April 2, 2025

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

IAN J.B. CADAVONA,
Airman Basic (E-1),
United States Air Force,

Appellant.

USCA Dkt. No. 25-0114/AF

Crim. App. Dkt. No. ACM 40476

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Issues Presented

I.

Whether the Air Force Court of Criminal Appeals erred in holding that a 224-day post-trial processing period without a reasonable explanation did not warrant relief.

II.

Whether, in light of *United States v. Williams*, 85 M.J. 121 (C.A.A.F. 2024), the Air Force Court of Criminal Appeals had jurisdiction under Article 66(d)(2), Uniform Code of Military Justice, to provide appropriate relief for the erroneous firearm prohibition on the indorsement to the entry of judgment.

III.

Whether the United States Court of Appeals for the Armed Forces has jurisdiction and authority to direct the modification of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment.

IV.

Whether review by the United States Court of Appeals for the Armed Forces of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment would satisfy this Court's prudential case or controversy doctrine.

V.

As applied to Airman Basic Cadavona, whether the Government can prove that 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 Honorable 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 October 27, 2022, a military judge sitting as a general court-martial at Kadena Air Base, Japan, convicted Appellant, Airman Basic (AB) Ian Cadavona, contrary to his pleas, of one charge and one specification of possession of child pornography in violation of Article 134, UCMJ, 10 U.S.C. § 934. R. at 263. The military judge sentenced Appellant to be reprimanded, confined for twenty-one months, and dishonorably discharged from the service. R. at 329. The convening authority took no action on the findings and approved the sentence in its entirety. Convening Authority Decision on Action (CADA), undated (signature dated Nov. 17, 2022).

[1] Unless otherwise noted, all references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (Mil. R. Evid.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

The AFCCA reviewed this case, concluded that the findings and sentence are correct in law and fact and that there was no error materially prejudicial to AB Cadavona's substantial rights, and affirmed the findings and sentence. *United States v. Cadavona*, No. ACM 40476, slip op. at 16–17 (A.F. Ct. Crim. App. Jan. 16, 2025) (Appendix A).

Statement of Facts

The government initially investigated AB Cadavona for indecent recording and indecent broadcasting in late 2019 and early 2020. R. at 49, 55; Pros. Ex. 12. Investigators obtained a warrant to search an iCloud account with suspected association to AB Cadavona. R. at 49. The return from this warrant revealed suspected child pornography, leading investigators to obtain an expanded warrant. *Id.* A review under the expanded warrant revealed multiple files believed to contain child pornography, as listed in a report dated September 8, 2020. R. at 50; App. Ex. VII at 11–22.

After AB Cadavona completed the sentence from his first court-martial, the government preferred the charge at issue here on February 16, 2022. DD Form 458, *Charge Sheet*. AB Cadavona was arraigned in

June 2022, and this case ultimately went to trial in October 2022. R. at 1, 20. The military judge found AB Cadavona guilty. R. at 263.

The court announced AB Cadavona's sentence on October 27, 2022. R. at 329. Following AB Cadavona's clemency request, the convening authority signed the CADA on November 17, 2022. CADA, undated (signature dated Nov. 17, 2022). The court reporter prepared a transcript of proceedings, certifying the transcript on January 3, 2023, after trial and defense counsel reviewed it. Certification of the Transcript, Jan. 3, 2023; Court Reporter Chronology, Jan. 21, 2023. The court reporter also certified the record of trial (ROT) on December 9, 2022. Certification of the Record of Trial, Dec. 9, 2022. AB Cadavona received a copy of the ROT on March 22, 2023. ROT Receipt, Mar. 22, 2023. This case was docketed with the AFCCA on June 8, 2023. Appendix A at 12.

Reasons to Grant Review

This case presents an opportunity for this Court to update one of its seminal precedents. Some of the post-trial processing timelines established in *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), are now obsolete due to changes in post-trial processing procedures. This has led the Courts of Criminal Appeals to take differing approaches when

assessing post-trial processing delays. Consequently, the AFCCA's decision conflicts with an applicable decision of another Court of Criminal Appeals. C.A.A.F. R. 21(b)(5)(B). This Court should grant review to update the *Moreno* standards in light of the new procedures and standardize delay assessments across the services.

The AFCCA also erred in its conclusion that the post-trial processing delay does not warrant relief. The 224-day delay exceeded the 150-day threshold applied by the AFCCA by almost fifty percent. Moreover, the Government's explanation for the delay described only routine efforts to prepare and review the record of trial, which the AFCCA found was not an efficient process. Nevertheless, the AFCCA only barely acknowledged the prejudice experienced by AB Cadavona before rejecting it as unpersuasive and concluding that no relief is warranted. This Court should grant review and find, based on a balancing of all the factors, that relief is warranted for the excessive post-trial delay without a reasonable explanation.

There is also an issue with AB Cadavona's firearms prohibition following his conviction. AB Cadavona was convicted of possession of child pornography, a non-violent offense. Despite this, he is purportedly

barred for life from possessing firearms under 18 U.S.C. § 922. Such a ban is not consistent with the nation's history and tradition of regulating firearms and therefore merits scrutiny. AB Cadavona raised this as an error before the AFCCA, but that court concluded the issue did not warrant discussion. As a result, it affirmed the prohibition, and this Court can now review that affirmation.

The issues AB Cadavona raises regarding the purported firearms prohibition are similar to issues the Court is reviewing in other cases. *See United States v. Johnson*, No. 24-0004/SF, 2024 CAAF LEXIS 561 (C.A.A.F. Sept. 24, 2024) (granting review of issues concerning firearms prohibitions). These cases involve "question[s] of law that ha[ve] not been, but should be, settled by this Court." C.A.A.F. R. 21(b)(5)(A). AB Cadavona seeks to have his case be a trailer to *Johnson* so that it can be decided in accordance with the Court's ultimate holdings.

Argument

I.

The Air Force Court of Criminal Appeals erred by declining to provide relief for a 224-day post-trial processing period without a reasonable explanation.

Standard of Review

This Court reviews "de novo claims that an appellant has been denied the due process right to a speedy post-trial review and appeal." *Moreno*, 63 M.J. at 135.

Law and Analysis

A. This Court should grant this petition to update the *Moreno* standards for facially unreasonable delay in post-trial processing.

A delay of 224 days elapsed between AB Cadavona's sentencing on October 27, 2022, and the docketing of his case with the AFCCA on June 8, 2023. R. at 329; Appendix A at 12. Service members have a right to timely post-trial appellate review of court-martial convictions. *Moreno*, 63 M.J. at 135. This Court previously established specific standards for post-trial processing, including 120 days between completion of trial and convening authority action and 30 days between convening authority action and docketing at the applicable Court of Criminal Appeals.

Moreno, 63 M.J. at 142. This Court further applied a presumption of unreasonable delay to cases exceeding these time standards. *Id.* However, subsequent changes in post-trial processing procedures have displaced these two standards, and this Court has not yet indicated what constitutes presumptively unreasonable delay under the new procedures. *See United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (describing changes in post-trial processing procedures, including earlier convening authority action and additional processing the Government must complete before a case can be docketed).

