IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee,

v.

DEVIN W. JOHNSON,
Specialist 3 (E-3),
United States Space Force,
Appellant.

USCA Dkt. No. 24-0004/SF

Crim. App. Dkt. No. 40257

REPLY BRIEF ON BEHALF OF APPELLANT

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In pertinent part, 10 U.S.C. § 819(a) provides, "Special courts-martial may . . . adjudge any punishment . . . except . . . confinement for more than one year . . . ."

18 U.S.C. § 921(20)(A) defines "[t]he term 'crime punishable by imprisonment for a term exceeding one year'" as not including "any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices . . . ."

The relevant portion of 18 U.S.C. § 926(a) dictates, "The Attorney General may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter [18 USCS §§ 921 et seq.] . . . ."

As relevant herein, 28 C.F.R. 0.130 states:

> Subject to the direction of the Attorney General and the Deputy Attorney General, the Director of the Bureau of Alcohol, Tobacco, Firearms, and Explosives [ATF] shall:
>
> > (a) Investigate, administer, and enforce the laws related to alcohol, tobacco, firearms, explosives, and arson, and perform other duties as assigned by the Attorney General . . . .

Argument

I. This Court does not have jurisdiction to act on the granted issues at this time. Because the granted issues are not ripe for this Court's action, this Court should remand to the lower court.

The parties agree that under this case's procedural posture, this Court does not have jurisdiction to act on the third granted issue, whether 18 U.S.C. § 922 is constitutional as applied to Specialist 3 (Spc3) Devin Johnson. This Court should

remand Spc3 Johnson's case for three reasons. First, there is good cause for why the firearm prohibition issue was not raised at the Air Force Court of Criminal Appeals (AFCCA). Therefore, remand is appropriate to secure review of this issue. Second, Spc3 Johnson's case raises issues under *United States v. Mendoza*, __ M.J. __, No. 23-0210, 2024 CAAF LEXIS 590 (C.A.A.F. Oct. 7, 2024). Because appellants get "the benefit of changes to the law" while on appeal, this Court should remand to resolve these issues. *United States v. Tovarchavez*, 78 M.J. 458, 462 (C.A.A.F. 2019) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)); *United States v. Harcrow*, 66 M.J. 154, 159 (C.A.A.F. 2008). Finally, the granted issues are not ripe where this Court lacks jurisdiction to act on them. Remand fixes both ripeness and jurisdiction.

1. <u>There is good cause for why the firearms prohibition issue was not raised before the AFCCA, which supports remand.</u>

In his supplement to the petition for grant of review, Spc3 Johnson articulated his good cause, which relied on the timing of his assignments of error and several critical circuit court decisions, along with the AFCCA's refusal to consider this error.

Spc3 Johnson filed his initial brief with the AFCCA on January 26, 2023. Br. on Behalf of Appellant at 1 (Jan. 26, 2023). The Fifth Circuit initially decided *United States v. Rahimi* on February 2, 2023, then substituted that opinion with another one on March 2, 2023. *United States v. Rahimi*, 61 F.4th 443, 448 (5th Cir. 2023) (citing *United States v. Rahimi*, 59 F.4th 163 (5th Cir. 2023)). *Rahimi* was the impetus for this issue, followed by *Range v. AG United States*, 69 F.4th 96 (3d Cir. June 6, 2023),

and *United States v. Daniels*, 77 F.4th 337 (5th Cir. Aug. 9, 2023). All three of these cases, which challenged 18 U.S.C. § 922, post-dated Spc3 Johnson's assignment of errors. Each circuit court case resolved in favor of the appellants under *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). When Spc3 Johnson filed his brief with the AFCCA, the national legal landscape foresaw no successful challenges to 18 U.S.C. § 922. There was little indication that decades of Second Amendment jurisprudence would be castoff in the Fifth and Third Circuits.

It was only after *Rahimi*, *Range*, and *Daniels* that the constitutionality of 18 U.S.C. § 922 was raised in other cases before the AFCCA. Br. on Behalf of Appellant at 16-17 (Nov. 4, 2024) (citing numerous cases, all of which have been granted by this Court as trailer cases). Relevantly, while the instant case was pending at the AFCCA, the AFCCA denied a motion to file this error in a supplemental assignment of error in another case. *See United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465, at *27 (A.F. Ct. Crim. App. Nov. 2, 2023), *rev. granted*, No. 24-0069/AF, 2024 CAAF LEXIS 105 (C.A.A.F. Feb. 22, 2024); Motion for Leave to File Supp. Assignment of Error under *Grostefon*,[1] *United States v. Lampkins*, No. ACM 40135 (f rev), 2023 CCA LEXIS 465 (A.F. Ct. Crim. App. Nov. 2, 2023). This denial made clear the AFCCA would not consider this error even if Spc3 Johnson attempted to raise it. Furthermore, even if he had attempted to raise it via a motion, the AFCCA's

[1] *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

denial of the motion would not have changed the jurisdictional dynamic; the AFCCA still would not have "acted" on the error by simply denying the motion. *C.f. United States v. Dominguez-Garcia*, No. ACM S32694 (f rev), 2024 CCA LEXIS 218, at *2 (A.F. Ct. Crim. App. May 31, 2024) (per curiam) (acting by denying *relief* on the firearm prohibition without discussion), *rev. granted*, No. 24-0183, 2024 CAAF LEXIS 586 (C.A.A.F. Oct. 3, 2024).

The AFCCA has never considered whether it has jurisdiction to consider the erroneous firearm prohibition under Article 66(d)(2), Uniform Code of Military Justice (UCMJ),[2] 10 U.S.C. § 866, even following *Williams*. *United States v. Williams*, __ M.J. __, No. 24-0015, 2024 CAAF LEXIS 501 (C.A.A.F. Sept. 5, 2024). But *Williams* made clear that the Courts of Criminal Appeals (CCAs) would have authority to review and act upon an appellant-raised error occurring after the entry of judgment (EOJ) under Article 66(d)(2), UCMJ. *Id*. at *13-14. The AFCCA has repeatedly rejected this argument without explanation. *See*, *e.g.*, Order, *United States v. Wood*, No. ACM 40429, 2024 CCA LEXIS 334 (A.F. Ct. Crim. App. Aug. 13, 2024) (per curiam) (denying the motion for reconsideration that was filed following *Williams*), *rev. granted*, No. 25-0005/AF, 2024 CAAF LEXIS 753 (C.A.A.F. Nov. 26, 2024); Order, Denied Motion for Reconsideration, *United States v. Block*, No. ACM

[2] All references to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the versions in the *Manual for Courts-Martial, United States* (2019 ed.) unless otherwise stated.

40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024) (per curiam) (stamping the motion for reconsideration "denied" following *Williams*); Order, *United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431 (A.F. Ct. Crim. App. Oct. 17, 2024) (per curiam) (denying the motion for reconsideration with suggestion for en banc that was filed following *Williams*). It would have been fruitless to raise the issue following Spc3 Johnson's initial submission of errors based on the AFCCA's position.

Spc3 Johnson's case was decided August 9, 2023. JA at 1. At the first moment he could raise this issue, he did. Ultimately, there is good cause for why he did not raise the issue at the AFCCA. By not doing so, Spc3 Johnson acknowledges this Court does not have jurisdiction to act on his challenge to the firearm prohibition in the EOJ based on *Williams.* However, remand to raise this error is appropriate should this Court find the AFCCA would have jurisdiction under Article 66(d)(2), UCMJ.

2. Remand is appropriate due to *Mendoza*, as overturning this unconstitutional conviction will also remove the firearm prohibition.

This Court has granted review of this case, Article 67(a)(3), UCMJ, but action by this Court is not limited to "the issues specified in the grant of review." Article 67(c)(1)(3), UCMJ, 10 U.S.C. § 867(a)(3). Rather, the only relevant statutory restraint is this Court's limitation to act only with respect to matters of law. Article 67(c)(1)(4), UCMJ. The third granted issue in this case, on whether 18 U.S.C. § 922 is constitutionally applied to Spc3 Johnson, can be resolved without affecting the EOJ

and without concern for any issues of standing by reviewing the lawfulness of the conviction itself, something on which the Government has predicated its entire argument. If Spc3 Johnson's ability to purchase and possess firearms is predicated only on his conviction—rather than the Government reporting Spc3 Johnson's conviction qualifies for indexing in the first place—this Court can review and act upon the prohibition by reviewing Spc3 Johnson's conviction under *Mendoza*. This Court certainly has jurisdiction to review and act on the findings affirmed by the AFCCA. Article 67(c)(1)(A), UCMJ. Following *Mendoza*, decided long after the AFCCA's decision, the conviction is unconstitutional—or, at least, this case should be remanded for a new legal and factual sufficiency review. This is relevant to the granted issues because, based on the Government's argument, if the conviction is not lawful, neither is the firearm prohibition. Br. on Behalf of the U.S. at 23, 26-27.

