November 5, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee,

v.

ZHUO H. ZHONG,
Staff Sergeant (E-5),
United States Air Force,

Appellant.

USCA Dkt. No. 25-0011/AF

Crim. App. Dkt. No. ACM 40441

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

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Issues Presented

I.

Whether the Court of Appeals for the Armed Forces has statutory authority to decide whether a conviction is factually sufficient.

II.

Whether Appellant's conviction for indecent recording is factually sufficient where the evidence does not prove that a video taken on the charged date depicted a private area of T.M., and Staff Sergeant Zhong had a reasonable mistake of fact as to consent.

III.

Whether the lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), Uniform Code of Military Justice.

IV.

Whether, in light of *United States v. Williams*, ___ M.J. ___, CAAF LEXIS 501 (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.

V.

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.

VI.

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 doctrines.

VII.

As applied to Staff Sergeant Zhong, 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 December 14, 2022, a military judge sitting as a general court-martial at Seymour Johnson Air Force Base, North Carolina, convicted Appellant, Staff Sergeant (SSgt) Zhuo Zhong, contrary to his pleas, of one charge and one specification of indecent visual recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c. R. at 414. The military judge sentenced SSgt Zhong to be reduced to the

[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*).

grade of E-1, confined for two months, and discharged from the service with a bad-conduct discharge. R. at 481. The convening authority took no action on the findings or sentence. Convening Authority Decision on Action, January 20, 2023.

The AFCCA reviewed this case, concluded the findings and sentence are correct in law and fact, and affirmed the findings and sentence. *United States v. Zhong*, No. ACM 40441, slip op. at 11 (A.F. Ct. Crim. App. Aug. 21, 2024) (Appendix A).

Statement of Facts

SSgt Zhong first met T.M., the named victim in this case, on the dating application "Bumble" in approximately February 2021. R. at 155. They quickly met in person and began a sexual relationship at the end of February 2021. R. at 156. Over the next two months, they met two more times, engaging in sexual intercourse in SSgt Zhong's bedroom each time they were together. R. at 131, 156–57, 221.

During their third encounter, which took place in April 2021, SSgt Zhong recorded approximately ten videos of the two of them having sex. R. at 162. T.M. was aware SSgt Zhong was recording her while they had sex, knowingly participated in these videos, and continued having sex

with SSgt Zhong. R. at 162–64. Afterwards, T.M. saw one of these videos and asked SSgt Zhong to delete it because she did not like the way she looked in the video. R. at 135, 165. SSgt Zhong later told her he deleted it. R. at 137.

The events for which SSgt Zhong was convicted arose when SSgt Zhong and T.M. next saw each other, on October 31, 2021. R. at 167–68. T.M. went to SSgt Zhong's house, and, after they ate and watched a movie, they once again went up to SSgt Zhong's room and began having sex. R. at 167, 170. T.M. testified that she noticed a navy blue or black object out of the corner of her eye after they had been having sex for about 15 minutes. R. at 143, 170–71. She said she saw a flash and heard what sounded like a phone clicking while she was laying on the bed and SSgt Zhong was behind her. R. at 143, 171. After this, the two of them continued having sex for about ten more minutes. R. at 172.

Once they finished having sex, SSgt Zhong went to the bathroom for about ten minutes, and T.M. remained in the bedroom. R. at 173. SSgt Zhong's phone was on the bed, and T.M. heard a sound which she believed to be a notification from the application Snapchat. *Id.* She picked up his phone and saw a number of Snapchat notifications, but she was not able

to see any photos or videos on his phone. R. at 174. When SSgt Zhong returned from the bathroom, he sat on the bed and began interacting with his phone. R. at 175. T.M. got dressed, gathered her things, and prepared to leave. *Id.* However, T.M. testified she felt something was off, so just before she walked out of the door to his room, she turned to SSgt Zhong and said, "Delete it." R. at 176–77. T.M. recounted that SSgt Zhong seemed to freeze and then frantically move his fingers on his phone. R. at 177. She walked over to him and saw him delete a video. R. at 178. According to her testimony, she observed the video for three to four seconds and saw that the video showed her buttocks and the two of them having sex. R. at 179, 182. T.M. also testified she saw a timestamp that was about 12 minutes earlier, but three days after this incident, she told agents from the Air Force Office of Special Investigations (AFOSI) that the timestamp was two minutes earlier. R. at 179, 183. T.M. saw SSgt Zhong delete this video and then left his house. R. at 145–46.

On her way home, T.M. called 911 and said she thought someone had recorded her while they were having sex and that she did not know if he had other videos of her. R. at 185. Later, she sent SSgt Zhong a text message threatening to "press charges" unless he sent her proof that he

did not have any videos of them having sex, in which case she said he would be "off the hook." Pros. Ex. 2; R. at 193–94. SSgt Zhong responded by sending a screen recording from his phone to show it did not have any videos from 31 October 2021 of them having sex. *Id.*

Three days later, T.M. met with AFOSI agents on November 3, 2021. R. at 183. When describing the video she purportedly saw, she told the agents it was "probably" a video of the two of them. R. at 181. At trial, she stated that she knew it was her because "I know my backside." R. at 182. T.M. also indicated she wanted to "make [SSgt Zhong] a victim of his consequences" and told the AFOSI agents, "I want you guys to write this down. He has erectile disfunction [sic]." R. at 196.

