged 13 January 2023 by GCM convened at Joint Base Charleston, South Carolina. Sentence entered by military judge on 13 April 2023: confinement for 8 months, reduction to E-1, and a reprimand.

For Appellant: Major Samantha P. Golseth, USAF.

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

Before RICHARDSON, MASON, and KEARLEY, *Appellate Military Judges*.

Judge MASON delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge KEARLEY 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.

MASON, Judge:

A general court-martial composed of officer and enlisted members convicted Appellant, contrary to his pleas, of one specification of reckless operation of a vehicle causing injury, in violation of Article 113, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 913.[2,3] The military judge sentenced Appellant to confinement for eight months, reduction to the grade of E-1, and a reprimand. Appellant requested that the convening authority defer the adjudged reduction in grade until the entry of judgment and waive the automatic forfeitures for six months. The convening authority denied Appellant's requests, took no action on the findings or sentence, and provided the language of the reprimand.

Appellant raises four issues on appeal, which we have reworded: (1) whether Appellant's conviction is factually sufficient; (2) whether the sentence is inappropriately severe; (3) whether the Government can prove 18 U.S.C. § 922 is constitutional because its application is not consistent with the nation's historical tradition of firearm regulation, and whether the court can decide that question; and (4) whether the convening authority abused her discretion in denying Appellant's requests for deferment and waiver.[4]

We have carefully considered issues (3) and (4) and find they do not require discussion or relief. *See United States v. Matias,* 25 M.J. 356, 361 (C.M.A. 1987). As to the remaining issues, we find no error that materially prejudiced Appellant's substantial rights, and we affirm the findings and sentence.

I. BACKGROUND

In July 2020, Appellant deployed from Joint Base Charleston to Ali Al Salem Air Base, Kuwait. He was assigned to the special handling section for the expeditionary logistics readiness squadron (ELRS). His job in that section was

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[2] Unless otherwise noted, all other references in this opinion to the UCMJ and Rules for Courts-Martial are to the *Manual for Courts-Martial, United States* (2019 ed.).

[3] Appellant was found not guilty of one specification of dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892.

[4] Appellant raises issue (4) pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

to provide handling of anything that was not general cargo, including explosives, hazardous materials, registered mail, and vehicles.

Around 14 September 2020, a Polaris Ranger vehicle was delivered for handling to the ELRS. On that day, Appellant drove the Polaris in an unpaved, sandy, handling area for the unit. He did so with another member of the unit, RO, in the passenger seat. At some point during the drive, while making a sharp turn, the Polaris tipped over onto the passenger side. As a result, RO was trapped under the vehicle with part of the roll cage compressing his head into the ground.

Security Forces members responded to the scene and immediately saw that RO was deceased. Medical responders confirmed RO's death. Security Forces asked Appellant what had happened. Appellant said, "I'm not going to lie, we were out here joyriding and it just flipped."

At trial, an expert in accident reconstruction testified. He conservatively estimated that the Polaris would need to be driving at a minimum speed of 15.38 miles per hour to tip over. He further estimated that the Polaris was traveling 18.68 miles per hour at the time it tipped over. The military judge took judicial notice of the wing instruction that set a speed limit for the applicable area at six miles per hour.

II. DISCUSSION

A. Factual Sufficiency

1. Law

We review issues of factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

"The test for factual sufficiency 'is whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses,' [this] court is 'convinced of the [appellant]'s guilt beyond a reasonable doubt.'" *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)). "In conducting this unique appellate role, we take '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) (alteration in original) (quoting *Washington*, 57 M.J. at 399). This court's review of the factual sufficiency of evidence for findings is limited to the evidence admitted at trial. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007) (citations omitted); *United States v. Rodela*, 82 M.J. 521, 525 (A.F. Ct. Crim. App. 2021) (citation omitted).