Spc3 Johnson recognizes this Court did not grant review on the general verdict issue presented in his case. *Compare* Order Granting Review at 1 (Mar. 29, 2024), *with* Supp. to the Petition for Grant of Review at 1, 15, 20-21. However, consideration of the *Mendoza* issue supports Spc3 Johnson's request for remand on the granted issues, particularly where favorable resolution would result in elimination of the firearm prohibition. This Court need look no further than the AFCCA decision to see the *Mendoza* issue here.

As described by the AFCCA, there were two touches that could have constituted the abusive sexual contact without consent charge. JA at 4, 9. One was while the named victim was awake ("oven touch"), the other was while she was asleep ("mattress touch"). *Id*. The members asked whether the abusive sexual contact specification charged as without consent covered both touches. *Id*. at 15. In a hearing without the members, the Government requested the members be instructed the without consent specification covered both touches. *Id*. Defense counsel did not object, asking only whether it was proper for the judge to instruct on the Government's theory of the case. *Id*. The judge ultimately instructed the panel members it was their obligation to determine whether the "three elements [of abusive sexual contact] occurred at any time" during the course of the charged timeframe (the single night when both touches purportedly occurred). *Id*. at 15-16. The Government then argued consistent with that instruction and theory that the mattress touch, while the named victim was asleep, constituted abusive sexual contact without consent. *Id*. at 16.

This, on its face, violates *Mendoza*. *Mendoza*, 2024 CAAF LEXIS 590, at *18 (citing *United States v. Riggins*, 75 M.J. 78, 83 (C.A.A.F. 2016)). The Government cannot charge one theory of liability and then argue another. *Id*. This is a violation of due process. *Id*. Even assuming there was evidence to support the "oven touch," the AFCCA only evaluated the mattress touch—i.e., when the named victim was

asleep—in its legal and factual sufficiency review for this "without consent" case. JA at 12-13. As with *Mendoza*, this demands remand because the AFCCA conducted its legal and factual sufficiency review incorrectly. *Mendoza*, 2024 CAAF LEXIS 590, at *21-23.

In addition, when grappling with the "notice and due process" issue,[3] the AFCCA held, "We see no reason why the Government may not use evidence that [the named victim] was asleep—ordinarily the focal point of a prosecution under the theory of while asleep—as circumstantial evidence of the lack of actual consent in a prosecution under a theory of without consent." JA at 18. The named victim being asleep is not proof of withholding consent following *Mendoza* because that is a capacity theory, rather than a consent theory. *See Mendoza*, 2024 CAAF LEXIS 590, at *16-18. Affirming the conviction on the theory that the named victim was asleep was invalid, and the AFCCA did not analyze legal or factual sufficiency for the oven touch. Even when "evidence sufficient to justify a finding of guilty on any theory of liability [is] submitted to the members," where one theory submitted to the panel is unconstitutional, as here, the conviction must be set aside. *Hedgpeth v. Pulido*, 555

[3] In his supplement to this Court, this issue was restyled as a "general verdict" issue. Supp. to the Petition for Grant of Review at 1, 15, 20-21. But at the AFCCA, Spc3 Johnson argued that he was "convicted on an uncharged theory of abusive sexual contact" and that "the military judge violated the canon against surplusage and his due process rights by allowing the Government to argue a different theory of liability than charged." JA at 2, 14. These are the same underlying issues this Court reviewed in *Mendoza*. *Mendoza*, 2024 CAAF LEXIS 590, at *14-18.

U.S. 57, 58 (2008) (requiring harmless error analysis where a general verdict was returned when multiple theories of liability, one of which was improper, were instructed); *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) (quoting *United States v. Vidal,* 23 M.J. 319, 325 (C.M.A. 1987)). Alternatively, if there is no evidence supporting the conviction at all, the conviction must be set aside with prejudice for legal and factual insufficiency.

Spc3 Johnson was convicted of this offense, which triggered the Government's coding of Spc3 Johnson on the EOJ. In resolving the granted issues, this Court has jurisdiction to remand for a new legal and factual sufficiency analysis following *Mendoza*, which would have three benefits here. First, it would allow Spc3 Johnson the opportunity to raise the firearm prohibition error in a way that would fall within AFCCA's and this Court's jurisdiction to act. Second, where both this Court and the AFCCA have jurisdiction, the issue of standing could be resolved because it would be ripe for review.

Finally, and most significantly, the *Mendoza* issue impedes review of all three granted issues because overturning the conviction could eliminate the prohibition against purchasing and possessing firearms or ammunition entirely. Even if this Court were to reach the second granted issue concerning standing, the Government's argument about how only the conviction causes the firearm prohibition counsels this case be remanded for a new legal and factual sufficiency review. Otherwise, there is

yet another unknown impeding meaningful review of the 18 U.S.C. § 922 issue. *See* Br. on Behalf of Appellant at 22-23 (discussing ripeness). Through remand, Spc3 Johnson could secure relief via *Mendoza*, mooting any question of jurisdiction, standing, or applicability of the firearm prohibition.

3. Ripeness and jurisdiction are related. Both require remand.

This Court's lack of jurisdiction to act on the firearm prohibition in the EOJ is predicated on the firearm prohibition not having been raised to the AFCCA. Because jurisdiction and standing are dependent on how the AFCCA acts on the erroneous application of 18 U.S.C. § 922 to Spc3 Johnson, all three granted issues are not ripe for adjudication in this case. Therefore, as part of resolving this Court's jurisdiction under the first granted issue, determining that the AFCCA has jurisdiction and then remanding will correct the ripeness problem.

A. The AFCCA has jurisdiction, whether or not this Court does, based on the Air Force's unique post-trial processing.

Remand remains appropriate because the AFCCA has jurisdiction under Article 66(d)(2), UCMJ. Congress specifically provided an avenue for an appellant to raise and request relief for an "error" occurring after EOJ. Article 66(d)(2), UCMJ. This is the first jurisdictional requirement at both levels of appeal. *Williams*, 2024 CAAF LEXIS 501, at *8-10. Erroneous indexing in the National Instant Criminal Background Check System (NICS) is an error following the EOJ because indexing

occurs due to the Government's assessment that a conviction qualifies under 18 U.S.C. § 922.

The Government contends the indexing error occurs "simultaneously" with the EOJ. Br. on Behalf of the U.S. at 5, 15-16. This is a legal and logical fallacy. The EOJ was signed on January 20, 2022. JA at 26. The indorsement to the EOJ was signed the day after, on January 21, 2022. JA at 27. A 24-hour difference cannot be "simultaneous." The Government ignores these facts in its brief. By the plain language of Article 66(d)(2), UCMJ, the AFCCA would have jurisdiction over the erroneous indexing determination and its distribution to the Air Force agency that handles NICS indexing for the Air Force. Therefore, remand remains appropriate because the AFCCA never evaluated this issue and has erroneously found no jurisdiction in other cases. *E.g.*, *United States v. Vanzant*, 84 M.J. 671 (A.F. Ct. Crim. App. 2024), *rev. granted*, No. 24-0182, 2024 CAAF LEXIS 640 (C.A.A.F. Oct. 17, 2024).

B. The AFCCA has jurisdiction to modify the firearm prohibition in the EOJ, but how the AFCCA "acts" affects this Court's jurisdiction.

The AFCCA having jurisdiction does not resolve this Court's jurisdiction because what the AFCCA "affirms" or "sets aside" matters. The issue raised before this Court is whether, as applied to Spc3 Johnson, 18 U.S.C. § 922 is constitutional after *Bruen*. But the *error* occurring after the EOJ is the erroneous indexing. The issue as presented suggests the desired relief, but correcting the EOJ is not the only possible

appropriate relief AFCCA could award. The AFCCA could also act upon the findings or the sentence if it determines that relief is appropriate.

The discretion afforded to the Courts of Criminal Appeals (CCAs) under Article 66(d)(2), UCMJ, to provide "appropriate relief" makes resolution of this issue even more speculative. Without raising the issue to the AFCCA, the scope of the issue and this Court's jurisdiction are undefined. Appropriate relief could include modifying the indexing requirement, as proposed before this Court, or it could be something else depending on the appellant. In the latter case, if relief impacted the sentence, this Court's jurisdiction would be under Article 67(c)(1)(A), UCMJ, as the AFCCA would have acted upon the sentence in determining whether to grant appropriate relief. In such a situation, by the Government's own argument, this Court would have jurisdiction. Br. on Behalf of the U.S. at 12-13 (discussing how this Court can act upon the findings or sentence affirmed or set aside by the AFCCA).