At the direction of the AFOSI agents, she sent SSgt Zhong a text message saying she was not upset but just wanted to know why he felt comfortable doing "that." Pros. Ex. 3; R. at 194–95. SSgt Zhong responded by saying, "I'm sorry again for doing that without your permission. Guess I thought it was okay since we had before. I've deleted everything so there's none of that." Pros Ex. 3; R. at 195. Despite AFOSI seizing his phone, no video from October 31, 2021, was introduced at trial. R. at 223–24, 408.

AFOSI agents interviewed SSgt Zhong at a later date. R. at 281. During this interview, SSgt Zhong acknowledged taking a video without T.M.'s permission while he and T.M. were having sex. Pros. Ex. 7.

Reasons to Grant Review

This case raises the question of whether SSgt Zhong's conviction is factually sufficient. During one of SSgt Zhong's and T.M.'s repeated sexual encounters, SSgt Zhong consensually recorded multiple videos of the two of them having sex. At their next encounter, he thought the same activity would again be consensual and tried to make another video. That video is not in evidence, and there is reason to doubt whether the video taken that day met the elements of the charged offense. When later confronted about it, SSgt Zhong apologized and stated he made a mistake. The evidence does not prove this mistake was unreasonable.

There is also an issue with SSgt Zhong's firearms prohibition following his conviction. SSgt Zhong was convicted of indecent recording, 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. SSgt Zhong raised this as an error before the

AFCCA, but that court concluded the issue did not merit discussion. As a result, if affirmed the prohibition, and this Court can now review that affirmation.

The issues SSgt Zhong raises are similar to issues the Court is reviewing in other cases. *See United States v. Csiti*, 2024 CAAF LEXIS 533 (C.A.A.F. Sept. 11, 2024) (granting review of factual sufficiency issues); *United States v. Johnson*, 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). SSgt Zhong seeks to have his case be a trailer to *Csiti* and *Johnson* so that it can be decided in accordance with the Court's ultimate holdings.

Argument

I.

The Court of Appeals for the Armed Forces has statutory authority to decide whether a conviction is factually sufficient.

Standard of Review

This Court reviews questions of statutory interpretation de novo. *United States v. Caldwell*, 75 M.J. 276, 280 (C.A.A.F. 2016).

Law and Analysis

Congress recently amended the factual sufficiency review standard in Article 66(d)(1)(B), UCMJ. 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021). This Court reviewed the new statutory language in *United States v. Harvey*, ___ M.J. ___, 2024 CAAF LEXIS 502 (C.A.A.F. 2024). While it rejected the interpretation from the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and remanded the case for a new review, it did not address the question of whether this Court has statutory authority to decide whether a conviction is factually sufficient. *Id.* at *1–2. Since deciding *Harvey*, the Court has granted review of this issue in at least two additional cases. *United States v. Csiti*, 2024 CAAF LEXIS 533; *United States v. McLeod*, 2024 CAAF LEXIS 530 (C.A.A.F. Sept. 12, 2024).

The recent statutory amendments provide the Court the authority to decide whether a conviction is factually sufficient. The statutory text plainly gives the Court the authority to act with respect to "the findings set forth in the entry of judgment, as affirmed, dismissed, set aside, or modified by the Court of Criminal Appeals *as incorrect in fact* under [Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B)]." Article 67(c)(1)(C),

UCMJ, 10 U.S.C. § 867(c)(1)(C) (emphasis added). Article 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B), is the provision that describes factual sufficiency review by the Courts of Criminal Appeals, so the authority to act with respect to actions by lower courts under that provision reasonably includes the authority to decide whether a conviction is factually sufficient. This is a change from the previous Article 67(c)(1), UCMJ, under which this Court could only act with respect to the findings as affirmed or set aside as incorrect in law by Courts of Criminal Appeals. 10 U.S.C. § 867(c)(1) (2018).

The Court's forthcoming opinion will likely clarify this matter, and SSgt Zhong's case should be decided in accordance with that opinion. SSgt Zhong's petition should be granted to review this question because, with this Court's interpretation outstanding, the scope of the Court's authority to determine whether a conviction is factually sufficient remains unsettled.

II.

The findings of guilt are factually insufficient because the evidence does not prove that a video taken on the charged date showed a private area of T.M., and Staff Sergeant Zhong had a reasonable mistake of fact as to consent.

Standard of Review

This Court has not set forth the standard of review for factual sufficiency for Article 67, UCMJ, 10 U.S.C. § 867 (effective Jan. 1, 2021). SSgt Zhong asserts that this Court should conduct a factual sufficiency review using the de novo standard of review. *Cf. United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

Law and Analysis

1. The evidence does not prove, beyond a reasonable doubt, that a video from 31 October 2021 depicted T.M.'s private area.

The Government did not meet its burden to prove the indecent recording specification beyond a reasonable doubt. To do so, it was required to prove three elements: (1) that SSgt Zhong knowingly recorded the private area of T.M.; (2) that said recording was without T.M.'s consent; and (3) that said recording was made under circumstances in which T.M. had a reasonable expectation of privacy.