Following the changes in post-trial processing, Courts of Criminal Appeals have taken different approaches to assessing post-trial delay. The AFCCA and the Coast Guard Court of Criminal Appeals apply the 150-day aggregate standard from sentencing to docketing that was originally established by *Moreno*. *Id.* at 633–34; *United States v. Armitage*, No. 1478, 2022 CCA LEXIS 530, at *7–9 (C.G. Ct. Crim. App. Sept. 12, 2022), *pet. denied*, 83 M.J. 248 (C.A.A.F. 2023). The Army Court of Criminal Appeals previously applied this standard but abandoned it, stating, "[S]ome cases justifiably take longer than 150 days to process for appellate review. Others should take significantly less time." *United*

States v. Winfield, 83 M.J. 662, 665 (A. Ct. Crim. App. 2023). The Navy-Marine Corps Court of Criminal Appeals notes two different processing timelines based on a Judge Advocate General Instruction, but it ultimately only tests for prejudice when the two timelines together, which encompass the time from sentencing to docketing, exceed 150 days. *United States v. Rivera*, 81 M.J. 741, 746 (N-M. Ct. Crim. App. 2021).

Recent AFCCA opinions have further muddled post-trial processing delay analyses by finding that the standards in *Livak* and *Moreno* are inapplicable to certain cases. *United States v. Boren*, No. ACM 40296 (f rev), 2025 CCA LEXIS 103, at *47 (A.F. Ct. Crim. App. Mar. 19, 2025); *United States v. Gray*, No. ACM 40648, 2025 CCA LEXIS 122, at *15 (A.F. Ct. Crim. App. Mar. 24, 2025). In *Boren*, the AFCCA held that "the 150-day threshold established in *Livak* does not apply to appeals by an accused under Article 66(b)(1)(A) [10 U.S.C. § 866(b)(1)(A)], UCMJ, filed after Congress amended Articles 66 and 69, UCMJ, effective 23 December 202[2]." 2025 CCA LEXIS 103, at *47. That Court went further in *Gray*, holding "that neither *Livak* nor *Moreno* are directly applicable to Appellant's case from sentencing to docketing with this court, as these cases considered post-trial processing delays for appeals filed before

Congress amended Articles 66 and 69, UCMJ." 2025 CCA LEXIS 122, at *15. That Court also added that "it is possible that an appellant could demonstrate a case-specific facially unreasonable delay outside of *Livak* and *Moreno*," triggering a due process analysis. *Id.* The 224-day period that it took the Government to produce a record of trial in this case—which involved a single specification tried by a military judge alone—would seem to constitute case-specific facially unreasonable delay. Appendix A at 2. Indeed, the limited record makes this a case in which post-trial processing should take significantly less than 150 days, as the Army Court of Criminal Appeals suggested in *Winfield*, 83 M.J. at 665. But without further guidance from this Court, it is not clear which of the varied analytical approaches should apply.

There are also changes to consideration of relief without a due process violation for which the lower courts need direction. The AFCCA indicated that it concluded relief was not appropriate here even in the absence of a due process violation. Appendix A at 14 (citing *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)). However, this Court recently held that "errors regarding post-trial delay

are now solely governed by Article 66(d)(2) [10 U.S.C. § 866(d)(2)]. Accordingly, *Tardif* and its progeny have been superseded by Article 66(d)(2)." *United States v. Valentin-Andino*, __ M.J. __, No. 24-0208, 2025 CAAF LEXIS 248, at *10 n.4 (C.A.A.F. Mar. 31, 2025). Thus, the cases the AFCCA cited for its analysis has been superseded by statute, but that Court has not begun applying the new statute to its analyses. Nor does it have a framework to apply this statute. This Court has an opportunity to fill that gap by granting this petition.

These differing approaches—especially the Army Court of Criminal Appeals' eschewal of any standard for presumptively unreasonable delay and the Air Force Court's eschewal of any such standard in non-automatic appeal cases—necessitate clarity for how delays should be assessed under the new post-trial processing procedures. *Winfield*, 83 M.J. at 665; *Boren*, 2025 CCA LEXIS 103, at *47; *Gray*, 2025 CCA LEXIS 122, at *15. This Court previously articulated clear standards for what constitutes facially unreasonable delay in post-trial processing. *Moreno*, 63 M.J. at 142. Those standards are now obsolete because of intervening changes in post-trial processing procedures, including convening authority action occurring earlier in the post-trial process and additional

processing the Government must complete before docketing. *Livak*, 80 M.J. at 633. Articulating new standards is necessary to fill the gap in post-*Moreno* jurisprudence. This Court should grant this petition to clarify what constitutes facially unreasonable delay in post-trial processing and to resolve a deep split among the Courts of Criminal Appeals.

B. The AFCCA erred in declining to grant relief.

The AFCCA found that the 224-day delay between sentencing and docketing was facially unreasonable because it "exceeds the 150-day threshold by 74 days." Appendix A at 13 (citing *Livak*, 80 M.J. at 633). Despite this, it still concluded that relief is not warranted. *Id.* at 14. A facially unreasonable delay triggers a due-process analysis using four factors identified in *Moreno*: "(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." 63 M.J. at 135 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). The four factors are balanced, and no single factor is necessary or sufficient to find a due process violation. *Id.* at 136 (citing *Barker*, 407 U.S. at 533).

Here, the AFCCA found that the first two factors both weighed in AB Cadavona's favor. Appendix A at 13–14. The length of the delay exceeded the standard by almost fifty percent, and many of the reasons for the delay given by the Government demonstrated inefficient preparation and review of the record of trial. *Id.* In particular, the Government took ninety-five days to prepare two versions of the record of trial and thirty days to review the record, even though this case only involved a single specification tried by a military judge alone. *Id.* at 2, 14. The AFCCA weighed the third factor against AB Cadavona because he did not assert his right to speedy appellate review until his initial brief, but it did not say how heavily it weighed this factor. *Id.* at 14. This Court has previously found that such circumstances weigh only slightly against the appellant because the government ultimately bears the obligation to ensure a timely review. *Moreno*, 63 M.J. at 138 (citing *United States v. Bodkins*, 60 M.J. 322, 323–24 (C.A.A.F. 2004)).

On the fourth factor, the AFFCA summarily dismissed AB Cadavona's assertions of prejudice, saying simply that it found they are "not persuasive." Appendix A at 14. This Court has recognized three interests in which prejudice from post-trial delays may appear: (1)

oppressive incarceration pending appeal, (2) anxiety and concern, and (3) impairment of the ability to present a defense at a rehearing. *Moreno*, 63 M.J. at 138–41. AB Cadavona experienced two types of prejudice within these categories: oppressive incarceration and particularized anxiety and concern. The post-trial delay ensured the AB Cadavona would remain confined by delaying his opportunity to seek appellate relief that could reduce his confinement. Indeed, the delay substantially increased the probability that he would complete his confinement before receiving appellate review, which ultimately came to fruition. *See* R. at 329 (sentencing AB Cadavona to be confined for 21 months). AB Cadavona also experienced particularized anxiety and concern. As he told the court-martial, he wanted to kill himself when he was previously in confinement, and ensuring he remained confined by delaying the post-trial processing could only further this acute distress. R. at 317. This prejudice should not have been so easily dismissed by the AFCCA and, combined with the first and second factors weighing in AB Cadavona's favor, warranted relief from the lower court.