This relates to the Government's unpersuasive surplusage argument about the two bases for jurisdiction before this Court. Br. on Behalf of the U.S. at 12-13. Without directly saying so, and without any stare decisis analysis, the Government requests this Court overturn *Williams* in part, which found this Court had authority to vacate the CCA's action because the statement of trial results (STR) is part of the EOJ:

> We agree with Appellant that—at a minimum—we can vacate the ACCA's action under this provision. Per Article 60c(a)(1)(A), UCMJ,

> the STR is part of the trial court's "judgment." And by modifying the STR, the ACCA "set aside as incorrect in law" the judgment of the military judge. Therefore, under Article 67(c)(1)(B), UCMJ, this Court has authority to vacate the ACCA's modification of the STR if we conclude that the ACCA lacked the authority to engage in such action.

Williams, 2024 CAAF LEXIS 501, at *10. This Court's unanimous interpretation is correct and not poorly reasoned. The plain language of the statute controls, which means that a "judgment," to include the "entry of judgment," can be acted upon by this Court under Article 67(c)(1)(B), UCMJ.

This conclusion is reinforced by R.C.M. 1111(c), which allows this Court to modify the "judgment," i.e., the EOJ, in the performance of its duties and responsibilities. As defined by the President, the judgment, like the STR, includes more than just the "findings" and the "sentence." R.C.M. 1111(b). It includes "additional information." R.C.M. 1111(b)(3). As such, as part of this Court's ability to review and act upon judgments by the military judge, this Court can modify the additional information in the EOJ if such information was affirmed or set aside by the CCA. *Williams*, 2024 CAAF LEXIS 501, at *10.

What the Government urges is for this Court to ignore the plain meaning of the word "judgment" in Article 67(c)(1)(B), UCMJ, and in R.C.M. 1111. Ignoring a word in a statute, as the Government requests this Court do here, would run afoul of the canon against surplusage. *United States v. Sager*, 76 M.J. 158, 161 (C.A.A.F. 2017). Instead, this Court can give independent meaning to the subsections of

Article 67(c)(1) by interpreting the specific language of subsection (c)(1)(A) as excluded from the general language of subsection (c)(1)(B). This is a form of the general-terms canon and the general/specific canon. *See*, *e.g.*, *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75, 79-80 (1998) (holding the term "sex" discrimination protected both men and women, even though addressing same-sex harassment may not have been Congress's intent in enacting the statute); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("[A] specific statute will not be controlled or nullified by a general one . . . ."). The "findings" and the "sentence," specific parts of the judgment, are the limit of (c)(1)(A), whereas (c)(1)(B) covers everything else in a "judgment," which is a general term.

Through narrowing the term "judgment" in (c)(1)(B) to exclude "findings" and "sentence," neither part of the statute is rendered meaningless. Furthermore, the general term of "judgment" in (c)(1)(B) is not needlessly narrowed to that which is covered by (c)(1)(A). It is also not unnecessarily limited to only interlocutory appeals, as the Government urges this Court to find, despite there being no such limitation in the text or by this Court in *Fink v. Y.B*., 83 M.J. 222 (C.A.A.F. 2023). Br. on Behalf of the U.S. at 12-13 (citing *Fink*). Rather, in *Fink*, this Court found interlocutory appeals now fall within this Court's jurisdiction because no "findings" or "sentence" is required under subsection (c)(1)(B). *Fink*, 83 M.J. at 225. "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not

demonstrate ambiguity. It demonstrates breadth." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (cleaned up). The breadth of Article 67(c)(1)(B), UCMJ, does not negate (c)(1)(A); it covers everything (c)(1)(A) does not. Thus, this Court will have jurisdiction following remand, possibly under either subsection of Article 67(c)(1), UCMJ, depending on what the AFCCA elects to "affirm" or "set aside."

II. A convicted Department of the Air Force servicemember has standing to raise a challenge to 18 U.S.C. § 922 as an error occurring after the entry of judgment. Nevertheless, remand is still appropriate in this case.

Spc3 Johnson has standing to raise this issue because (1) it is the national criminal indexing caused by the Government that prevents him from purchasing a firearm and (2) adjudicating an as applied "felon-in-possession" law significantly increases the likelihood of restoring his right to bear arms. *Utah v. Evans*, 536 U.S. 452, 464 (2002). The Government essentially concedes a deprivation of constitutional rights qualifies as an injury. Br. on Behalf of the U.S. at 22. Therefore, only causation and redressability remain at issue.

1. <u>The Government's indexing causes the injury.</u>

When the Government erroneously codes appellants when 18 U.S.C. § 922 does not apply, the chain of causation begins and ends with the Government's post-trial processing errors. *United States v. Dominguez-Garcia* is a helpful example. *United States v. Dominguez-Garcia*, No. ACM S32694, 2022 CCA LEXIS 582, at *3

(A.F. Ct. Crim. App. Oct. 11, 2022); *Dominguez-Garcia*, No. ACM S32694 (f rev), 2024 CCA LEXIS 218, at *2.

Airman First Class (A1C) Dominguez-Garcia was convicted at a special court-martial for a non-domestic violence offense. *Dominguez-Garcia*, 2022 CCA LEXIS 582, at *3. In her initial post-trial processing paperwork, she was not indexed. Supp. to the Petition for Grant of Review at 3, *United States v. Dominguez-Garcia*, 2024 CAAF LEXIS 586 (C.A.A.F. Oct. 3, 2024) (No. 24-0183). This was correct. 18 U.S.C. § 922(g)(1); 10 U.S.C. § 819(a); ATF Form 4473 (Aug. 2023) (explaining in the directions that conviction of a "felony" is a conviction at a general, not special, court-martial).[4] The Air Force's regulations align with the statute and the ATF's interpretation. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, ¶ 29.30.1.1 (Jan. 24, 2024) (reproduced in the appendix); Department of the Air Force Manual (DAFMAN) 71-102, *Air Force Criminal Indexing*, ¶ 4.3.1.2 (July 21, 2020). Per the Air Force's own regulations, A1C Dominguez-Garcia should not be firearm barred.

But after the AFCCA sent her case back for new post-trial processing, the Government reported that she had a qualifying conviction under 18 U.S.C. § 922.

[4] Congress authorized the Attorney General to prescribe "such rules and regulations as are necessary to carry out" 18 U.S.C. § 922. 18 U.S.C. § 926(a). The Attorney General has delegated that authority to ATF. 28 C.F.R. 0.130(a) (2024). Therefore, the ATF interpretations control.

Supp. to the Petition for Grant of Review at 3, *Dominguez-Garcia*, 2024 CAAF LEXIS 586 (No. 24-0183). Her STR noted otherwise. *See id.* (noting it was on remand in the EOJ that "for the first time" the conviction was considered qualifying). Though her conviction stayed the same, the Government determined she must be indexed and sent that information to NICS through law enforcement channels. Br. on Behalf of Appellant at 26-29 (describing how NICS indexing works). Someone like A1C Dominguez-Garcia is therefore barred from obtaining a firearm not because of her conviction, as the Government argues here, but the erroneous indexing. This is because the NICS indexing is what tells a federally licensed firearms dealer not to sell or otherwise transfer firearms or ammunition to the individual.

Additionally, contrary to the Government's argument, the STR's indorsement with a firearm prohibition is meaningless following the EOJ, as *Dominguez-Garcia* demonstrates. A case resulting in an acquittal further demonstrates how. As the Government notes, coding also happens through other means, like through the Air Force Form 177. Br. on Behalf of the U.S. at 27-28. This form is sent to the Department of the Air Force Criminal Justice Information Cell (DAF-CJIC) after referral of charges. DAFMAN 71-102, at Table 4.1, ¶ 4.6.3. In most cases, when an acquittal occurs, an EOJ is created with the firearm prohibition noting "No." DAFI 51-201, at ¶ 20.3 (Jan. 24, 2024) (showing no STR is created for an acquittal). The EOJ is then distributed as the "final disposition." DAFI 51-201, at ¶¶ 15.13.1, 15.13.3

(Jan. 18, 2019). The AF Form 177 is no longer the operative indexing document; the EOJ overrides the previous reporting because the EOJ is the final disposition of the referred charges. Similarly, the EOJ overrides the previously distributed STR, as in *Dominguez-Garcia*. Even though the EOJ contains the STR with its own indorsement, the operative indorsement is the one on the EOJ because this is the "final disposition." DAFI 51-201, at ¶¶ 15.13.1, 15.13.3 (Jan. 18, 2019). The Government ignores this dynamic and its own regulations.