2019 MCM, ¶ 63(b)(2); DD Form 458, Charge Sheet. The statute defines "private area" as "the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." 10 U.S.C. § 920c(d)(2). Thus, to prove the first element, the Government had to prove SSgt Zhong knowingly recorded T.M.'s naked or underwear-clad genitalia, anus, buttocks, areola, or nipple.

The evidence does not include any video from 31 October 2021. R. at 408 (trial counsel acknowledging that video from October encounter is not in evidence). Without the video, the Court cannot view for itself whether the video captured any of the body parts specified in the indecent recording statute. None of the evidence introduced at trial established beyond a reasonable doubt that a private area was recorded and, in the absence of evidence to reliably establish that element, SSgt Zhong's conviction should be set aside.

When interviewed by AFOSI agents, SSgt Zhong acknowledged taking a video while he and T.M. had sex in October, but he never specified any body parts depicted in the video. Pros. Ex. 7. Taking a video during sexual intercourse is not enough by itself to satisfy the elements of indecent recording; the video must capture another person's private

area. Further, a video taken while having sex could show a participant without showing a private area of that person. This is especially possible here because SSgt Zhong was positioned behind T.M., who was facing away from the recording device. R. at 143, 171. Considering the relative positions of SSgt Zhong and T.M., the Government did not present evidence foreclosing the possibility that he took a video of her back without her private area. *See* R. at 143. SSgt Zhong's statements to AFOSI leave reasonable doubt as to whether the video from the October encounter depicted T.M.'s private area.

A close examination of T.M.'s testimony and the surrounding circumstances similarly leaves reasonable doubt on this element of the offense. When she testified at trial in December 2022, T.M. expressed confidence she had seen her buttocks when she glimpsed a video for three to four seconds almost 14 months earlier in October 2021. R. at 182. However, this assertion lacks credibility because she was far less confident three days after the incident when she spoke to AFOSI agents, telling them it was "probably" a video of her and SSgt Zhong. R. at 181. A description of what something probably was does not constitute proof beyond a reasonable doubt. Even if she did see a video depicting her own

buttocks, it could have been one of the ten consensually recorded videos from their previous encounter. R. at 162–64.

Without the video itself, the remaining evidence leaves reason to doubt that SSgt Zhong took a video on the charged date that depicted T.M.'s private area. Thus, the Government did not meet its burden of proving every element of the offense beyond a reasonable doubt. In light of the deficiencies of proof, this Court should grant review of this issue.

2. Evidence indicates Staff Sergeant Zhong had a reasonable mistake of fact as to consent.

SSgt Zhong's statements give rise to a reasonable mistake of fact as to consent. Pros. Exs. 3, 7. It is a defense that, as the result of a mistake, SSgt Zhong held "an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense." R.C.M. 916(j)(1). On the matter of consent, the mistake must have both existed in SSgt Zhong's mind and been reasonable under all the circumstances. *Id.* The Government bears the burden of proving beyond a reasonable doubt that such a defense did not exist. R.C.M. 916(b)(1).

Here, SSgt Zhong's text message to T.M. shows his mistake of fact as to consent. When T.M. texted him about this incident, with the help

of AFOSI, SSgt Zhong immediately replied that he was sorry and that he thought it was okay since he had done the same thing before. Pros. Ex. 3. SSgt Zhong had no indication AFOSI was involved in this message and was not defending himself against any criminal allegations. Rather, he had reason at this point to be motivated to tell T.M. how he really felt in an effort to salvage his relationship with her. Thus, this statement is a reflection of SSgt Zhong's honest mistake.

Under all the circumstances, this mistake was objectively reasonable. T.M.'s testimony corroborates the previous, consensual recordings of their sexual activity, indicating SSgt Zhong made ten videos in which she knowingly and willingly participated the last time they had sex. R. at 162–64. That they had done the same thing at their very last encounter gave SSgt Zhong reason to believe, albeit mistakenly, that the same would be okay the next time they had sex. Although T.M. indicated she did not like the way she looked in the video she saw and asked him to delete it, she also returned to his house and consented to sexual activity. She did not tell SSgt Zhong she was not okay with recording at all, and comments about being dissatisfied with how she looked in one video do not indicate he should not record again. In this

relationship, the two parties had sex every time they were together, one party recorded ten videos of sexual activity at their last encounter, and the other party objected only to how she looked in one video, not to the recording overall. It was thus reasonable to think recording would be consensual at their next sexual encounter, even if that belief turned out to be mistaken.

Taking SSgt Zhong's statements and T.M.'s testimony together, SSgt Zhong's belief that her consent included recording a video during sex was a mistake, but it was a reasonable mistake under the circumstances. The Government has not met its burden of proving otherwise beyond a reasonable doubt. This gives this Court additional reason to grant review of this issue.

III.

The lower court erroneously interpreted and applied the amended factual sufficiency standard under Article 66(d)(1)(B), UCMJ.