This Court should grant this petition to recalibrate the lower court's perspective of when post-trial processing delay warrants relief. The

AFCCA has recognized "a systemic problem indicating institutional neglect" in post-trial processing and the preparation of records of trial. *United States v. Valentin-Andino*, No. ACM 40185 (f rev), 2024 CCA LEXIS 223, at *17–18 (A.F. Ct. Crim. App. June 7, 2024), *aff'd*, __ M.J. __, No. 24-0208/AF, 2025 CAAF LEXIS 248 (C.A.A.F. Mar. 31, 2025). But when presented with a case in which post-trial processing delay resulted from the Government's inefficient record preparation and significantly exceed the standard used by that court, it declined to grant any relief and largely ignored the prejudice caused by the delay. The delay here lacks a reasonable explanation and is further evidence of the systemic problem noted by the AFCCA, a problem that will persist until courts address it by granting relief. This Court should grant the petition, review this case, provide sorely needed guidance to military justice practitioners, and conclude that relief is warranted by the unreasonable delay in the post-trial processing.

II.

The Air Force Court of Criminal Appeals had jurisdiction under Article 66(d)(2), Uniform Code of Military Justice, and in light of United States v. Williams, 85 M.J. 121 (C.A.A.F. 2024), to provide appropriate relief for the erroneous firearm

prohibition on the indorsement to the entry of judgment.

Additional Facts

The first indorsement to the Entry of Judgment states that AB Cadavona is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, First Indorsement, December 6, 2022.

Standard of Review

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

Law and Analysis

A. The AFCCA had authority to grant appropriate relief for any demonstrated error in post-trial processing occurring after the entry of judgment.

The AFCCA did not explain its rejection of AB Cadavona's error. Appendix A at 2 (citing *United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987)). In a previous opinion, the AFCCA indicated that it only assessed its authority to review and act under Article 66(d)(1), UCMJ. *United States v. Vanzant*, 84 M.J. 671, 680–81 (A.F. Ct. Crim. App. 2024), *pet. granted*, __ M.J. __, No. 24-0182/AF, 2024 CAAF LEXIS 640 (C.A.A.F.

Oct. 17, 2024). Article 66(d)(1), UCMJ, provides, "In any case before the Court of Criminal Appeals under subsection (b), the *Court may act only with respect to the findings and sentence* as entered into the record under section 860c of this title ([A]rticle 60c)." 10 U.S.C. § 866(d)(1) (emphasis added). *Vanzant* reveals that the AFCCA is not considering any other basis for jurisdiction, such as Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). But Article 66(d)(2), UCMJ, applied at the time the firearm bar was noted in Air Force post-trial processing, as supported by this Court's analysis in *Williams*.

By order of the Secretary of the Air Force, the Judge Advocate General of the Air Force published Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* (Apr. 14, 2022) (Appendix B), which outlines the applicable procedures for Air Force post-trial processing, including the timing of the creation of the EOJ and the indorsement at issue. In the Air Force, "*after* the [EOJ] is signed by the military judge and returned to the servicing legal office, the [Staff Judge Advocate] signs and attaches to the [EOJ] a first indorsement, indicating whether . . . firearm prohibitions are triggered." DAFI 51-201, at ¶ 20.41 (emphasis added). Section 20I of DAFI 51-201

distinguishes the EOJ from the indorsement. *Compare* DAFI 51-201, at ¶ 20.40, *with* DAFI 51-201, at ¶ 20.41.

While the EOJ must include the statement of trial results (STR) and any "other information" required by the Secretary of the Air Force (R.C.M. 1111(b)), the operative firearm notification is not in the EOJ when it is signed by the military judge. *Compare Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *6, *with* DAFI 51-201, at ¶¶ 20.40.1, 29.33. Rather, the Secretary of the Air Force directs the Staff Judge Advocate to separately complete the indorsement with the 18 U.S.C. § 922 notification, which gets incorporated into the EOJ for "final disposition" after Article 60c, UCMJ, action. DAFI 51-201, at ¶¶ 20.41, 29.32, 29.33. The indorsement becomes a part of the EOJ, but it chronologically occurs after the military judge enters the judgment into the record. Even then, it is still a separate document appended to the EOJ.

In *Williams*, this Court considered the Army's post-trial processing procedure where the STR, containing the only firearm bar, was completed by the military judge and incorporated into the entry of judgment before the military judge signed the judgment. *Williams*, 85 M.J. at 124. Under those circumstances, this Court held that the plain

language of Article 66(d)(2), UCMJ, prohibited the Army Court of Criminal Appeals from changing the STR firearm bar notation—since that notation came before action under Article 60c, UCMJ. *Id.* at 126. However, the situation here is different. In the Air Force, the controlling firearm disposition notice occurs "after the judgment was entered into the record," in accordance with the plain language of Article 66(d)(2), UCMJ. Consequently, based on the Air Force's unique post-trial processing, the AFCCA has authority to review this post-trial processing error under Article 66(d)(2), UCMJ, if the error is demonstrated by the accused.

B. Unlike the appellant in *Williams*, Airman Basic Cadavona meets the factual predicate to trigger the AFCCA's review under Article 66(d)(2), UCMJ.

When analyzing whether Article 66(d)(2), UCMJ, authorized the Army Court of Criminal Appeals to modify the STR firearm notation in *Williams*, this Court relied on the plain language of the statute. *Williams*, 85 M.J. at 126. Using the same analysis, here, AB Cadavona's erroneous and unconstitutional firearm prohibition falls squarely within the AFCCA's review authority under Article 66(d)(2), UCMJ.

First, "the accused demonstrate[d] error." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). In his brief to the AFCCA, AB Cadavona demonstrated he was erroneously deprived of his right to bear arms pursuant to *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022). Br. on Behalf of Appellant, Aug. 13, 2024, at 22–27. Unlike in *Williams*, where no such error was raised, AB Cadavona directly challenged the firearm prohibition, and the AFCCA could have resolved the error by analyzing whether 18 U.S.C. § 922 applied to AB Cadavona. *Id.*

In raising this error, AB Cadavona broadly framed the AFCCA's jurisdiction under Article 66, UCMJ, and sought relief through correction of both the EOJ and the STR, the latter of which was similar to the approach in *Williams*. *Williams*, 85 M.J. at 126. Throughout his briefing, AB Cadavona made references to the EOJ, which included the indorsement containing the firearms prohibition. Br. on Behalf of Appellant at 22, 26–27. While the AFCCA could not correct the erroneous firearms bar associated with the STR, it could have corrected the erroneous firearm notation on the indorsement to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, 85 M.J. at 127; *see supra* at 14–17 (discussing timing in detail).

In fact, AB Cadavona also presented this issue as an error on the First Indorsement to the EOJ, and part of his requested relief was to correct the EOJ. Br. on Behalf of Appellant at 22, 26–27. The issue of jurisdiction has now been clarified, and unlike the appellant in *Williams*, AB Cadavona demonstrated an error that the AFCCA had authority to consider under Article 66(d)(2), UCMJ. *See United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) ("An appellant gets the benefit of changes to the law . . . .").