The Government also ignores that the Air Force admits it can correct erroneous indexing causing federal firearm prohibitions. DAFMAN 71-102, at ¶¶ 9.2.-9.3. Just after *Williams*, the Air Force published a new expungement request form. Department of the Air Force (DAF) Form 235 (Oct. 24, 2024) (reproduced in the appendix).[5] Previously, there was no way to correct erroneous firearm prohibitions administratively; the former expungement form did not have a firearm section. DAFMAN 71-102, at Attachments 2, 3. Now, for those coded incorrectly, like A1C Dominguez-Garcia, the Air Force can correct NICS submissions via DAF Form 235 (section I.7). This development makes sense considering it is the Air Force's responsibility to index individuals who qualify and to remove those who do not. DAFMAN 71-102, at ¶¶ 4.3.1.2, 4.4.3; NICS INDICES, https://www.fbi.gov/how-we-

[5] Also available for download here: https://static.e-publishing. af.mil/production/1/saf_ig/form/daf235/daf235.pdf

can-help-you/more-fbi-services-and-informat ion/nics/nics-indices (last visited Dec. 25, 2024) (noting it is the contributing agency's responsibility to remove an individual from NICS Indices if their prohibitor is no longer valid).

The Air Force's acknowledgment that it can correct erroneous firearm prohibitions further demonstrates that it is the indexing that causes the denial of Second Amendment rights. *See also* DAFMAN 71-102, at ¶ 4.4. ("Reporting of persons qualifying for NICS prohibition is an immediate denial of the individual's right to exercise his or her constitutional right to possess a firearm."). When someone like A1C Dominguez-Garcia attempts to purchase a firearm, she cannot because NICS will produce a denial. This denial is not because of her conviction. It is because of the Government's error in indexing her after the EOJ. Even the Air Force as an agency recognizes this, which reenforces causality here.

This new administrative remedy helps individuals like A1C Dominguez-Garcia, but not individuals like Spc3 Johnson. For Spc3 Johnson and those like him, there must be a determination the conviction does not qualify under the law. This is the crux of the constitutional issue. If the Second Amendment does not permit the Government to categorically deprive Spc3 Johnson of his right to bear arms due to his status as a "felon," then he would not be barred from owning a firearm. A favorable ruling from this Court or the AFCCA would require the Government to update the EOJ and report that the conviction is not qualifying under 18 U.S.C. § 922.

DAFMAN 71-102, at ¶ 4.4.3.1. This would correct the report in NICS so that Spc3 Johnson could purchase a firearm from a federal firearm licensee.

Therefore, based on when indexing arises, how indexing bars the purchase of firearms, and how adjudicating the constitutional issue would correct unconstitutional indexing, there is causation to meet standing requirements. Nevertheless, since there is nothing this Court can do to affect the firearm prohibition issue directly due to jurisdiction, the case should be remanded.[6]

2. Spc3 Johnson's lifetime firearm prohibition is redressable by this Court and the AFCCA.

Spc3 Johnson's deprivation of his constitutional right to bear arms is likely to be redressed by invalidation of the federal regulation as applied to him. The burden for redressability is "relatively modest." *Bennett v. Spear*, 520 U.S. 154, 171 (1997). Redress only requires showing that there would be "a change in a legal status" and that a "practical consequence of that change" is a significant increase in likelihood of obtaining relief that redresses the injury. *Evans*, 536 U.S. at 464.

Almost every state has a "felon-in-possession" prohibition, although not all bars are permanent. *50-State Comparison: Loss & Restoration of Civil/Firearm Rights*, RESTORATION OF RIGHTS PROJECT, https://ccresourcecenter.org/state-

[6] Although, this Court could eliminate the firearm prohibition by finding the conviction legally insufficient under *Mendoza*, which this Court does have jurisdiction to do.

restoration-profiles/chart-1-loss-and-restoration-of-civil-rights-and-firearms-privile ges-2/ (last visited Dec. 25, 2024). Some states focus on "violent" felonies while others are categorical, barring even the "white collar crimes" that 18 U.S.C. § 922 does not. *Id*.; *see* 18 U.S.C. § 921(20)(A) (excluding certain crimes from the "felon" prohibition). But it is safe to assume the term "felony" in every state *at least* covers "a crime punishable by imprisonment for a term exceeding one year," thereby making every state as restrictive as 18 U.S.C. § 922 (without its exceptions). The Georgia statute cited by the Government is one such example. Br. on Behalf of the U.S. at 29. Consequently, most, if not all, jurisdictions bar "felons" or "violent felons" from possessing firearms.

Finding that the federal government cannot constitutionally deprive a *nonviolent felon* from owning firearms would create a "change in legal status" with the practical consequence of significantly increasing the likelihood of relief. *Evans*, 536 U.S. at 464. Spc3 Johnson could obtain firearms because he would be no longer indexed in NICS, the system both state and federal firearms dealers use. ABOUT NICS, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-informatio n/nics/about-nics (last visited Dec. 25, 2024) (showing all states use NICS in one way or another). NICS would show Spc3 Johnson does not have a qualifying offense because his conviction is not a qualifying "felony," under the broadest definition of the term. It does not matter which state Spc3 Johnson resides in. NICS is used by all

federal firearm licensees and "felon" status is a prohibitor in all states. Correction of the federal indexing would "amount to a significant increase in the likelihood" that Spc3 Johnson could obtain a firearm in any state.

The Government conflates the redress of barring prosecution with the requested relief of being able to purchase or possess firearms. Br. on Behalf of the U.S. at 25, 31-32. Spc3 Johnson is seeking to immediately purchase a firearm, but he cannot do so because of how he is indexed. Based on how the Air Force reports qualifying convictions during the entry of judgment and then subsequently distributes it, NICS is what stops the sale or transfer of firearms. Br. on Behalf of Appellant at 26-28 (discussing the interplay between the Air Force indexing and NICS issuing a "proceed" to the firearm sale). Spc3 Johnson is requesting this impediment be removed. By focusing on the conviction, the Government argues Spc3 Johnson could still be prosecuted. But Spc3 Johnson is not seeking a preliminary injunction to prevent enforcement of 18 U.S.C. § 922; he is seeking correction of indexing that will dictate 18 U.S.C. § 922 does not apply to him at all.

Furthermore, the case the Government cites to contest redressability has two significant distinctions from Spc3 Johnson's case. Br. on Behalf of the U.S. at 31 (citing *Daogaru v. Brandon*, 683 Fed. Appx. 824 (11th Cir. 2017)). First, it predates both *Bruen* and *United States v. Rahimi*, 602 U.S. 680 (2024). *Bruen* dramatically changed the landscape of firearm regulation. Any case pre-dating *Bruen* should be

given little persuasive value. *Rahimi* further changed the assumption that the felon in possession prohibition is presumptively lawful where the Supreme Court rejected the Government's contention that only "responsible" people could own firearms. *Rahimi*, 602 U.S. at 701-02. Cases pre-*Rahimi* that rely on unchallenged presumptions should also be given little weight.

Second, the way the appellant in *Daogaru* challenged 18 U.S.C. § 922 is distinct from how Spc3 Johnson is challenging the prohibition. The "white collar crime" exemption under 18 U.S.C. § 922 does not exist in all jurisdictions, whereas the umbrella category of simply being a felon exists in all jurisdictions. Therefore, even if the *Daogaru* appellant was not barred under federal law due to the exemption, he was still barred under state law. But that is not the case here. If the Second Amendment protects nonviolent felons' possession of firearms, all "felon status" firearm prohibitions are unconstitutional as applied to Spc3 Johnson. This is hierarchy of laws; above all is the Constitution, under which applicable statutes must fall in line. *United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997). If Spc3 Johnson's conviction still exists following review, the state and federal governments could attempt to prosecute him. But even then, proving Spc3 Johnson knew his "felon status" qualified as an 18 U.S.C. § 922(g) prohibitor would be difficult, if not impossible, where a federal court has stated the Second Amendment protects Spc3

Johnson's right to purchase and possess a firearm as a nonviolent felon. Br. on Behalf of Appellant at 29-30.