Standard of Review

This Court reviews questions of statutory construction de novo. *United States v. Kohlbeck*, 78 M.J. 326, 330-31 (C.A.A.F. 2019) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

Law and Analysis

Congress recently amended the factual sufficiency review standard in Article 66(d)(1)(B), UCMJ. 10 U.S.C. § 866(d)(1)(B) (effective Jan. 1, 2021). But the changes to Article 66, UCMJ, do not hollow out a CCA's factual sufficiency review. The prior version of Article 66(d), UCMJ, empowered the CCAs to approve findings that are "correct in law and fact and . . . on the basis of the entire record, should be approved." Article 66(d), UCMJ, 10 U.S.C. § 866(d) (2018). This Court's predecessor interpreted this language to require that members of a CCA "are themselves convinced of the accused's guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). Neither the old nor the new statute explicitly requires that the CCAs believe the accused's guilt beyond a reasonable doubt—this flows from case law alone.

Article 66, UCMJ, now requires that CCAs afford "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." 10 U.S.C. § 866(d)(1)(B)(ii) (effective Jan. 1, 2021). In *United States v. Csiti*, the AFCCA correctly pointed out that the "current statute does not specify what is meant by the term 'appropriate

deference.'" No. ACM 40386, 2024 CCA LEXIS 160, at *19 (A.F. Ct. Crim. App. Apr. 29, 2024). But the AFCCA "broadly agree[d]" with the NMCCA's conclusion in *Harvey* that "'appropriate deference' is a more deferential standard than 'recognizing.'" *Id.* Like the NMCCA, the AFCCA did not state how much deference is "appropriate deference," how to measure it, or how to apply it. Further, the AFCCA agreed with the NMCCA that in changing the language of the statute, Congress intended to make it "more difficult" to overturn a conviction for factual sufficiency. *Id.* at *21.

This Court reviewed the new statutory language in *Harvey*, ___ M.J. ___, 2024 CAAF LEXIS 502. The Court rejected the NMCCA's interpretation that this new standard created a rebuttable presumption of guilt on appeal. *Id.* at *12. Rather, the Court held that the phrases "weight of the evidence" and "clearly convinced" do not change the quantum of proof required to sustain a conviction, which remains proof beyond a reasonable doubt. *Id.* at *10–12. While it provided some clarity, this opinion did not settle the standards for factual sufficiency review under the new statutory language. As a result, the Court subsequently granted further review of this issue in *Csiti*, a case in which the AFCCA

applied the same factual sufficiency standards as it did in SSgt Zhong's case. 2024 CAAF LEXIS 533.

SSgt Zhong's petition should be granted to review the factual sufficiency standard because, with this Court's interpretation outstanding, it is impossible to know whether the AFCCA applied the proper standard.

IV.

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, ___ M.J. ___, CAAF LEXIS 501 (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 SSgt Zhong is subject to a "Firearm Prohibition Triggered Under 18 U.S.C. § 922." Entry of Judgment, First Indorsement, February 1, 2023.

Standard of Review

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

Law and Analysis

1. 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 SSgt Zhong's error. Appendix A at 2. Rather, it cited a case that indicates correcting a firearms prohibition is a collateral matter outside the court's review authority because it falls outside the "findings and sentence" entered into the record. *Id.* (citing *United States v. Vanzant*, 84 M.J. 671, 680–81 (A.F. Ct. Crim. App. 2024)). The language in the cited opinion indicates that the lower court only assessed its authority to review and act under Article 66(d)(1), UCMJ. 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). The citation to *Vanzant* highlights that the AFCCA did not consider any other basis for jurisdiction in SSgt Zhong's case, 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*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *6. 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 *14. 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.

2. Unlike the appellant in *Williams*, Staff Sergeant Zhong 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*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *13-14. Using the same analysis, here, SrA Wood's erroneous and unconstitutional firearm prohibition falls squarely within the AFCCA's review authority under Article 66(d)(2), UCMJ.

First, "the accused demonstrated error." Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2). In his brief to the AFCCA, SSgt Zhong 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, May 9, 2024, at 21–25. Unlike in *Williams*, where no such error was raised, SSgt Zhong directly challenged the firearm prohibition, and the AFCCA could have resolved the error by analyzing whether 18 U.S.C. § 922 applied to SSgt Zhong. *Id.*

In raising this error, SSgt Zhong broadly framed the AFCCA's jurisdiction under Article 66, UCMJ, and sought relief through correction of the STR, similar to the approach in *Williams*. *Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *11. However, throughout his briefing, SSgt Zhong made references to the EOJ, which included the indorsement containing the firearms prohibition. Br. on Behalf of Appellant at 21, 23–25. While the AFCCA could not correct the erroneous firearms bar associated with 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*, ___ M.J. ___, 2024 CAAF LEXIS 501, at *14-15; *see supra* at 19–22 (discussing timing in detail). In fact, SSgt Zhong 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 21, 25. The issue of jurisdiction has now been clarified, and unlike the appellant in *Williams*, SSgt Zhong 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 SSgt Zhong 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 SrA Wood was deprived of his constitutional right to bear arms by virtue of the Air Force's post-trial processing.

V.

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 "warrant[s] neither discussion nor relief." Appendix A at 2 (emphasis added). 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 SSgt Zhong. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

VI.

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 doctrines.

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 SSgt Zhong. Thus, the Court should grant review of this issue and resolve it in accordance with its ultimate holding in *Johnson*.

VII.

The Government cannot prove that 18 U.S.C. § 922 is constitutional as applied to Staff Sergeant Zhong.