Second, the error on the indorsement that deprived AB Cadavona of his constitutional right to bear arms occurred in the "processing of the court-martial after the judgment was entered into the record under section 860c . . . ([A]rticle 60c)." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). Here, the First Indorsement was completed after the military judge signed the EOJ, i.e., *after* the military judge entered the judgment into the record under Article 60c, UCMJ. DAFI 51-201, at ¶ 20.41. Nothing in the record proves otherwise, and there is no indication that the Government violated its own regulations. Therefore—unlike how the issue was factually raised in *Williams*, i.e., prior to the entry of

judgment—here, the error raised occurred after the entry of judgment, satisfying the final triggering criterion under Article 66(d)(2), UCMJ.

Consequently, the AFCCA had jurisdiction under Article 66(d)(2), UCMJ, to decide whether AB Cadavona was deprived of his constitutional right to bear arms by virtue of the Air Force's post-trial processing.

III.

The United States Court of Appeals for the Armed Forces has jurisdiction and authority to direct the modification of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law and Analysis

The AFCCA effectively affirmed the error in the EOJ by concluding this issue "does not require discussion or warrant relief." Appendix A at 2. Therefore, this Court has jurisdiction to review and act upon the error in the EOJ under Article 67(c)(1)(B), UCMJ, 10 U.S.C. § 867(c)(1)(B)

(authorizing this Court to act on a judgment by a military judge affirmed by the AFCCA).

The Court has granted review of this question in *Johnson*, 2024 CAAF LEXIS 561. As in that case, resolution of this predicate issue is necessary to reach the ultimate issue of whether the firearms prohibition under 18 U.S.C. § 922 is constitutional as applied to AB Cadavona. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

IV.

Review by the United States Court of Appeals for the Armed Forces of the 18 U.S.C. § 922 prohibition noted on the indorsement to the entry of judgment would satisfy this Court's prudential case or controversy doctrine.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law and Analysis

The Court has granted review of this question in *Johnson*, 2024 CAAF LEXIS 561. As in that case, resolution of this predicate issue is necessary to reach the ultimate issue of whether the firearms prohibition

under 18 U.S.C. § 922 is constitutional as applied to AB Cadavona. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

V.

The Government cannot prove that 18 U.S.C. § 922 is constitutional as applied to Airman Basic Cadavona.

Standard of Review

This Court reviews questions of jurisdiction, law, and statutory interpretation de novo. *Hale*, 78 M.J. at 270; *Wilson*, 76 M.J. at 6.

Law and Analysis

Recent Supreme Court precedent changed the framework for analyzing restrictions on a person's right to bear firearms. *See Bruen*, 597 U.S. at 22 (assessing lawfulness of handgun ban "by scrutinizing whether it comported with history and tradition"). This new precedent calls into question the constitutionality of firearms bans for those, like AB Cadavona, who have been convicted of non-violent offenses. The historical tradition took a narrower view of firearms regulation for criminal acts than that reflected in Section 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, 704 (quoting 1926 Uniform Firearms Act §§ 1, 4). 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 (quoting 1926 Uniform Firearms Act § 1).

The offense of which AB Cadavona was convicted—possession of child pornography—falls short of these "crimes of violence." It was not until 1968 that Congress "banned possession and extended the prohibition on receipt to include any firearm that ever had traveled in interstate commerce." *Id.* at 698. "[I]t is difficult to see the justification

for the complete lifetime ban for all felons that federal law has imposed only since 1968." *Id.* at 735.

In the midst of these questions, this Court has recently granted review of the constitutionality of firearms prohibitions as applied to other appellants. *E.g., Johnson*, 2024 CAAF LEXIS 561; *United States v. Donley*, No. 24-0209/AF, 2024 CAAF LEXIS 674 (C.A.A.F. Oct. 29, 2024); *United States v. Zhong*, No. 25-0011/AF, 2024 CAAF LEXIS 812 (C.A.A.F. Dec. 16, 2024). This positions the Court to potentially resolve questions about the application of 18 U.S.C. § 922, and the fate of AB Cadavona's rights to bear firearms should be decided in accordance with the Court's forthcoming opinion.

AB Cadavona faces undue prejudice: a lifetime firearms ban for a *non-violent* crime. This disability goes against the history and tradition of firearm regulation in this country. *See Bruen*, 597 U.S. at 24. AB Cadavona's petition should be granted to review the constitutionality of this prohibition because, with this Court's review of the issue outstanding, it is impossible to fairly resolve AB Cadavona's challenge.

Conclusion

AB Cadavona respectfully requests that this Court grant his petition for review.

Respectfully Submitted,

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and electronically served on the Air Force Government Trial and Appellate Operations Division at AF.JAJG.AFLOA.Filng.Workflow@us.af.mil on April 2, 2025.

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Appendix A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40476

UNITED STATES
Appellee

v.

Ian J. B. CADAVONA
Airman Basic (E-1), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 16 January 2025

Military Judge: Matthew P. Stoffel (arraignment, motions); Christopher D. James (trial).[1]

Sentence: Sentence adjudged 27 October 2022 by GCM convened at Kadena Air Base, Japan. Sentence entered by military judge on 6 December 2022: Dishonorable discharge, 21 months' confinement, and a reprimand.

For Appellant: Major Frederick J. Johnson, USAF.

For Appellee: Colonel Steven R. Kaufman, USAF; Lieutenant Colonel J. Peter Ferrell, USAF; Mary Ellen Payne, Esquire.

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

Judge DOUGLAS delivered the opinion of the court, in which Senior Judge ANNEXSTAD and Judge PERCLE joined.

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[1] The trial judge for the arraignment and motions hearing stated on the record that Article 30a, Uniform Code of Military Justice, 10 U.S.C. § 830a, proceedings had taken place on 5 November 2021 and on 18 November 2022. However, the record does not contain any information about the Article 30a, UCMJ, judge, or any documentation related to the proceedings. Appellant does not assign error, and we find none as neither Rules for Courts-Martial 1112(b) nor 1112(f) require it.

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

DOUGLAS, Judge:

A general court-martial composed of a military judge convicted Appellant, contrary to his pleas, of one specification[2] of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 934.[3] The military judge sentenced Appellant to a dishonorable discharge, 21 months' confinement, and a reprimand. The convening authority took no action on the findings and approved the sentence in its entirety.[4]

Appellant raises four issues on appeal which we have reworded: whether (1) the prosecution of this offense constitutes plain error because the Government knew about the evidence of the underlying misconduct prior to Appellant's first court-martial; (2) Appellant was denied effective assistance of counsel when his trial defense counsel withdrew an objection to a change in the specification of the charge; (3) a 224-day appellate docketing delay warrants relief; and (4) 18 U.S.C. § 922 is constitutional as applied in Appellant's case. We also considered an additional issue, not raised by Appellant, that was identified during this court's Article 66(d), UCMJ, 10 U.S.C. § 866(d), review: (5) whether Appellant is entitled to relief for facially unreasonable appellate delay in accordance with *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006), or *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002).

We have carefully considered Appellant's contention in issue (4) and find that it does not require discussion or warrant 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 the sentence.

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[2] The military judge merged two specifications—both alleging possession of child pornography but during different timeframes—into one specification. *See* Section II.B. *infra*.

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

[4] The convening authority referred two specifications of possession of child pornography, alleging possession occurred both before 1 January 2019 and on or after 1 January 2019. Pursuant to R.C.M. 902A, and before arraignment, Appellant elected sentencing rules in effect on 1 January 2019. This election remained in effect after the trial judge merged the two offenses for findings purposes.