Finding 18 U.S.C. § 922 is unconstitutional as applied to Spc3 Johnson would produce a corrected NICS indicator. Fixing the prohibitor in NICS would remedy the practical bar to possessing a firearm. This goes back to how the NICS operates nationwide. The Federal Bureau of Investigation (FBI) provides full service to the federal firearms licensees in 31 states, five U.S. territories, and the District of Columbia. ABOUT NICS. The FBI provides partial service to four states. *Id*. The remaining 15 states perform their own checks through NICS. *Id*. Thus while states may independently criminalize possession under a "felony" label, states still use NICS to determine if an individual like Spc3 Johnson can purchase a firearm. Spc3 Johnson is not arguing this is a res judicata situation, but rather a ruling from this Court or the AFCCA would impact NICS and therefore his ability to purchase and possess a firearm.

Consequently, the requested relief, correction of the EOJ's indexing determination, has a substantial likelihood of redressing the constitutional deprivation of Spc3 Johnson's right to bear arms. *Lujan v. Defs. of Wildlife*, 504 U.S. 555 (1992). Nevertheless, this Court has no jurisdiction over this issue at this time—except if it finds the conviction legally insufficient per *Mendoza*—so remand is the proper recourse.

Conclusion

This Court should remand this case, not because the challenge to the firearm prohibition lacks merit, but because this Court has no jurisdiction to provide relief on this ground where the issue was never raised to the AFCCA. Additionally, even assuming this Court does not have jurisdiction to act on the firearms prohibition and Spc3 Johnson does not have standing to adjudicate the constitutionality of the firearm prohibition in this forum, remand is still appropriate. This is because, as the Government argues, the issue of standing is not tied to indexing but to the conviction itself. The conviction here is in violation of *Mendoza*, as the AFCCA opinion demonstrates. Thus, no matter the resolution of the granted issues, this case should be remanded to the AFCCA for, at minimum, a new legal and factual sufficiency review.

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Certificate of Filing and Service

I certify that an electronic copy of the foregoing was electronically sent to the Court and served on the Air Force Appellate Government Division on December 30, 2024.

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Certificate of Compliance with Rules 24(b) and 37

1. This brief complies with the type-volume limitation of Rule 24(b) because it contains 6,168 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in a proportional typeface, Times New Roman, in 14-point type.

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Appendix

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 40429**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Brandon A. WOOD	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Special Panel**

On 19 September 2024, Appellant moved for this court to reconsider out of time its decision in *United States v. Wood*, No. ACM 40429, 2024 CCA LEXIS 334 (A.F. Ct. Crim. App. 13 Aug. 2024) (per curiam) (unpub. op.). The Government opposed the motion on 25 September 2024.

The court has considered Appellant's motion out of time, the Government's opposition, case law, and this court's Rules of Practice and Procedure.

Accordingly, it is by the court on this 30th day of September, 2024,

ORDERED:

Appellant's motion for reconsideration is **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,* *v.* Master Sergeant (E-7) **DANIEL L. BLOCK,** United States Air Force, *Appellant.*	**APPELLANT'S MOTION FOR RECONSIDERATION** Before Panel No. 3 No. ACM 40466 19 September 2024

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

Pursuant to Rule 31 of this Court's Rules of Practice and Procedure, Master Sergeant (MSgt) Daniel L. Block, the Appellant, respectfully moves this Court to reconsider its 29 August 2024 decision in his case. *See United States v. Block*, No. ACM 40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024). MSgt Block provides the following information in accordance with Rule 31.2(a):

1. Undersigned counsel received this Court's decision on 29 August 2024.

2. MSgt Block is seeking reconsideration on an issue he personally raised, whether 18 U.S.C. § 922 is unconstitutional as applied to him when he was not convicted of a violent offense, in light of *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 24 (2022).[1]

3. The basis for reconsideration is that the Court of Appeals for the Armed Forces (CAAF) decided *United States v. Williams*, ___ M.J. ___, 2024 CAAF LEXIS 501 (C.A.A.F. Sept. 5, 2024), after MSgt Block's case was decided by this Court.

---

[1] This motion for reconsideration is filed on Issue I, which MSgt Block filed personally, pursuant *States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982). Merits Brief, App. A, *United States v.* ACM 40466, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. Aug. 29, 2024). This motion ideration is not raised personally; MSgt Block has new detailed Article 70, Uniform Military Justice (UCMJ), counsel, who is raising this issue for him based on a change in .F. Ct. Crim. App. R. 31.2(b).

DENIED
30 SEP 2024

4. No other court has jurisdiction over this case.

This Court should grant this motion, reconsider its resolution of the issue, and find 18 U.S.C. § 922 does not apply to MSgt Block, remanding the record for correction pursuant to this Court's authority under 10 U.S.C. § 866(d)(2) and Rule for Court Martial (R.C.M.) 1112(d)(2).

I.

AS APPLIED TO MASTER SERGEANT BLOCK, THE GOVERNMENT CANNOT PROVE 18 U.S.C. § 922 IS CONSTITUTIONAL BY DEMONSTRATING THAT IT IS CONSISTENT WITH THE NATION'S HISTORICAL TRADITION OF FIREARM REGULATION WHEN MASTER SERGEANT BLOCK WAS NOT CONVICTED OF A VIOLENT OFFENSE.

Analysis

On 5 September 2024, the CAAF issued *United States v. Williams*, where the CAAF considered whether the Army Court of Criminal Appeals (Army Court) had the authority to alter the military judge's correction to the Statement of Trial Results (STR), which is incorporated into the judgment of the court signed by the military judge. *Williams*, 2024 CAAF LEXIS 501, at *1-3. In *Williams*, the military judge had erroneously marked on the STR that the appellant's conviction triggered the Lautenberg Amendment, 18 U.S.C. § 922(g), after advising the appellant of the opposite during his guilty plea. *Id*. at *1-2. Later, in promulgating the judgment, the military judge incorporated and amended the original STR to correct the firearms ban so that 18 U.S.C. § 922(g) was not triggered. *Id*. at *6. On appeal, the Army Court changed the firearm bar on the STR *back*, to reindicate the appellant was barred from possessing a firearm. *Id*.

The CAAF determined that changing the STR back was an ultra vires act by the Army Court because "the STR is not part of the findings or sentence," but rather "other information"

required by R.C.M. 1101(a)(6). *Id*. at *12-13. Therefore, the Army Court did not have authority to act pursuant to Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2018),[2] in this way. *Id*.

However, the CAAF then analyzed whether the Army Court had the authority to change the firearm ban under Article 66(d)(2), UCMJ, 10 U.S.C. § 866(d)(2), as an "error . . . in the processing of the court-martial after the judgment was entered into the record." *Id*. at *13. The CAAF resolved the issue against the appellant in *Williams* for three reasons related to the unique facts of that case. *Id*. at *14-15. First, there was no "error" because the military judge corrected any erroneous notation on the STR before signing the judgment. *Id*. at *14. Thus, by the plain language of the statute, there was no error to consider after the entry of judgment. Second, assuming error, the burden of raising such error was on the accused. *Id*. As the appellant in *Williams* agreed with the military judge's action in correcting the firearm notation, no error was raised. *Id*. Therefore, the Army Court's "correction authority" had not been "triggered," as the appellant never raised the firearm notation as an error. Third, assuming error and assuming the error had been raised, the timing of the military judge's erroneous notation preceded the entry of judgment; it was on the STR. *Id*. Therefore, based on the plain language of Article 66(d)(2), UCMJ, it was not an error occurring *after* the entry of judgment.

The CAAF did not foreclose properly raising an erroneous firearm notation to the service courts of appeal under Article 66(d)(2), UCMJ, when the error raised occurs *after* the entry of judgment, as in MSgt Block's case. Unlike the appellant in *Williams*, MSgt Block meets the factual predicate to trigger this Court's review under Article 66(d)(2), UCMJ.

[2] The language at issue in Article 66, UCMJ, is not substantively different between the 2018 version analyzed in *Williams* and the version applicable to MSgt Block's appeal.

First, MSgt Block argued there was an error in his case, that he was erroneously and unconstitutionally deprived of his right to bear arms, in his initial submission to this Court. Merits Brief, App. A at 1, *Block*, No. ACM 40466, 2024 CCA LEXIS 371. Unlike in *Williams*, there is an error to correct upon analyzing whether 18 U.S.C. § 922(g) applies to MSgt Block. *Id*. at 2-3.