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 New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1, 22 (2022) (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 SSgt Zhong, 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 SSgt Zhong was convicted—indecent recording—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 at least two other appellants. *United States v. Johnson*, 2024 CAAF LEXIS 561; *United States v. Donley*, 2024 CAAF LEXIS 674 (C.A.A.F. Oct. 29, 2024). This positions the Court to potentially resolve questions about the application of 18 U.S.C. § 922, and the fate of SSgt Zhong's rights to bear firearms should be decided in accordance with the Court's forthcoming opinion.

SSgt Zhong 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. SSgt Zhong'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 SSgt Zhong's challenge.

Conclusion

SSgt Zhong respectfully requests that this Court grant his petition for review.

Respectfully Submitted,

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Certificate of Compliance

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 5,978 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Century Schoolbook font, using 14-point type with one-inch margins.

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 November 5, 2024.

Respectfully submitted,

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Appendix A

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM 40441

UNITED STATES
Appellee

v.

Zhuo H. ZHONG
Staff Sergeant (E-5), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 21 August 2024

Military Judge: Pilar G. Wennrich (arraignment); Tyler B. Musselman.

Sentence: Sentence adjudged 14 December 2022 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Sentence entered by military judge on 1 February 2023: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

For Appellant: Major Kasey W. Hawkins, USAF; Major Frederick J. Johnson, USAF.

For Appellee: Lieutenant Colonel J. Peter Ferrell, USAF; Major Vanessa Bairos, USAF; Major Olivia B. Hoff, USAF; Captain Tyler L. Washburn, USAF; Mary Ellen Payne, Esquire.

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

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

RICHARDSON, Senior Judge:

A military judge sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of indecent recording in violation of Article 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920c.[1,2] The military judge sentenced Appellant to a bad-conduct discharge, confinement for two months, and reduction to the grade of E-1.

Appellant raises four assignments of error: (1) whether the findings of guilt to the specification and charge are factually insufficient; (2) whether the record of trial is substantially incomplete; (3) whether the Government's submission of an incomplete record to this court "tolls the presumption of post-trial delay;" and (4) whether the Government can prove the 18 U.S.C. § 922 firearms prohibition is constitutional as applied to Appellant and whether this court has jurisdiction to decide that issue. We have carefully considered issues (3) and (4) and conclude they warrant neither discussion nor relief. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987); *see also United States v. Vanzant*, ___ M.J. ___, No. ACM 22004, 2024 CCA LEXIS 215, at *23–25 (A.F. Ct. Crim. App. 28 May 2024) (holding the 18 U.S.C. § 922 firearm prohibition notation included in the staff judge advocate's indorsement to the entry of judgment is beyond a Court of Criminal Appeals' statutory authority to review). As to the remaining assignments of error, we find no error that materially prejudiced Appellant's substantial rights.

I. BACKGROUND

Appellant and TM met through a dating application. In April 2021, while having consensual sex, Appellant recorded TM. Appellant sent TM at least one of those recordings; she asked him to delete it because she did not like the way she looked. Thereafter, Appellant and TM interacted sporadically.

On 31 October 2021—the date of the convicted offense—TM went to Appellant's home in Goldsboro, North Carolina. In a downstairs living area, they ate and watched a movie. They went upstairs to Appellant's room and engaged in consensual sex. While engaged in sex with TM from behind, Appellant used his phone to record TM without her knowledge. TM suspected Appellant had recorded them having sex, and asked Appellant to delete it. She demanded she see him delete it, and he did.

---

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

[2] Appellant was acquitted of two specifications of wrongful distribution of intimate visual images in violation of Article 117a, UCMJ, 10 U.S.C. § 917a.

TM left Appellant's home and started her drive home. She was upset. She called a friend, then called the police. She told the police that she was having sex with someone and she thought he recorded her, she told him to delete it and he did, and she thought he had other nonconsensual recordings of her.

In November 2021, agents from the Air Force Office of Special Investigations (OSI) interviewed Appellant, after Appellant waived his Article 31, UCMJ, 10 U.S.C. § 831, rights. Appellant admitted he recorded TM during sex without her permission. The OSI coordinated with the local police to obtain a search warrant for Appellant's cell phone and laptop computer. They also received a warrant for Appellant's Snapchat records. The deleted video from October was not recovered.

II. DISCUSSION

A. Factual Sufficiency

Appellant asserts two deficiencies of proof. He asserts the evidence did not prove: (1) the recording was of a private area of TM, and (2) Appellant did not have a reasonable mistake of fact as to consent. We find the conviction factually sufficient.

1. Additional Background

TM testified that the videorecording she saw on 31 October 2021 showed her buttocks. On direct examination, TM explained to trial counsel how she discovered the recording after sexual intercourse with Appellant:

> A. Before I left, [Appellant] was laying in the bed, fully immersed in whatever was on his phone screen. And, once again, I just felt something was off. So, before I left—because, I almost walked just straight out of his room. I'm by the door, and I'm just looking at him. He's still looking at his phone. And, I just said, "Delete it." When I said that his whole body froze, he frantically started moving things, and then, I was like, "No, because I want to see you delete it." And I started approaching him and then he just—he said, "It was only on Snapchat." And then by the time I got to him I saw a video—the video of me, from behind, and him deleting.
>
> Q. So, you saw his screen?
>
> A. Yes.
>
> Q. And there was a video on the screen?
>
> A. Yes.
>
> Q. What portions of your body were captured in the video?