I. BACKGROUND

Appellant joined the Air Force in 2016 and was assigned to Kadena Air Base (AB), Japan. By late 2019, law enforcement was investigating him for indecent recording and broadcasting of an adult. As part of that investigation, the Air Force Office of Special Investigations (OSI) searched and seized Appellant's electronic devices. Unrelated to the indecent recording and broadcasting allegations, OSI agents found suspected child exploitive material (CEM). They obtained additional search warrants, including one for Appellant's iCloud account. This account was used as back-up storage for one or more of Appellant's devices. In Appellant's iCloud account, OSI discovered dozens of videos of child pornography, which became the basis for the Article 134, UCMJ, conviction.

II. DISCUSSION

A. Failure to Try All Known Charges at a Single Court-Martial

For the first time, on appeal, Appellant asserts the Government intentionally prosecuted him in successive courts-martial when it knew of all offenses before the start of the first court-martial. As evidence of this argument, Appellant directs us primarily to the OSI preliminary report, dated 8 September 2020, which lists the discovered child pornography videos, with names and source paths. The report explains that the videos were contained in the Apple search return for Appellant's iCloud account. The summary of the findings stated it was a preliminary analysis and that the videos were sent to the National Center for Missing and Exploited Children (NCMEC) portal for further analysis. As a consequence of being tried in two successive courts-martial, Appellant argues, he was prejudiced because the Government punished him unnecessarily by forcing consecutive sentences. The Government disagrees with Appellant's contentions and submits that it was not prepared to prove the Article 134, UCMJ, offense of child pornography possession at the time of the first court-martial. We find the Appellant has not met his burden on this issue we and find no error.

1. Additional Background

Investigation into Appellant began in late 2019 and continued into 2020. During that time, Appellant was investigated for indecent recording and broadcasting. On 25 March 2021, at Kadena AB, he was found guilty, contrary to his pleas, at a general court-martial, comprised of a military judge alone, of two specifications of indecent recording and broadcasting in violation of Article 120c, UCMJ, 10 U.S.C. § 920c, and one specification of obstruction of justice in violation of Article 131b, UCMJ, 10 U.S.C. § 131b. He was sentenced to a bad-conduct discharge, seven months' confinement, and reduction to the grade of E-1. On 23 September 2022, the Air Force Court of Criminal Appeals affirmed

the findings of guilty and the sentence. *See United States v. Cadavona*, No. ACM 40129, 2022 CCA LEXIS 545, at *15 (A.F. Ct. Crim. App. 23 Sep. 2022) (unpub. op.), *rev. denied*, 83 M.J. 249 (C.A.A.F. 2023).

After release from confinement, Appellant was prosecuted at Kadena AB, for possession of child pornography. On 27 October 2022, he was found guilty at a general court-martial of the one specification before this court: possession of child pornography in violation of Article 134, UCMJ. He was sentenced to a dishonorable discharge, 21 months' confinement, and a reprimand.

During the presentencing phase of his second court-martial, Appellant, in his unsworn statement, explained, "I have known a second court-martial is [sic] coming since before my first court went to trial." Appellant's trial defense counsel, during presentencing argument, repeated Appellant's assertion, "He already knew that this court-martial was coming before he even went to trial the first time." Appellant pleaded not guilty to a charge of violating Article 134, UCMJ, at this trial. He did not object or move to dismiss for any reason.

2. Law

a. Standard of Review

The lack of a motion or objection at trial forfeits the issue, absent waiver. Rule for Courts-Martial (R.C.M.) 905(e). Forfeited issues are reviewed for plain error. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017) (citing *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009)). For this court to grant relief under a plain error standard of review, Appellant bears the burden of establishing: "(1) there was error; (2) the error was clear and obvious; and (3) the error materially prejudiced a substantial right." *United States v. Gomez*, 76 M.J. 76, 79 (C.A.A.F. 2017) (citing *United States v. Knapp*, 73 M.J. 33, 36 (C.A.A.F. 2014)). "As all three prongs must be satisfied . . . the failure to establish any one of the prongs is fatal to a plain error claim." *Id.* (omission in original) (quoting *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)).

b. Joinder

"The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), pt. I, Preamble, ¶ 3.

"Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under [Chapter 47, UCMJ,] triable in courts-martial . . . may be prescribed by the President by regulations which shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States . . . ." Article 36(a), UCMJ, 10 U.S.C. § 836(a).

"Charges and specifications alleging all known offenses by an accused *may* be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person." R.C.M. 307(c)(4) (emphasis added). "Ordinarily, all known charges should be tried at a single court-martial." R.C.M. 906(b)(10), Discussion.

> In the discretion of the convening authority, two or more offenses charged against an accused *may* be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless [of] whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without the consent of the accused.

R.C.M. 601(e)(2) (emphasis added). "The military justice system encourages the joinder of all known offenses at one trial." *United States v. Simpson*, 56 M.J. 462, 464 (C.A.A.F. 2002) (footnote omitted) (citing R.C.M. 601(e)(2), *Manual for Courts-Martial*, *United States* (2000 ed.)). This preference does not create an entitlement. *See United States v. Booker*, 62 M.J. 703, 707 (A.F. Ct. Crim. App. 2006).

Article 33, UCMJ, 10 U.S.C. § 833, addresses non-binding guidance for decisionmakers when it comes to making charging decisions:

> The President shall direct the Secretary of Defense to issue . . . non-binding guidance regarding factors that commanders, convening authorities, staff judge advocates, and judge advocates should take into account when exercising their duties with respect to disposition of charges and specifications in the interest of justice and discipline . . . .

This policy of the non-binding disposition guidance outlines several factors for decision makers to consider "and to further promote the purpose of military law." *See MCM*, App. 2.1, ¶ 1.1.a, at A2.1-1 (where this appendix supplements the *MCM* and provides disposition factors for decision makers to consider, "but does not require a particular disposition decision or other action in any given case").

3. Analysis

Appellant advances the argument that he is entitled to joinder of offenses at one court-martial. We analyze this issue for plain error, because Appellant did not object or move to dismiss on the basis of having been tried for other

offenses while this offense was known by the Government. According to his unsworn statement in his second presentencing hearing, Appellant knew he was under investigation for possession of child pornography before his first court-martial. If he had wanted to be tried for possession of child pornography videos at the time when he was tried for indecent recording and broadcasting, the best time to articulate that perspective would have been prior to arraignment at his first trial. But that trial result and the appellate review are now final and are not before us.

Here, the Government chose not to prefer or refer all known offenses to the same court-martial. *See* R.C.M. 307(c)(4); R.C.M. 601(e)(2). From a review of the record, it appears the Government had not completed its investigation into the Article 134, UCMJ, offense at the time other charges were referred to Appellant's first court-martial. In order to convict Appellant of possession of child pornography, as charged in this case, the Government was required to prove that at or near Kadena AB, Japan, between 17 February 2017 and on or about 31 March 2020: (1) Appellant knowingly and wrongfully possessed child pornography; and (2) under the circumstances, the conduct was of a nature to bring discredit upon the armed forces. *See* 10 U.S.C. § 134; *MCM*, pt. IV, ¶ 95.b.(1). Appellant may not be convicted of possession of child pornography "if he was not aware that the [videos] were of minors, or what appeared to be minors, engaging in sexually explicit conduct. Awareness may be inferred from circumstantial evidence, such as the name of a computer file or folder . . . and the number of [videos] possessed." *MCM*, pt. IV, ¶ 95.c.(5). Further, "[A]ny facts or circumstances that show that a visual depiction of child pornography was unintentionally or inadvertently acquired are relevant to wrongfulness . . . ." *MCM*, pt. IV, ¶ 95.c.(12). The Government knew of the potential offense of possession of child pornography, but, evidently, was not prepared to prove at that time that Appellant knew that he possessed child pornography and knew it was wrongful beyond a reasonable doubt.