Second, with different detailed Article 70, UCMJ, counsel, MSgt Block personally raised and demonstrated an 18 U.S.C. § 922(g) error. Merits Brief, App. A at 1, *Block*, No. ACM 40466, 2024 CCA LEXIS 371. In personally raising this error, he framed this Court's jurisdiction broadly under Article 66, UCMJ, and sought relief through correction of the STR, because that was how the issue was primarily presented in *Williams*. *Williams*, 2024 CAAF LEXIS 501, at *11. However, throughout his briefing, MSgt Block made references to the Entry of Judgment (EOJ), which incorporates the First Indorsement noting the firearm ban. Merits Brief, App. A at 1, 4-5, *Block*, No. ACM 40466, 2024 CCA LEXIS 371. Pursuant to *Williams*, under Article 66(d), UCMJ, this Court cannot correct the erroneous firearms bar associated with the STR, but it *can* correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed after the entry of judgment during post-trial processing. *Williams*, 2024 CAAF LEXIS 501, at *14-15; *see infra* (discussing timing in detail). The facts and issue presented in MSgt Block's case have not changed; instead, MSgt Block is raising a different basis for jurisdiction and relief based on a change in the law that was previously overlooked. A.F. Ct. Crim. App. R. 31.2(b)(1). This is a valid basis for reconsideration when neither this Court nor MSgt Block had the benefit of *Williams* when MSgt Block's firearm issue was decided. *Id*. Therefore, unlike the appellant in *Williams*, there is an error raised by MSgt Block for this Court to consider under Article 66(d)(2), UCMJ.

Finally, the error on the First Indorsement erroneously depriving MSgt Block of his constitutional right to a firearm was an error in the "processing of the court-martial after the judgment was entered into the record under section 860(c) . . . (article 60(c))." Article 66(d)(2),

UCMJ. Under the applicable Air Force regulation, "*[a]fter* 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." Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice* ¶ 20.41 (Apr. 14, 2022) (emphasis added). The firearm denotation on the First Indorsement that accompanies the entry of judgment into the record of trial explicitly happens *after* the entry of judgment is signed by the military judge pursuant to Article 60(c), UCMJ. *Id*. Additionally, as this First Indorsement is the most recent notification to law enforcement entities about the applicability of 18 U.S.C. § 922 to MSgt Block, it makes sense that this is the document the Court should review for post-trial processing error. *See id*. at ¶¶ 20.42, 29.6, 29.32, 29.33 (dictating when notifications are made through distribution of the EOJ and attachments). Therefore, unlike in the issue addressed in *Williams*, here, the error occurred after the entry of judgment, in accordance with the last triggering criterion under Article 66(d)(2), UCMJ.

This Court's authority to review the erroneous firearm ban under Article 66(d)(2), UCMJ, is not foreclosed by this Court's published opinion in *United States v. Vanzant*, 84 M.J. 671, 2024 CCA LEXIS 215 (A.F. Ct. Crim. App. 2024). In *Vanzant*, this Court determined it did not have authority to act on collateral consequences not a part of the findings or sentence under Article 66(d)(1), UCMJ. *Id*. at *23. ("Article 66(d), UCMJ, provides that a CCA 'may act only with respect to the findings and sentence as entered into the record under [Article 60c, UCMJ, 10 U.S.C. § 860c].'"). The CAAF agreed with this interpretation. *Williams*, 2024 CAAF LEXIS 501, at *11-13. However, MSgt Block is asking this Court to review an error in post-trial processing under Article 66(d)(2), UCMJ, which this Court did not analyze in *Vanzant*. *See Vanzant*, 84 M.J. 671, 2024 CCA LEXIS 215, at *23 (quoting the language of Article 66(d)(1), UCMJ, not (d)(2)). Using the CAAF's analysis in *Williams*, this Court should reconsider its jurisdiction and the

unconstitutional, post-trial processing, firearms error tied to the facts of MSgt Block's court-martial. To effectuate any remedy, this Court should use its power under R.C.M. 1112(d)(2), which permits this Court to send a defective record back to the military judge for correction, as, ultimately, the First Indorsement is a required component of the EOJ, albeit not part of the "findings" and "sentence," and the error materially affects MSgt Block's constitutional rights. R.C.M. 1111(b)(3)(F); R.C.M. 1112(b)(9); DAFI 51-201, at ¶ 20.41.

MSgt Block respectfully requests this Court address whether 10 U.S.C. § 922 is unconstitutional as applied to him, pursuant to its authority under Article 66(d)(2), UCMJ.

Respectfully Submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that the original and copies of the foregoing were sent via email to the Court and served on the Air Force Government Trial and Appellate Operations Division on 19 September 2024.

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IN THE UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES, *Appellee,*	)	UNITED STATES' OPPOSITION TO APPELLANT'S MOTION FOR RECONSIDERATION
v.	)	Before Panel No. 3
Master Sergeant (E-7) **DANIEL L. BLOCK** United States Air Force *Appellant.*	)	No. ACM 40466 26 September 2024

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

Pursuant to Rule 23(c) and 23.2 of this Court's Rules of Practice and Procedure, the United States respectfully requests this Honorable Court deny Appellant's Motion for Reconsideration, dated 19 September 2024.

Standard of Review

When reviewing a motion for reconsideration, this Court's rules state:

> Ordinarily, reconsideration will not be granted without a showing that one of the following grounds exists:
>
> (1) A material legal or factual matter was overlooked or misapplied in the decision;
>
> (2) A change in the law occurred after the case was submitted and was overlooked or misapplied by the Court;
>
> (3) The decision conflicts with a decision of the Supreme Court of the United States, the CAAF, another service court of criminal appeals, or this Court; or
>
> (4) New information is received that raises a substantial issue as to the mental responsibility of the accused at the time of the offense or the accused's mental capacity to stand trial.

Air Force Court of Criminal Appeals, Rules of Practice and Procedure, Rule 31. When evaluating a motion for reconsideration, this Court should consider whether Petitioner has shown a "manifest error of law," which is generally required for a reconsideration motion. Pryce v. Scism, 477 Fed. Appx. 867, 869 (3rd Cir. 2012).

Law

This Court "***may*** provide appropriate relief if the accused demonstrates error or excessive delay in the processing of the court-martial ***after*** the judgment was entered into the record under section 860c of this title[.]" 10 U.S.C. § 866 (emphasis added). The military judge enters the court-martial judgment into the record via the Entry of Judgment (EOJ). 10 U.S.C. § 860c. The EOJ includes the statement of trial results (STR). Id. The STR contains: (1) "each plea and finding;" (2) "the sentence, if any; and" (3) "such other information as the President may prescribe by regulation." 10 U.S.C. § 860. The President prescribed that "[a]ny additional information directed by the military judge or required under regulations prescribed by the Secretary concerned" may be added to the STR. R.C.M. 1101(a)(6). An annotation on the STR notifying the Appellant of an 18 U.S.C. § 922 firearms prohibition constituted "other information" as required by R.C.M. 1101(a)(6). United States v. Williams, 2024 CAAF LEXIS 501, *12-13 (C.A.A.F. 5 September 2024).

Following the President's instructions in R.C.M. 1101(a)(6), the Secretary of the Air Force required a First Indorsement to be attached to the STR. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, para. 13.3.3. (dated 18 January 2019). On the STR, the SJA must annotate whether "firearm prohibitions are triggered." Id. "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." DAFI 51-201, para. 15.31.

Analysis

Reconsideration is unnecessary in this case. This Court did not overlook or misapply Article 66(d)(2), and Williams did nothing to change the law with respect to Article 66(d)(2). 2024 CAAF LEXIS 501. Article 66 did not change between Appellant's submission of his Grostefon[1] issue and the filing of this motion for reconsideration. This Court summarily denied Appellant's claim that 18 U.S.C. § 922 is unconstitutional as applied to him. United States v. Block, 2024 CCA LEXIS 371 (A.F. Ct. Crim. App. 29 August 2024). This Court stated, "The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred." Block, 2024 CCA LEXIS 371 (c*iting* Articles 59(a) and 66(d), UCMJ, 10 U.S.C. §§ 859(a), 866(d) (Manual for Courts-Martial, United States (2024 ed.)). Appellant never asked for Article 66(d)(2) relief, which CAAF said is a prerequisite for a CCA to grant relief. Williams, 2024 CAAF LEXIS 501. There is no basis for granting reconsideration when Appellant did not request relief the first time around and, therefore there was nothing that this Court could have overlooked. This is especially true considering that relief under Article 66(d)(2) is discretionary – "the Court ***may*** provide appropriate relief if the accused demonstrates error." 10 U.S.C. 866(d)(1). This Court's decision did not conflict with a decision of our superior courts or sister services. Appellant's motion for reconsideration should not be granted because it does not meet the requirements set out by this Court for such relief.