> A. So, definitely me, in the position I was. So, laying down, so you could see my butt on the screen.
>
> . . . .
>
> Q. But, your buttocks were visible?
>
> A. Mm-hm.
>
> Q. Unclothed or clothed?
>
> A. Unclothed.

On cross-examination, TM testified she saw the video for "[t]hree to four seconds, so like a good amount of time" and could see it "[v]ery clear[ly]." At least four times she stated she recognized her own buttocks in the recording.

The Government introduced Prosecution Exhibit 7, the recording of OSI's interview with Appellant around 23 November 2021. Appellant stated he recorded TM once with her permission, and once without. Regarding the nonconsensual occasion, he stated it was "a couple weeks ago," probably on a weekend. He said he and TM got food, watched a movie, then went upstairs and had sex. He stated that on a whim, mid-sex in the "doggie" position, he picked up his phone and recorded TM for about ten seconds. He thought he used the camera application to record this occasion, and not Snapchat as he had in the past. When agents asked whether TM saw him recording, Appellant answered, "I guess she did" and "afterwards she told me to see it and then told me to delete it." When asked what made him think recording TM on this occasion would be "alright" or if he thought she would not see it, Appellant answered: "I thought, I don't know why, I thought it was alright since we recorded before."

On cross-examination, trial defense counsel asked TM some details leading to her discovery of Appellant recording her. TM confirmed that on 31 October 2021 she and Appellant ate and watched a movie downstairs, then went upstairs and had sex. She confirmed she told OSI that they were in a "doggie-style" position. What she saw and heard during sex suggested to her Appellant had recorded her again. Before she left his room, TM told Appellant to "delete it," to which Appellant reacted "like he was in shock." Appellant said, "It was only on Snapchat." TM demanded she see him delete it, and she did.

The Defense made a motion under Rule for Courts-Martial (R.C.M.) 917 for findings of not guilty to all specifications of the two charges. Pertaining to the offense at issue here, the Specification of Charge II, the military judge asked the Defense:

> [W]hat do you make of [Appellant]'s interview video, in which he tells OSI that he recorded her an additional time, without her permission, that it was a couple of weeks ago, that it was mid-

> sex, in the doggie-style position. The recording took 10 seconds, he recorded it on his phone. And then when asked later, "Did she see you," he says, "I guess, because she asked to see it and then asked me [to] delete it."

The military judge expanded on these facts when he denied the Defense's motion in its entirety.

2. Law

In order to convict Appellant of indecent recording as charged in this case, the Government was required to prove that at or near Goldsboro, North Carolina, on or about 31 October 2021, without legal justification or lawful authorization: (1) Appellant knowingly recorded the private area of TM; (2) the recording was without TM's consent; and (3) the recording was made under circumstances in which TM had a reasonable expectation of privacy. *See* 10 U.S.C. § 920c(a)(2); *Manual for Courts-Martial*, *United States* (2019 ed.) (*MCM*), pt. IV, ¶ 63.b.(2). "The term 'private area' means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple." 10 U.S.C. § 920c(d)(2). "The term 'consent' means a freely given agreement to the conduct at issue by a competent person." *MCM*, pt. IV, ¶¶ 60.a.(g)(7)(A), 63.c.(2)(b). "A recording is a still or moving visual image captured or recorded by any means." *MCM*, pt. IV, ¶ 63.c.(2)(a).

Article 66(d)(1), UCMJ, provides:

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

10 U.S.C. § 866(d)(1), *Manual for Courts-Martial, United States* (2024 ed.) (2024 *MCM*). The factual sufficiency standard applies to courts-martial in which every finding of guilty in the entry of judgment is for an offense occurring on or after 1 January 2021. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3612–13 (1 Jan. 2021).

A "specific showing of a deficiency in proof" is not the same standard courts apply for claims of legal insufficiency; that is, an appellant is not required to demonstrate the entire absence of evidence supporting an element of the offense. *See United States v. Harvey*, 83 M.J. 685, 691 (N.M. Ct. Crim. App. 2023), *rev. granted*, ___ M.J. ___, No. 23-0239, 2024 CAAF LEXIS 13 (C.A.A.F. 10 Jan. 2024). Rather, to challenge factual sufficiency, the statute requires an appellant to "identify a weakness in the evidence admitted at trial to support an element (or more than one element) and explain why, on balance, the evidence (or lack thereof) admitted at trial contradicts a guilty finding." *Id*.

3. Analysis

Essentially, Appellant would have us find that TM's testimony about the recording is not credible. Having reviewed TM's testimony and the other evidence supporting the specification, and giving "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence," we decline. Article 66(d)(1)(B)(ii)(I), UCMJ (2024 *MCM*).