Furthermore, the known offense of possession of child pornography videos was not an offense that was substantially one transaction with the convicted offenses of indecent recording and broadcasting of a specific adult in Appellant's first court-marital. *See* R.C.M. 307(c)(4). Appellant's possession of child pornography videos was discovered as a result of the investigation into allegations of indecent recording of an adult, but the child pornography videos were independent from that original investigation.

The purposes of military justice and discipline include promoting efficiency and effectiveness. *MCM*, Pt. I, Preamble, ¶ 3. The Government could have waited until the investigation into the possession of child pornography videos was completed before referring all charges to the same court-martial. *See Simpson*, 56 M.J. at 464. However, there is no requirement the Government

do so. *See Booker*, 62 M.J. at 707; *see also* R.C.M. 307(c)(4) (stating "[c]harges and specifications alleging all known offenses by an accused *may* be preferred at the same time" (emphasis added)). Further, the record before us does not indicate whether "all necessary procedural requirements concerning the additional charges [had] been complied with" for joinder of offenses. R.C.M. 601(e)(2). Finally, we do not find evidence in the record indicating the Government intentionally delayed prosecuting Appellant for the purpose of conducting a separate trial in order to increase its chances of obtaining a greater sentence.

Therefore, we do not find the Government plainly erred in this case by referring the Article 134, UCMJ, charge to a court-martial separate from the offenses tried at his previous court-martial. Thus, Appellant failed to meet the first prong of the plain error analysis. *Gomez*, 76 M.J. at 79 (citation omitted). This failure is fatal to the remainder of his plain error claim. *Id.*

B. Ineffective Assistance of Counsel

Appellant asserts his trial defense counsel were ineffective when they withdrew an objection to the Government striking the words "within his iCloud account" from the merged specification. The Government disagrees. After thoroughly reviewing this issue anew, we find Appellant has not met his burden. Appellant's trial defense counsel were not ineffective.

1. Additional Background

Initially, Appellant was charged with two specifications of possession of videos of child pornography in violation of Article 134, UCMJ. The primary difference between the two specifications was the charged timeframe. The first specification (Specification 1) included possession "between on or about 17 February 2017 and on or about 31 December 2018." The second specification (Specification 2) included possession "between on or about 1 January 2019 and on or about 22 October 2019." After arraignment, but prior to Appellant's pleas, the trial defense counsel moved to merge the specifications for findings.[5] The Government did not oppose. The trial judge then granted the defense motion for merger for purposes of findings. At this point, the merged specification incorporated the entire charged timeframe from both Specifications 1 and 2.

The Government then moved to make four changes to the merged specification. Of the four proposed changes, the Defense had no objection to three. First, the Government moved to strike "on or about" before the first date of the charged timeframe, 17 February 2017. Second, the Government moved to

[5] The Government's bill of particulars identified that the same evidence would be used to prove up both specifications of violating Article 134, UCMJ.

strike the end date, "22 October 2019," and replace it with a new end date, 31 March 2020. Third, the Government moved to make singular the word "minors" to instead reflect the words "a minor, or what appears to be a minor." With no objection from the trial defense counsel, the military judge granted these government changes to the merged specification.

The Government's fourth requested change was to strike through the words "within his iCloud account." The Defense objected on the basis that this change was not a minor change. The following exchange then occurred between the military judge (MJ) and the circuit defense counsel (CDC).

> MJ: Okay. Let me ask you a couple of questions.
>
> CDC: Yes, Your Honor.
>
> MJ: First question, do you agree, if I was to agree with you, that the [G]overnment could then come back and recharge your client without that language and it would not be double jeopardy,[6] because as it is right now it's specific as far as it's within the iCloud account. So[,] I have no clue what's going to happen in this court, but let's say for whatever reason[,] I was to find your client not guilty. They have chosen to charge him specifically ["]within his iCloud account.["] If they chose to charge him without that[,] what is your position on that? And do you need a moment? And do you need a recess?

After a short recess, the parties reconvened and the Defense answered the trial judge's questions as follows:

> CDC: Defense is not objecting -- withdraws its objection to the proposed change by the [G]overnment.

Based on Appellant's claim that his trial defense counsel were ineffective when they did not object to the change in the specification, and in response to the Government's motion to compel declarations from trial defense counsel, this court, on 29 August 2024, ordered trial defense counsel to provide declarations responsive to this claim. On 20 September 2024, the court attached two declarations to the record.[7] Major (Maj) SH was the circuit defense counsel and

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

[7] Statute directs the court to review "the entire record" when fulfilling its duties. Article 66(d)(1), UCMJ; 10 U.S.C. § 866(d)(1). Our superior court has recognized the court's ability to supplement the record in resolving issues raised in the record, but not fully resolvable, including claims of ineffective assistance of counsel (IAC). *United States v. Jessie*, 79 M.J. 437, 445 (C.A.A.F. 2020). We consider the trial defense counsel's declarations to help us resolve Appellant's claims of IAC, accordingly.

Maj EJ was the area defense counsel. Both represented Appellant at his second court-martial. Their declarations are substantively the same and explain the strategic reasoning behind their decision to withdraw the objection.

Maj SH explained that the withdrawal of the objection was made after full discussion with Appellant, and with his consent. The location of the files did not change the theory of their case, which was that the possession was unknowing. Further, the withdrawal "ensured finality." If acquitted, Appellant's acquittal "would increase the likelihood that double jeopardy would fully attach to the entirety of the evidence in the possession of the United States." Finally, Maj SH explained, due to the consultation with their confidential expert consultant, the trial defense team was aware of evidence the Government possessed which was "inflammatory and extremely inculpatory." If the Government had more time to prepare, and potentially charge this offense again, "a guilty finding was all but a foregone conclusion with greater sentencing exposure." Maj EJ's declaration was consistent with Maj SH's. She added, "Since this was already the [G]overnment's second prosecution of [Appellant], there appeared to be a risk that the [G]overnment could try again under a different theory if it did not like the findings or sentencing outcome of the court-martial."

2. Law

a. Standard of Review

We review claims of ineffective assistance of counsel (IAC) de novo. *United States v. Palik*, 84 M.J. 284, 288 (C.A.A.F. 2024) (citing *United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007)).

b. Ineffective Assistance of Counsel

To prevail on a claim of IAC, Appellant must demonstrate: "(1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *Id.* (quoting *United States v. Captain*, 75 M.J. 99, 101 (C.A.A.F. 2016)). Appellant must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

We use a three-part test to analyze whether a claim of IAC has overcome this presumption of competence:

> (1) [Is] Appellant's allegation[ ] true; if so, "is there a reasonable explanation for counsel's actions;"
>
> (2) If the allegation[is] true, did defense counsel's level of advocacy "fall measurably below the performance . . . [ordinarily expected] of fallible lawyers?" [and]

> (3) If defense counsel [were] ineffective, is there a "reasonable probability that, absent the errors," there would have been a different result?