Appellant was convicted of reckless operation of a vehicle causing injury, in violation of Article 113, UCMJ, which required the Government to prove the following three elements beyond a reasonable doubt: (1) that at or near Ali Al Salem Air Base, Kuwait, in the location in which terminal parked cargo is located, Appellant was in physical control of a vehicle; (2) that Appellant physically controlled the vehicle in a reckless manner by attempting a sharp turn at an excessive speed in sandy terrain and did thereby cause said vehicle to roll; and (3) that Appellant thereby caused the vehicle to injure RO. *See Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. IV, ¶ 51.b.

"The operation or physical control of a vehicle, vessel, or aircraft is reckless when it exhibits a culpable disregard of foreseeable consequences to others from the act or omission involved." *MCM*, pt. IV, ¶ 51.c.(7).

Recklessness is determined by evaluating whether, "under all the circumstances, the accused's manner of operation or physical control of the vehicle, vessel, or aircraft was of that heedless nature which made it actually or imminently dangerous to the occupants . . . ." *Id.*

2. Analysis

Appellant challenges the factual sufficiency of his conviction for reckless operation of a vehicle causing injury to RO. He argues that his conduct did not amount to culpable negligence.

The evidence proved Appellant's conduct amounted to more than simple negligence. Rather, his conduct demonstrated the requisite recklessness characterized by a negligent act combined with "a culpable disregard for the foreseeable consequences to others." *MCM*, pt. IV, ¶ 51.c.(7). Appellant was driving at least three times the speed limit for the area and attempted to execute a sharp turn at that speed. Considering the sandy terrain, the attempted maneuver, and the speed, recklessness is a generous characterization of Appellant's conduct. Further, Appellant's own admission to Security Forces personnel that they were "joyriding" demonstrates his knowledge of his culpability. The death of RO was entirely foreseeable under these circumstances.

After weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, we are convinced of the Appellant's guilt beyond a reasonable doubt. Thus, the conviction is factually sufficient.

B. Sentence Appropriateness

1. Law

We review sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We may affirm only as much of the sentence as we find correct in law and fact and determine should be approved based on the

entire record. Article 66(d), UCMJ, 10 U.S.C. § 866(d). In determining whether a sentence should be approved, our authority is "not legality alone, but legality limited by appropriateness." *United States v. Atkins*, 23 C.M.R. 301, 303 (C.M.A. 1957). We assess sentence appropriateness "by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record." *United States v. Fields*, 74 M.J. 619, 625 (A.F. Ct. Crim. App. 2015) (quoting *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006)).

In conducting our review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001).

While we have significant discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

When conducting our review, we not only consider the appropriateness of the entire sentence, *United States v. Sessions*, 45 C.M.R. 931, 931 (C.M.A. 1972), but also "must consider the appropriateness of each segment of a segmented sentence." *United States v. Flores*, 84 M.J 277, 281 (C.A.A.F. 2024).

2. Analysis

Appellant challenges the appropriateness of his sentence. He argues that he "did not need a sentence to rehabilitate him." He also asserts that "[this] sentence was not needed to promote respect for the law, the seriousness of the offense, or deterrence . . . ."

For his crime, Appellant could have been sentenced up to a dishonorable discharge, forfeiture of all pay and allowances, reduction to the grade of E-1, and confinement for 18 months. He was sentenced by the military judge to confinement for eight months, reduction to the grade of E-1, and a reprimand. Despite engaging in conduct that killed a fellow Airman in a deployed location, he was not sentenced to a punitive discharge. Moreover, his confinement term was less than half the maximum permitted. Yet, he argues that his sentence was inappropriately severe. We disagree.

Vehicular collisions and accidents resulting in death can be some of the most tragic cases. Oftentimes, the offender causing the collision or accident does not specifically intend to harm the victim. In many cases, the deceased victim may even be the friend or family of the offender. This frequently emphasizes the tragic nature of the death to the offender as they feel the sting their actions caused. The fact that they feel the sting in addition to the friends or family of the victim does not *per se* render an adjudged sentence inappropriately severe.

During his unsworn statement, Appellant recognized "that this accident will always follow [him] and will forever haunt [him]." Undoubtedly, he will remember for the rest of his life how his friend died due to his "joyriding." We have considered this fact, as well as all the evidence introduced, including the evidence of mitigation and extenuation. Appellant's sentence is not inappropriately severe.