The evidence shows Appellant recorded his sexual interaction with TM on 31 October 2021, in his bedroom at his home in Goldsboro, North Carolina, without TM's consent and while she had a reasonable expectation of privacy. TM testified numerous times that the recording showed her buttocks, a private area within the meaning of Article 120c, UCMJ. Appellant admitted to OSI that he recorded TM without her permission around that time and from a sexual position behind TM.[3]

Appellant had no legal justification or lawful authorization for the recording, and did not have a reasonable mistake of fact as to TM's consent. Granted, the evidence indicated Appellant may have believed he had TM's consent to being recorded before he made the recording. He told the agents that he "thought it was alright since [they] recorded before." In a text to TM, Appellant said, "I'm sorry again for doing that without your permission. Guess I thought it was okay since we had before."

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[3] While not strictly "findings of fact entered into the record by the military judge" as contemplated in Article 66(d)(1)(B)(ii)(II), UCMJ (*Manual for Courts-Martial, United States* (2024 ed.)), the military judge was aware of these facts as evidenced by his explanation for denial of the Defense's R.C.M. 917 motion.

The issue here is whether that belief was reasonable. Appellant argues essentially that because Appellant recorded TM in the past, with her knowledge but without her express consent, it was reasonable to think she consented this time. However, the evidence indicates Appellant recorded TM this time without her knowledge, much less her consent. TM testified about Appellant's furtive behavior after their sexual encounter in October 2021 when she told him to "delete it," which is some indication he knew he made the recording without her knowledge. Additionally, Appellant's own words indicate he recorded TM without her consent or knowledge. When the OSI agents asked whether TM saw him recording, Appellant answered, "I guess she did" and "afterwards she told me to see it and then told me to delete it." We find it was not reasonable for Appellant to believe that because TM may have consented to recording a sexual encounter about six months earlier, he received TM's consent this time.

Appellant repeats many of the same arguments he made before the fact-finder. In closing argument, his trial defense counsel laid out five reasons the military judge should find Appellant not guilty of this specification, including, "there's no evidence beyond a reasonable doubt that the 31 October [2021] video was of a private area" and Appellant "had a reasonable mistake of fact as to consent." Again, we give "appropriate deference to the fact that the trial court saw and heard the witnesses and other evidence." Article 66(d)(1)(B)(ii)(I), UCMJ (2024 *MCM*). We presume the trial court considered these arguments of counsel, encouraging him to view the testimony and other evidence through their lens. The court is not clearly convinced that the finding of guilty of this specification was against the weight of the evidence; the finding is factually sufficient. Article 66(d)(1)(B)(iii), UCMJ (2024 *MCM*).[4]

B. Contents of Record

Appellant asserts the "record of trial is substantially incomplete because some attachments to Appellate Exhibit II do not match the descriptions thereof on the record," specifically Attachments 1, 2, and 4 of Appellate Exhibit II. As

[4] Citing *United States v. Csiti*, No. ACM 40386, 2024 CCA LEXIS 160, at *2[3] (A.F. Ct. Crim. App. 29 Apr. 2024) (unpub. op.), Appellant asserts that "to set aside a conviction for factual insufficiency, [we] 'must be clearly convinced that the weight of the evidence does not support the conviction beyond a reasonable doubt.'" Even if we applied this factual sufficiency review standard, we would not grant relief as we are convinced of Appellant's guilt of the specification beyond a reasonable doubt.

relief, he requests we remand the case for correction.[5] The Government agrees. We do not.

1. Additional Background

Before entering pleas, Appellant moved to admit evidence under Mil. R. Evid 412.[6] The Defense's written motion, marked Appellate Exhibit II, listed five attachments:

> 5 Attachments:
>
> 1. Snapchat Video, dated 8 April 2021, 1 file
>
> 2. Snapchat Video, dated 31 October 2021, 1 file
>
> 3. AFOSI Report of Investigation, undated, 2 pages
>
> 4. AFOSI Interview of Ms. T.M., dated 3 Nov 21, 2 files
>
> 5. AFOSI Interview of SSgt Zhou [sic] Zhong., dated 23 Nov 21, 2 files

The list of attachments did not indicate any attachment was on a disc.[7] Pages 7, 8, 11, and 12 of Appellate Exhibit II are pages that relate to Attachments 1, 2, 4, and 5, respectively, and each state "1 disc," indicating the attachment is digital and not printed.

During the subsequent Mil. R. Evid. 412 hearing, the military judge tried to clarify what evidence was part of the defense motion.

> Let me ask you this, Defense. When you initially filed your motion there were, you had attached that document and provided the [c]ourt a working copy of one—two Snapchat—what's described as two Snapchat videos. So, two separate data files. You also provided the OSI interview of [TM], which was two separate data files, and also the OSI interview of [Appellant], which was two data files.

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[5] Appellant also notes the charge sheet reflects the convening order as "Special Order-30," when the charges were referred to the court-martial convened in Special Order A-30. He urges us to direct correction of this error in our remand. We have considered this issue and conclude no relief is warranted.

[6] The military judge ordered the filings and transcript relating to this motion sealed. We quote from these sealed materials as necessary to address this claimed error.

[7] The listing for each attachment ended "[transmitted via DoD SAFE]." Department of Defense (DoD) Secure Access File Exchange (SAFE) is a web-based file transfer service.