Palik, 84 M.J. at 289 (omission in original) (quoting *United States v. Gooch*, 69 M.J. 353, 362 (C.A.A.F. 2011)) (additional citation omitted).

c. Changes to Charges and Specifications

"A major change is one that adds a party, an offense, or a substantial matter not fairly included in the preferred charge or specification, or that is likely to mislead the accused as to the offense charged." R.C.M. 603(b)(1). "A minor change in a charge or specification is any change other than a major change." R.C.M. 603(b)(2). "Minor changes include those necessary to correct . . . slight errors." R.C.M. 603(b)(2), Discussion.

"After referral, a major change may not be made over the objection of the accused unless the charge or specification is withdrawn, amended, and referred anew." R.C.M. 603(d)(1). After arraignment, the trial judge "may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced." R.C.M. 603(e).

In one case, our superior court found a major change where "it altered the means of committing the offense and that change was not fairly included in the original specification." *United States v. Reese*, 76 M.J. 297, 300 (C.A.A.F. 2017). However, under the right circumstances, "changing the means by which a crime is accomplished may also constitute a slight error." *Id.* (citation omitted)

3. Analysis

Applying the three-part test to Appellant's assignment of error, we start with the first part: is Appellant's allegation true? That is, did his trial defense counsel withdraw an objection to the Government's striking of the words "within his iCloud account?" The record reflects Appellant's trial defense counsel did, in fact, withdraw an objection to the Government's proposed change to the merged specification before arraignment. Trial defense counsel's objection was articulated as an objection based upon the theory that the Government's proposed edit was a major change. Without ruling on the Government's proposed edit, or trial defense counsel's objection, the trial judge asked the trial defense counsel a question. The trial judge offered that if he agreed with the Defense, and sustained the objection, what did trial defense counsel believe might be the Government's next move? Instead of specifically answering that question, the defense team requested a recess, which the trial judge granted. Upon reconvening, the trial defense counsel withdrew their objection.

Finding the allegation is in fact, true, we turn to the remainder of the first part: is there a reasonable explanation for counsel's actions? We consider the attached trial defense counsel declarations because the record does not expose trial defense counsel's rationale behind their decision. The declarations of Appellant's trial defense counsel explain their strategic decisions behind the withdrawal of their objection to this change by the Government. First, they fully discussed this issue with Appellant, and ensured he understood their advice, and consented to the withdrawal of the objection. Second, they explained that whether the Government was required to prove the location of the evidence, within the iCloud account, did not impede their theory of the case, which was to attack the Government's ability to prove an essential element of the offense: knowing and wrongful possession. Third, and finally, they explained that they were aware the Government possessed additional evidence that would have proven challenging to Appellant's theory of defense that he did not know about the child pornography possession. Had the Government been aware of this additional evidence they already had, explained trial defense counsel, the Government could have and probably would have charged him again. This appears to have been a calculated risk assessment they, and Appellant, believed was in Appellant's favor. His trial defense counsel's strategic decision has multiple reasonable explanations. We find the first part of the three-part test is met, in counsel's favor.

Concluding the first part is met, subsequent analysis is not required. Nonetheless, we address the second part of the three-part test: if Appellant's allegation is true, as we have determined, did trial defense counsel's level of advocacy fall measurably below the performance ordinarily expected of fallible lawyers? Quite the opposite. We find the calculated risk assessment counsel made, with the advice and consent of their client, was intended to protect Appellant from potential future prosecution, compounding evidence of guilt and sentencing. Regardless of whether double jeopardy would have attached, we find the trial defense counsel's level of advocacy was exactly where it needed to be: zealously advocating for their client's best interests. They did not fall below the performance ordinarily expected of competent defense counsel. We find the second part of the three-part test is also satisfied, in trial defense counsel's favor.

We conclude counsel's performance was reasonable and fell within the performance ordinarily expected of trial defense counsel. *See Palik*, 84 M.J. at 289. Because Appellant has not met his burden on the first two parts of the three-part test, we need not address the third part, prejudice.[8] Because we do not

[8] Whether the Government's motion to strike through the words "within his iCloud account" was a major or minor change, was not determined at the trial level. Whether this change altered the means of committing the offense is not before us.

find trial defense counsel erred, we do not consider prejudice. Trial defense counsel were not ineffective. *Id.* at 288.

C. Delay in Forwarding Appellant's Record to this Court

Appellant seeks relief due to the Government's "unexplained" delay in forwarding the record of trial (ROT) to this court by asking us to reduce his dishonorable discharge to a bad-conduct discharge. The Government disagrees the ROT processing delay is unexplained or was delayed such that relief should be granted. We find that no relief is warranted.

1. Additional Background

Appellant's charge of violating Article 134, UCMJ, was referred to a general court-martial on 22 March 2022. Appellant's sentence was announced on 27 October 2022. His appeal was docketed with this court on 8 June 2023. Consequently, 224 days transpired from sentencing to docketing.

On 17 November 2022, the convening authority signed the decision on action memorandum. On 6 December 2022, the trial judge signed the entry of judgment. On 4 January 2023, the court reporter certified the record of trial (ROT). On 22 March 2023, Appellant was served the ROT.

On 15 October 2024, the court granted the Government's Motion to Attach Declarations responsive to Appellant's claim of an "unexplained" docketing delay. The court attached two declarations, one from Captain (Capt) JH, the Chief of Legal Operations, assigned to the 18th Wing legal office (18 WG/JA), and one from Maj KB, the Chief of Military Justice, assigned to the 5th Air Force legal office (5 AF/JA) advising the general court-martial convening authority.[9] The declaration from 18 WG/JA included a chronology from sentencing to docketing.

Capt JH declared the assembly of the ROT took place between 5 January 2023 and 10 April 2023, which was 95 days. Initially, 18 WG/JA was creating a hardcopy ROT, but were then instructed to assemble an electronic ROT, which necessitated starting a new process. The office also spent a portion of this time attempting to obtain two sealed exhibits from OSI. Although 18 WG/JA was instructed to create an electronic ROT, the 5 AF/JA wanted a hard copy version for their quality review, which 18 WG/JA provided.

In her declaration, Maj KB explained that the ROT was forwarded by mail to 5 AF/JA on 10 April 2023 and then shipped back to the installation on 4 May 2023. 18 WG/JA mailed the ROT on 9 May 2023 to the Appellate Records

[9] We consider the Government's declarations to help us resolve Appellant's claim of docketing delay, which is not fully resolvable by the record. *See Jessie*, 79 M.J. at 445.

section of the Department of the Air Force's Military Justice Law and Policy division, located at Joint Base Andrews, Maryland. Appellate Records received it on 31 May 2023, conducted their review, and forwarded the ROT to the court on 8 June 2023.

2. Law

We review "de novo whether an appellant's due process rights are violated because of post-trial delay." *United States v. Livak*, 80 M.J. 631, 633 (A.F. Ct. Crim. App. 2020) (citing *Moreno*, 63 M.J. at 135).