III. CONCLUSION

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

Appendix C

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), SSgt Benoit, through appellate defense counsel, personally requests that this Court consider the following matter:

Whether the AFCCA abused its discretion when assessing whether SSgt Benoit operated the vehicle in a reckless manner.

Additional Facts

The accident in this case occurred when SSgt Benoit took a turn and the Polaris Ranger tipped onto its passenger side, on top of RO. R. at 308-09, 311. SSgt Benoit called for help and in disbelief he explained that "he wasn't driving that fast." R. at 275-76. SSgt Benoit kept saying that "it was an accident. I didn't mean to do it." R. at 308. His hands were on his head, and he explained that "he took a turn too hard and it just started to roll and then . . . it looked like his friend, the passenger, tried to jump out as it was tipping and got caught." R. at 308-09.

SSgt Benoit's driving was not impeded by inclement weather or reduced visibility. R. at 302, 639. It was daylight. R. at 333. SSgt Benoit's blood and urine were tested, which confirmed his faculties were not impeded—he was not under the influence of alcohol or any illegal substances. R. at 478.

SSgt Benoit was driving in an area known as "Bay 69," at Ali Al Salem, Kuwait. R. at 276. Bay 69 is a sizeable area that is removed from, for example, the flightline and living quarters. *See* Pros. Ex. 1. It was a temporary storage area for cargo where

some pallets were located. R. at 275; Pros. Ex. 2-3. There were no pedestrians or other drivers in proximity to the area. *See* R. at 275-76 (SSgt Benoit had to call MSgt A.B. to request assistance). This area is sandy, but it was a "dry sand," where your feet would not sink into the sand. R. at 280. Moreover, Polaris Rangers are designed with suspension that makes them capable of traversing uneven terrain and the terrain in Bay 69 would not have impacted this. R. at 471.

There were no speed limit signs in Bay 69. R. at 365. Where speed limit signs were posted in other areas on the base, they were posted in kilometers.[3] R. at 354. Among the witnesses who were familiar with Bay 69, there was little awareness about what the speed limit was in Bay 69. R. at 354 ("Around the perimeter, I want to say it was only 10 [miles an hour]"), 378 (SSgt Benoit's leadership had not addressed speeding in Bay 69), 511. However, those who were aware of the speed limit knew that it was very low. R. at 378, 511. SSgt Benoit's commander volunteered, "On more than one occasion we had been asked if it was potentially possible to raise the speed limit because . . . the speed limit is almost as if you could walk by somebody, and he'd be going faster than they would be." R. at 378. It was common for members at Ali Al Salem to "speed." R. at 278, 378.

[3] One kilometer equals 0.6214 miles, therefore, a speed posted in kilometers would state a higher number than if posted in miles. *See* 7 Energy Law and Transactions § 3.02 (2024).

According to the government's expert witness, SSgt Benoit was driving at least 15.38 miles per hour, and his speed was approximated to be "18.1/18.5 miles an hour."[4] R. at 423, 464. The government's expert witness was unable to analyze the Polaris Ranger that SSgt Benoit drove and there was no evidence of whether it had a working speedometer. *See* R. at 416.

On appeal, SSgt Benoit raised whether his conviction is factually sufficient. Appendix A at 2. On January 3, 2025, the AFCCA determined SSgt Benoit's conviction is factually sufficient. *Id*.

Reasons to Grant Review

This Court should grant review of this case because the AFCCA abused its discretion when assessing whether SSgt Benoit operated the vehicle in a "reckless manner," *MCM*, pt. IV, para. 51.b.(2)(a), demonstrating the AFCCA misunderstood the law, or at least, there is an open question whether the AFCCA misunderstood the law. *See United States v. Thompson*, 83 M.J. 1, 4 (C.A.A.F. 2022) (explaining this Court retains the authority to review factual sufficiency determinations for the application of "correct legal principles" and can remand the case for another factual sufficiency review when a CCA has misunderstood the law or there is an open question regarding the CCA's understanding) (citing *United States v. Clark*, 75 M.J. 298, 300

[4] The government's expert witness had earlier testified SSgt Benoit's speed would have been "18.68 miles an hour." R. at 426, 464. The expert's approximation of speed is based on measurements taken at the scene. R. at 426.