The Defense replied that Attachment 2 contained the wrong date—it was not 31 October 2021, and Attachments 1 and 2 were on a single disc; they did not state how many data files it contained. Then the military judge asked about "the OSI interview videos," to which the Defense replied, "We do have copies on disc. Those were previously DoD-SAFEd. We do have discs for the court reporter as the originals." The military judge asked how they were marked, and the Defense replied, "[W]e have a disc for Snapchat videos . . . . And then we have [a]ttachments for—numbers 4 and 5 for each, both, this victim and subject interviews." The Defense did not assert how many data files were on the discs for Attachments 4 and 5.

The military judge announced he was "going to try to summarize to clear everything up." He ascertained that Attachments 1 and 2 were on the same disc. He then described Appellate Exhibit II as the defense motion, a 12-page document, dated 22 September 2022, with three disc attachments. He stated, "The first disc contains two Snapchat videos, so that's two data files." He then appeared to read from the attachment listing, stating, "The second disc contains the OSI interview of [TM]. That disc contains two data files. And there is a third disc that is the OSI interview of [Appellant], it is two data files." He also distinguished these attachments from Appellate Exhibit III, supplemental evidence also on a disc. He asked, "Anything, else to correct or clarify, Defense Counsel?" The trial circuit defense counsel—not the defense counsel who filed the defense motion—responded, "No, your Honor." Ultimately, the military judge granted the Defense's motion in its entirety.

In the record of trial, the disc with Attachments 1 and 2 contains three video files—the same as contained in Prosecution Exhibit 6. The disc for Attachment 4 contains only one file, but appears to be a complete OSI interview of TM; the recording lasts 1 hour, 51 minutes, and 48 seconds. The disc for Attachment 5 contains two files, and appears to be a complete OSI interview of Appellant; the first file ends after two hours and the second ends after less than two hours.

A recording of TM's interview with OSI is an attachment to the First Indorsement to the Charge Sheet. It is one file contained on one disc; the recording lasts 1 hour, 51 minutes, and 48 seconds.

2. Law

A "complete record of proceedings and testimony" must be prepared when the sentence at a court-martial includes a punitive discharge. Article 54(c)(2), UCMJ, 10 U.S.C. § 854(c)(2); *see also* R.C.M. 1114(a)(1) (requiring a certified verbatim transcript when the judgment entered includes a discharge). The President prescribes the other contents of the record of trial. Article 54(c)(1), UCMJ, 10 U.S.C. § 854(c)(1). In addition to the court-martial proceedings, the

record of trial shall include, *inter alia*, "any appellate exhibits." R.C.M. 1112(b)(6). Whether a record of trial is complete is a question of law we review de novo. *United States v. Davenport*, 73 M.J. 373, 376 (C.A.A.F. 2014) (citation omitted).

"A substantial omission renders a record of trial incomplete and raises a presumption of prejudice that the Government must rebut." *United States v. Miller*, 82 M.J. 204, 207 (C.A.A.F. 2022) (alteration omitted) (quoting *United States v. Henry*, 53 M.J. 108, 111 (C.A.A.F. 2000)). However, "[i]nsubstantial omissions from a record of trial do not raise a presumption of prejudice or affect that record's characterization as a complete one." *Henry*, 53 M.J. at 111. We approach the question of what constitutes a substantial omission on a case-by-case basis. *United States v. Abrams*, 50 M.J. 361, 363 (C.A.A.F. 1999) (citation omitted). "In assessing either whether a record is complete . . . the threshold question is 'whether the omitted material was "substantial," either qualitatively or quantitatively.'" *Davenport*, 73 M.J. at 377 (quoting *United States v. Lashley*, 14 M.J. 7, 9 (C.M.A. 1982)) (additional citation omitted).

3. Analysis

We begin by noting that the record of trial contains Appellate Exhibit II and its attachments. The issue here is whether Appellate Exhibit II nevertheless is incomplete. Appellant asserts "omission of part or all of three attachments means [Appellate Exhibit] II was not included in its entirety."

From our review of the record, it appears Appellate Exhibit II is complete but mislabeled. The trial defense counsel listed Attachment 4 as containing the victim interview; it does, albeit in one file and not two as stated on the defense motion's attachment listing. Similarly, Attachments 1 and 2 contain Snapchat videos, but in three files and not two as stated. We can discern nothing missing from what the Defense provided in Appellate Exhibit II. Rather, it seems the Defense made an error in its attachment listing regarding the number of files on each disc, and did not correct the military judge when he repeated that error during the hearing.

Appellant asserted this claimed "omission is substantial because it prevents a complete assessment of, inter alia, the Mil. R. Evid. 412 motion, the military judge's ruling, and the performance of trial defense counsel." However, Appellant does not claim Attachment 4 is missing any part of the victim interview, or Attachments 1 and 2 do not contain those Snapchat videos. Moreover, these were attachments to a defense motion on which the Defense prevailed. Although they may be used to critique other aspects of trial defense counsel's performance, they are part of the record for purposes of Mil. R. Evid. 412 evidence. The record of trial here is sufficient for counsel and this court to review Appellant's case on appeal. *See* R.C.M. 1116(b)(1), (A) (directing the certified

record of trial and required attachments be provided to the Court of Criminal Appeals, and a copy to appellate defense counsel). We find no substantial omission relating to Appellate Exhibit II.

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) (2024 *MCM*). 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).