Livak established an aggregate sentence-to-docketing standard threshold of 150 days for facially unreasonable delay in cases like Appellant's, that were referred to trial on or after 1 January 2019. *Id.* (citing *Moreno*, 63 M.J. at 142). This threshold "appropriately protects an appellant's due process right to timely post-trial . . . review and is consistent with our superior court's holding in *Moreno*." *Id.*

Moreno applied four factors to consider whether there was a due process violation: "(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." *Moreno*, 63 M.J. at 135 (citations omitted). Prejudice stems from three interests: (1) "prevention of oppressive incarceration pending appeal;" (2) "minimization of anxiety and concern;" and (3) impairment of the ability to present a defense at a rehearing. *Id.* at 138–39 (citations omitted).

Where an appellant has not shown prejudice from the delay, we cannot find a 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).

3. Analysis

We have applied the *Livak* standard in Appellant's case de novo. *Livak*, 80 M.J. at 633. The *Livak* standard is one part of the total *Moreno* standard. If a case does not make the *Livak* aggregate sentence-to-docketing threshold of 150 days, this period constitutes a facially unreasonable post-trial delay. *Id.*

We considered the four factors identified in *Moreno*. First, we find there is a delay that exceeds the 150-day threshold by 74 days, which weighs in Appellant's favor.

Second, the reasons for the delay are varied. The convening authority's decision on action memorandum was signed 28 days after sentencing. The court reporter certified the record of trial 68 days after sentencing. Appellant received the ROT 146 days after sentencing. This processing is efficient and in line with the 150-day sentencing-to-docketing threshold. However, the

Government's declarations and chronology indicate 95 days were taken to assemble two versions of the ROT, a hard copy and an electronic copy. They also indicate that 5 AF/JA performed a review of the hard copy after it was mailed to them. After taking almost 30 days to perform the review, they mailed it back to 18 WG/JA. After making the requisite corrections, 18 WG/JA mailed the ROT to the Appellate Records section. This portion of the timeline could have been more efficient. We find it weighs in Appellant's favor.

Third, not until Appellant's initial brief to this court does he assert timely *Livak* review, which weighs against him. His argument for prejudice is, in part, predicated on his first assignment of error, that he was unnecessarily prosecuted in a second court-martial, foreclosing the possibility of concurrent confinement terms. Appellant also advocates particularized anxiety and concern in his brief, by pointing to his unsworn statement at trial. These arguments are not persuasive, and weigh against Appellant.

On balance, we do not find a due process violation. *Livak*, 80 M.J. at 633. Further, we do not find the delay egregious. *Toohey*, 63 M.J. at 362.

Recognizing our authority under Article 66(d), UCMJ, 10 U.S.C. § 866(d), 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 224 (citation omitted). After considering the factors enumerated in *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), we conclude it is not.

D. Timeliness of Appellate Review

1. Law

"[C]onvicted service members have a due process right to timely review and appeal of courts-martial convictions." *Moreno*, 63 M.J. at 135 (citing *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37–38 (C.A.A.F. 2003)). Whether an appellant has been deprived of his due process right to speedy post-trial and appellate review, and whether constitutional error is harmless beyond a reasonable doubt, are questions of law we review de novo. *United States v. Arriaga*, 70 M.J. 51, 56 (C.A.A.F. 2011) (citing *Moreno*, 63 M.J. at 135).

A presumption of unreasonable delay arises when appellate review is not completed, and a decision is not rendered within 18 months of the case being docketed. *Moreno*, 63 M.J. at 142. A presumptively unreasonable delay triggers an analysis of 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." *Moreno*, 63 M.J. at 135 (additional citations omitted). *Moreno* identified three

types of prejudice arising from post-trial processing delay: (1) oppressive incarceration; (2) anxiety and concern; and (3) impairment of a convicted person's grounds for appeal and ability to present a defense at a rehearing. *Id.* at 138–39 (citations omitted).

"We analyze each factor and make a determination as to whether that factor favors the Government or the [A]ppellant." *Id.* at 136 (citation omitted). Then, we balance our analysis of the factors to determine whether a due process violation occurred. *Id.* (citing *Barker*, 407 U.S. at 533 ("Courts must still engage in a difficult and sensitive balancing process.")). "No single factor is required for finding a due process violation and the absence of a given factor will not prevent such a finding." *Id.* (citation omitted). However, where an appellant has not shown 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." *Toohey*, 63 M.J. at 362.

"[A] Court of Criminal Appeals has authority under Article 66[, UCMJ, 10 U.S.C. § 866,] to grant relief for excessive post-trial delay without a showing of 'actual prejudice' within the meaning of Article 59(a), [UCMJ, 10 U.S.C. § 859(a),] if it deems relief appropriate under the circumstances." *Tardif*, 57 M.J. at 224 (citation omitted).

The following factors are to be considered to determine if relief under *Tardif* is appropriate:

> 1. How long did the delay exceed the standards set forth in [*Moreno*]?
>
> 2. What reasons, if any, has the government set forth for the delay? Is there any evidence of bad faith or gross indifference to the overall post-trial processing of this case?
>
> 3. Keeping in mind that our goal under *Tardif* is not to analyze for prejudice, is there nonetheless some evidence of harm (either to the appellant or institutionally) caused by the delay?
>
> 4. Has the delay lessened the disciplinary effect of any particular aspect of the sentence, and is relief consistent with the dual goals of justice and good order and discipline?
>
> 5. Is there any evidence of institutional neglect concerning timely post-trial processing, either across the service or at a particular installation?
>
> 6. Given the passage of time, can this court provide meaningful relief in this particular situation?

United States v. Gay, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015) (citations omitted), *aff'd*, 75 M.J. 264 (C.A.A.F. 2016). In consideration of the above factors, "no single factor [is] dispositive, and a given case may reveal other appropriate considerations for this court in deciding whether post-trial delay has rendered an appellant's sentence inappropriate." *Id.* (footnote omitted).

2. Analysis

Appellant's case was docketed with the court on 8 June 2023. The delay in rendering this decision after 8 December 2024 is presumptively unreasonable. The reasons for the delay include the time required for Appellant to file his brief on 13 August 2024, the Government to file its answer on 15 October 2024, and Appellant to file his reply brief on 22 October 2024.[10] Appellant has made no specific assertion of the right to timely appellate review, nor claim of prejudice on this issue, and we find none. Because we find no particularized prejudice, and the delay is not so egregious as to adversely affect the public's perception of the fairness and integrity of the military justice system, there is no due process violation. *See id.*

We also conclude there is no basis for relief under Article 66(d)(2), UCMJ, or *Tardif*, in the absence of a due process violation. *See Gay*, 74 M.J. at 744. Considering all the facts and circumstances of Appellant's case, we decline to exercise our Article 66(d), UCMJ, authority to grant relief for the delay in completing appellate review.

III. CONCLUSION

The findings and the sentence 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).

[10] Appellant filed 12 motions for enlargement of time (the last enlargement request was for 12 days), all of which were opposed by the Government. Appellant's claim of ineffective assistance of counsel led the Government to request an order for defense counsel declarations, which we granted. In conjunction with their motion for defense counsel declarations, the Government also filed a motion for an enlargement of time, which we granted.

Accordingly, the findings and the 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).