(C.A.A.F. 2016) (quoting *United States v. Leak*, 61 M.J. 234, 241 (C.A.A.F. 2005)); *United States v. Thompson*, 2 C.M.A. 460, 464, 9 C.M.R. 90, 94 (1953); *United States v. Nerad*, 69 M.J. 138, 147 (C.A.A.F. 2010)). The AFCCA demonstrated it misunderstood the law because it's assessment, in effect, relied solely on SSgt Benoit's purported speed to find that the manner of his driving was reckless.

While the AFCCA stated it considered more than just SSgt Benoit's speed, Appendix A at 4, a closer review demonstrates that the AFCCA's decision is based solely on the alleged speed he was driving. This despite the *MCM* strictly forbidding a finding of reckless driving based solely on speed: "Recklessness is not determined solely by reason of the happening of an injury, or the invasion of the rights of another, nor by proof alone of excessive speed or erratic operation." *MCM*, pt. IV, para. 51.c(7); *see United States v. Lawrence*, 18 C.M.R. 855, 857 (A.F.C.M.R. 1955) (relying on the *MCM* (1951 ed.) in determining that "exceeding the speed limit, . . . standing alone, may show nothing more than simple negligence," which alone fails to establish driving in a reckless manner) (citations omitted); *United States v. Gamble*, 40 C.M.R. 646, 648 (A.C.M.R. 1969) ("[S]imply exceeding the speed limit is not culpable negligence.").

This is because while the AFCCA stated the sandy terrain was a factor, the evidence during SSgt Benoit's court-martial explained it was not. *See* R. at 280 (explaining the area was sandy, but it was a "dry sand," where your feet would not

sink into the sand); 471 (explaining Polaris Rangers are designed with suspension that makes them capable of traversing uneven terrain and the terrain where the accident occurred would not have impacted this).

And while the AFCCA pointed to SSgt Benoit's driving maneuver, stating "[he] was driving at least three times the speed limit for the area and attempted to execute a sharp turn at that speed," Appendix A at 4, this fails to recognize that the speed limit was so low that a pedestrian could almost walk faster than a vehicle could drive under the speed limit. R. at 378. Therefore, the turn did not make SSgt Benoit's driving reckless. Rather, this demonstrates that the AFCCA continued to focus solely on SSgt Benoit's speed. And it simply was not foreseeable that making a turn, even at eighteen miles per hour, would create a substantial and unjustifiable danger and that SSgt Benoit culpably disregarded this. *See United States v. Oxendine*, 55 M.J. 323, 325 (C.A.A.F. 2001) (explaining that while "[n]egligence is conduct that 'involves the creation of substantial and unjustifiable risk of which the person should be aware in view of all the circumstances,' [c]ulpable negligence is . . . 'a negligent act or omission accompanied by a culpable disregard for the foreseeable consequences to others of that act or omission'").

Lastly, while the AFCCA determined "[SSgt Benoit's] own admissions to Security Forces personnel that they were 'joyriding'[5] demonstrates his knowledge of

[5] R. at 323 (testifying that SSgt Benoit said, "I'm not going to lie, we were out here

his culpability." Appendix A at 4. This determination is unsupported in the record because SSgt Benoit did not elaborate on what he meant by this, and no evidence was introduced to define "joyriding" as in any way dangerous. And "joyriding" does not inherently mean that the driver is driving dangerously. *See United States v. Norris*, 8 C.M.R. 36, 39 (C.M.A. 1953) (explaining "joyriding" was akin to the offense of wrongful appropriation in violation of Article 121").

Therefore, the AFCCA abused its discretion when it, in effect relied solely on SSgt Benoit's speed to determine that he culpably disregarded a substantial and unjustifiable danger created by his acts. Thus, SSgt Benoit respectfully requests this Court grant review.

joyriding and it just flipped.").