Even if this Court reconsiders its opinion, Article 66(d)(2) does not apply to Appellant's case because the 18 U.S.C. § 922 annotation on the first indorsement of the STR and

[1] United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982).

incorporated into the EOJ was neither an error nor did it occur after the judgment was entered on the record. "Article 66(d)(2), UCMJ, only authorizes a [Court of Criminal Appeals] to provide relief when there has been an 'error or excessive delay in the processing of the court-martial." United States v. Williams, 2024 CAAF LEXIS 501, *14 (C.A.A.F. 5 September 2024). In Williams, the Court of Appeals for the Armed Forces (CAAF) pointed to three statutory conditions that must be met before a Court of Criminal Appeals (CCA) may review a post-trial processing error under Article 66(d)(2). Id. at *14. First, an error must have occurred. Id. Second, an appellant must raise a post-trial processing error with the CCA. Id. Third, the error must have occurred after the judgment was entered. Id.

Appellant argues these three requirements are unique to the facts in Williams. (*Appellant's Motion for Reconsideration*, dated 19 September 2024 at 3). But they are not. The three conditions CAAF listed in the opinion trigger a CCA's review under Article 66(d)(2) in any case. The Court never limited the test to the specific facts in Williams. Instead, the Court used the language of the statute to identify the three triggers required for Article 66(d)(2) review by a CCA. Then in separate sentences the Court applied the facts of Williams to the rule they articulated. The Court laid out the three triggers and said:

> First, Article 66(d)(2), UCMJ, only authorizes a CCA to provide relief when there has been an "error or excessive delay in the processing of the court-martial."
>
> . . .
>
> Second, even if there was an error, Article 66(d)(2), UCMJ, places the burden on the accused to raise the issue before the CCA.
>
> . . .
>
> Finally, even assuming that there was an error and that Appellant properly raised the issue, Article 66(d)(2), UCMJ, only applies to

> errors taking place "after the judgment was entered into the record."

Williams, 2024 CAAF LEXIS 501, *14. Appellant must meet all three conditions to trigger Article 66(d)(2). Id. In this case, Appellant does not meet these conditions because the § 922 annotation occurred as part of the judgment that was entered into the record, and the § 922 annotation was not an error.

A. The § 922 annotation was entered into the record before the judgment of the court was entered via the EOJ.

The 18 U.S.C. § 922 annotation on the first indorsement of the STR is attached to the STR as "other information" under R.C.M. 1101(a)(6), and then both the other information and the STR are entered into the record. 10 U.S.C. § 860(1)(C). Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" cited in Article 66(d)(2). *Compare* 10 U.S.C. § 866 *with* 10 U.S.C. § 860c. Because the STR and the first indorsement are incorporated into the EOJ before the judgment is entered into the record under Article 60c, the § 922 annotation on the first endorsement is not an error occurring "***after*** the judgment was entered into the record." 10 U.S.C. § 866 (emphasis added). They are entered into the record again and simultaneously with the EOJ. Because they are entered again simultaneously with the judgment of the court via the EOJ they are not errors occurring after the judgment is entered into the record. 10 U.S.C. § 860c. Thus, Article 66(d)(2) does not grant this Court jurisdiction to review § 922 annotation on either the STR or the EOJ.

Appellant argues:

> Pursuant to Williams, under Article 66(d), UCMJ, this Court cannot correct the erroneous firearms bar associated with the STR, but it can correct the erroneous firearm notation on the First Indorsement attached to the EOJ, which was completed after the entry of judgment during post-trial processing.

(*Appellant's Motion for Reconsideration* at 3). But Appellant's argument fails because it confuses which document in the record constitutes the judgment of the court. The judgment of the court is the EOJ. And the § 922 annotation occurred when it was attached to the STR, before the EOJ was entered into the record, and then it was entered again simultaneously with the EOJ. The first indorsement to the EOJ merely repeats what is in the STR. Also, under R.C.M. 1111(b)(3)(F) the first indorsement is part of the EOJ itself, since it is "additional" information required by DAFI 51-201, para. 13.53.3.1. Thus, the information in the first indorsement cannot be an error occurring "after the judgment was entered," and it is not a correction this Court has authority to make under Article 66(d)(2) even if it was erroneous – which as discussed below it was not.

B. The § 922 annotation was not an error because it accurately notified Appellant that his conviction triggered the firearms prohibition under federal law.

The 18 U.S.C. § 922 annotation on the first indorsement of the STR and incorporated into the EOJ was not an error because it accurately stated that the firearm prohibition applied to Appellant in accordance with federal law. "Persons convicted of a crime punishable by imprisonment for a term exceeding one year" are subject to the federal firearm prohibition. DAFI 51-201, para. 15.28.1.; *see also* 18 U.S.C. §922(g)(1). For the crimes to which Appellant pleaded guilty, he faced, *inter alia*, a maximum of 25 years in confinement and a dishonorable discharge. (R. at 53.) The military judge convicted Appellant of these offenses and sentenced Appellant to reduction in grade to E-1, total forfeitures, confinement for 24 months, and a dishonorable discharge. (*Entry of Judgement*, dated 10 April 2023, ROT, Vol. 1.). Appellant's convictions triggered the firearm prohibition under 18 U.S.C. § 922. The first indorsement to the STR that was incorporated into the EOJ included the following annotation: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (Id.). The first indorsement to the STR accurately

reflected that per federal law, Appellant cannot possess a firearm. 18 U.S.C. § 922(g). The annotation was not erroneous.

The government maintains that 18 U.S.C. § 922 is a constitutional limitation on a felon's ability to possess a firearm, and the government rests on its answer brief to address Appellant's arguments about the constitutionality of 18 U.S.C. § 922.

Finally, this Court's authority to correct errors under Article 66(d)(2) is discretionary, since the statute states that the Court of Criminal Appeals "*may* provide appropriate relief." Any relief that this Court could grant under Article 66(d)(2) would be a pyrrhic victory. Even if this Court had authority to remove the firearms prohibition annotation from the first indorsement to EOJ (*Entry of Judgment*, ROT Vol. 1 at 3), it could not remove the firearms annotation from the STR that was incorporated into the EOJ (*Entry of Judgment*, ROT Vol. 1, Attach. at 3) because that annotation on the STR occurred before the EOJ. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since this Court's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should decline to exercise such discretion.

Reconsideration is unnecessary in this case. This Court did not overlook or misapply Article 66(d)(2), and Congress did not alter Article 66 between Appellant's submission of his Grostefon issue and Appellant's motion for reconsideration. Article 66(d)(2) does not grant this Court authority to correct the STR or EOJ in this case because the § 922 annotation is not an error that occurred "after the judgment was entered into the record."

CONCLUSION

The United States opposes Appellant's motion for reconsideration of this Court's decision in the above captioned case. For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's motion for reconsideration.

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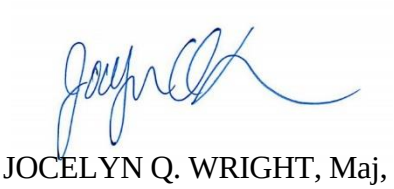
CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court and the Air Force Appellate Defense Division on 26 September 2024.



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UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

UNITED STATES	)	**No. ACM 23034**
Appellee	)	
	)	
v.	)	
	)	**ORDER**
Andrew V. LAWSON	)	
Senior Airman (E-4)	)	
U.S. Air Force	)	
Appellant	)	**Panel 2**

On 5 November 2024, Appellant moved this court to reconsider its 17 October 2024 opinion, *United States v. Lawson*, No. ACM 23034, 2024 CCA LEXIS 431 (A.F. Ct. Crim. App. 17 Oct. 2024) (per curiam) (unpub. op.), and consideration *en banc*. Appellee opposed the motion.

In accordance with Rule 27(c) of The Joint Rules of Appellate Procedure, Appellant's motion was transmitted to each judge of the court in regular active service, and not disqualified from participation due to a conflict of interest. JT. CT. CRIM. APP. R. 27(c). No judge called for a vote to reconsider the opinion *en banc*.

The panel of Senior Judge Richardson, Judge Mason, and Judge Kearley voted 3–0 against panel reconsideration.

Accordingly, it is by the court on this 6th day of December, 2024,

ORDERED:

Appellant's Motion for Reconsideration and Reconsideration *En Banc* is **DENIED**.

FOR THE COURT

Carol K. Joyce

CAROL K. JOYCE
Clerk of the Court

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 three 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; Unlawful acts; 27 C.F.R. § 478.11)

29.29. General Provision. The National Instant Criminal Background Check System (NICS) is a nationwide database of persons who are prohibited from shipping, transporting, receiving, and possessing firearms, ammunition, and explosives, in or affecting interstate or foreign commerce, under 18 U.S.C. §922(g) and (n).

29.29.1. 18 U.S.C. §925(a)(1), *Exceptions: Relief from Disabilities*, allows persons prohibited under 18 U.S.C. §§922(g) and (n), except for those convicted of misdemeanor crimes of domestic violence who are subject to the prohibition of 18 U.S.C. §922(g)(9), to transport, ship, receive, and possess government-owned firearms, ammunition, and explosives for official government business.

29.29.2. In accordance with DoDI 6400.06, *Domestic Abuse Involving DoD Military and Certain Affiliated Personnel*, Section 9, persons convicted of felony crimes of domestic violence (i.e., those crimes punishable by more than one year confinement, tried by a general or special court-martial, which otherwise meet the definition of a misdemeanor crime of domestic violence), are also prohibited from transporting, shipping, receiving, and possessing government-owned firearms, ammunition, and explosives for official government business.

29.29.3. In accordance with DoDI 6400.06, Section 9, personnel with a qualifying conviction for a crime of misdemeanor or felony domestic violence are not prohibited from working with: (1) major military weapons systems; or (2) crew-served military weapons and ammunition (e.g., tanks, missiles, and aircraft).

29.30. Categories of Prohibition. 18 U.S.C. §§922(g) and (n) detail ten categories that prohibit persons from shipping, transporting, receiving, or possessing firearms, ammunition, and explosives, in or affecting interstate or foreign commerce. See 18 U.S.C. §§922(g) and (n), 27 C.F.R. §478.11, and AFMAN 71-102, Chapter 4. The categories and their criteria are set forth below.

29.30.1. Persons convicted of a crime punishable by imprisonment for a term exceeding one year. See 18 U.S.C. §922(g)(1).

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.

EXPUNGEMENT REQUEST FOR RECORDS OF CURRENT SERVICE MEMBERS

PRIVACY ACT STATEMENT:
AUTHORITY: 10 USC Ch. 47*;* 10 USC § 9013*;* 28 USC 534*; 28 CFR Part 20; DoDI 5505.11, DoDI 5505.14.*
ROUTINE USES: May specifically be disclosed outside the DoD to the Federal Bureau of Investigation (FBI) Criminal Justice Information Service Division.
PURPOSE: To request removal or correction of information entered by the Air Force within Criminal History Databases
DISCLOSURE:
SYSTEM OF RECORD NOTICE: F071 AF OSI D, *Investigative Information Management System (I2MS)*. AF SORNs are available by number and title at ***https://dpcld.defense.gov/privacy/SORNS.aspx***
Law Enforcement Sensitive: *When filled in, the information in this document is Controlled Unclassified Information-Law Enforcement Sensitive (CUI-LES). It is the property of the law enforcement agency identified below and may be distributed within the federal government (and its authorized contractors) to law enforcement and to public safety, protection, and intelligence officials with a need to know. Distribution to other entities without prior authorization from the owning agency is prohibited. Precautions will be taken to ensure that this information is viewed, transmitted, stored, and destroyed in a manner that precludes unauthorized access. Information bearing the CUI-LES marking may not be used in legal proceedings without prior authorization from the owning agency. Recipients are prohibited from subsequently distributing the information and from posting information marked CUI-LES on any website or non-government network.*

Before choosing your answers on this form, it is important that you read the directions (found at the end), especially those that apply to the check boxes. For example, on number 5, if you check "Expungement of III Criminal History Data...," you must choose at least one of the sub-boxes that follow.

I. EXPUNGEMENT/CORRECTION REQUEST

I request that the Department of the Air Force (DAF) review information it has submitted into criminal indexing systems on me. In support of this request, I am providing:
1. Verification of Identity for Expungement Request

2. My legal name(s), including maiden name:

3. My AFOSI Investigation or Security Forces case number was (if known; if not, write "unknown, if applicable"):

4. Other documents in support of my request include:

5. Specifically, regarding my III record, I request the following (check as appropriate):

☐ Expungement of III Criminal History Data and Fingerprints, IAW DoDI 5505.11*, Fingerprint Reporting Requirements*, because:

☐ The offense was not a qualifying index IAW the version of DoDI 5505.11 that was current at the time I was indexed.

☐ There was no probable cause that I committed the offense(s) for which I was indexed at the time I was indexed.

Note: Probable cause is defined as a determination that there are reasonable grounds to believe that an offense has been committed and that the person identified as the offender committed it. Probable cause is not based upon conviction at trial.

☐ Amendment

☐ The disposition is incorrect.

☐ The charges listed are incorrect.

6. Specifically, regarding my DCII record, I request (check as appropriate):

☐ Expungement of my DCII record, IAW DoDI 5505.07, *Titling and Indexing in Criminal Investigations*, because:

☐ Probable cause did not or does not exist to believe that I committed the criminal offense for which I was investigated.

☐ This is a case of mistaken identity, and I was not the subject of a criminal investigation.

7. Specifically, regarding my NICS record, I request (check as appropriate):

☐ Expungement of my DAF NICS entry, IAW PL 103-159, 18, USC § 922; 27 CFR § Section 478.11, *Gun Control Act of 1968,* the *Brady Handgun Violence Prevention Act of 1993* and *Bipartisan Safer Communities Act of 2022* because:

☐ I did not qualify for any firearms, explosives, or ammunition prohibition set forth in the guidance, and therefore should not have been entered into NICS.

8. Specifically, regarding my DNA record in the CODIS, I request (check as appropriate):

☐ Expungement of my CODIS record, IAW DoDI 5505.14, *DNA Collection and Submission Requirements for Law Enforcement*, because:

☐ I was convicted at a general or special court-martial of an offense that is not subject to indexing.

☐ I was not convicted of any offense at a general or special court-martial.

I understand that as a result of this request, the DAF will review all DAF criminal indexing records associated with me. This review may result in the creation or deletion of a record and/or addition, adjustment, or deletion of charges and dispositions for those records.

9. Additional Comments	
10. If you require additional information, please contact me at phone	
11. or email me at	

II. ACKNOWLEDGMENTS AND SIGNATURES

1. Current Service Member Name	2. Home Address or Post Office Box
4. My Signature	**5. Date**

III. INDORSEMENTS

FIRST INDORSEMENT: STAFF JUDGE ADVOCATE (SJA)

1. I have reviewed this request and make the following recommendation regarding expungement of DNA from CODIS, as indicated by the appropriately checked box

☐ The member's request for expungement of their DNA from CODIS should be forwarded to USACIL for processing because they were not convicted of a qualifying offense under DoDI 5505.14 at a general or special court-martial.

☐ The member's request for expungement of their DNA from CODIS should ***NOT*** be forwarded to USACIL for processing because they were convicted of a qualifying offense under DoDI 5505.14 at a general or special court-martial.

2. Please contact me at phone number/email if you require more information:	
3. Staff Judge Advocate's Signature	4. Date

SECOND INDORSEMENT: COMMANDER IN RANK OF 0-4 OR HIGHER

5. I have reviewed this request and make the following recommendation regarding expungement of DNA from CODIS, as indicated by the appropriately checked boxes

☐ Your request for expungement of your DNA from CODIS should be forwarded to USACIL for processing because you were not convicted of a qualifying offense under DoDI 5505.14 at a general or special court-martial.

☐ Your request for expungement of your DNA from CODIS should ***NOT*** be forwarded to USACIL for processing because you were convicted of a qualifying offense under DoDI 5505.14 at a general or special court-martial.

6. I have consulted with my SJA in making these findings.

7. Please contact me at phone number/email if you require more information:

8. Commander's Signature

9. Date

IV. Instructions for Completing Expungement Request for Current Service Members

1. In order to facilitate timely processing of requests for expungement/correction of DAF criminal history records, we are providing you with the accompanying template. So that we can properly process your request, please use the following process.

2. Current service members requesting expungement of their Interstate Identification index (III) and/or Defense Central Index of Investigations (DCII) and/or National Instant Criminal Background Check System (NICS) records must complete the form, checking the applicable boxes

3. This form must be signed digitally with a Common Access card (CAC) or with an actual wet signature.

4. Requesters must route the request with any supporting documentation through the servicing legal office.

5. For current service members requesting expungement from the CODIS, Section III, Indorsements, must be completed. The SJA must check the appropriate box under the first indorsement, then forward to the first Commander in the requester's chain of command in the rank of O-4 or higher. The requester's Commander must check the appropriate box under the second indorsement, then provide this form back to the requester for submission to DAF-CJIC. Per DAFMAN 71-102 the SJA and commander are the only persons authorized to provide indorsements for CODIS Expungement requests.

6. This form, verification of identity document, and any supporting documents must be submitted to daf.cjic.expungements@us.af.mil for processing. Alternatively, requesters may submit the required documents to Department of the Air Force Criminal Justice Information Center (DAF-CJIC), Attn: Expungements, 27130 Telegraph Road, Quantico, VA 22134.