IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	BRIEF ON BEHALF OF
	)	THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40257
	)	
Specialist 3 (E-3)	)	USCA Dkt. No. 24-0004/SF
DEVIN W. JOHNSON	)	
United States Space Force	)	20 December 2024
Appellant.	)	

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IN THE UNITED STATES COURT OF APPEALS
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UNITED STATES, *Appellee*	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. 40257
Specialist 3 (E-3) **DEVIN W. JOHNSON** United States Space Force *Appellant.*	)	USC Dkt. No. 24-0004/SF

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

ISSUES PRESENTED

I.

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 STAFF JUDGE ADVOCATE'S INDORSEMENT TO THE ENTRY OF JUDGMENT.

II.

WHETHER REVIEW BY THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES OF THE 18 U.S.C. § 922 PROHIBITION NOTED ON THE STAFF JUDGE ADVOCATE'S INDORSEMENT TO THE ENTRY OF JUDGMENT WOULD SATISFY THE COURT'S PRUDENTIAL CASE OR CONTROVERSY DOCTRINES. *SEE* B.M. V. UNITED STATES, 84 M.J. 314, 317 (C.A.A.F.

2024) (DETAILING THIS COURT'S PRUDENTIAL CASE AND CONTROVERSY DOCTRINES).

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ, 10 U.S.C. §866(d)[1]. This Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

STATEMENT OF THE CASE

At a general court-martial convened at Schriever Space Force Base, Colorado, Appellant elected trial by officer members and entered pleas of not guilty. (JA at 25.) Contrary to his pleas, the panel found Appellant guilty of one charge and one specification of abusive sexual contact, in violation of Article 120, UCMJ. (Id.) The members acquitted Appellant of two specifications of sexual assault, in violation of Article 120, UCMJ. (Id.) All charged misconduct involved the same victim, GH. (Id.) Appellant elected sentencing by members. (Id.) The members sentenced Appellant to a reduction to the grade of E-1, six months confinement, and a bad-conduct discharge. (JA. at 25-26.) The convening authority took no action on the findings or sentence in Appellant's case. (JA at 32.)

[1] All references to the UCMJ, the Rules for Courts-Martial (R.C.M.), and the Military Rules of Evidence (M.R.E.) are to the Manual for Courts-Martial, United States (2019 ed.) [MCM], unless otherwise noted.

At AFCCA, Appellant submitted a brief asserting five assignments of error and two additional issues under United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). Notably, Appellant did not raise an 18 U.S.C. § 922 issue. On August 9, 2023, AFCCA affirmed the finding and sentence in Appellant's case. (JA at 24).

STATEMENT OF THE FACTS

On 18 September 2020, Appellant committed Abusive Sexual Contact against GH by touching her buttocks without her consent, in violation of Article 120, UCMJ. (JA at 25.) The statutory maximum punishment for Appellant's conviction was forfeiture of all pay and allowances, confinement for seven years, and a dishonorable discharge. MCM, pt. IV, para. 60.d.(4). The Staff Judge Advocate's (SJA) First Indorsement to the Entry of Judgment (EOJ) and Statement of Trial Results (STR) in Appellant's case contains the following statement: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (JA at 27, 30.)

SUMMARY OF THE ARGUMENT

Issue I- Jurisdiction

This Court lacks the authority to direct the modification of the 18 U.S.C. § 922 firearms prohibition annotation (firearms annotation) contained in the EOJ. Article 67(c)(1)(B), UCMJ[2], does not endow this Court with independent authority to modify all aspects of the EOJ. To hold otherwise would be contrary to the

[2] All references to Article 66 and Article 67 contained herein, refer to the UCMJ.

statutory canon of construction against surplusage, since it would render Article 67(c)(1)(A) meaningless. As this Court noted in Fink v. Y.B., 83 M.J. 222 (C.A.A.F. 2023), the 2017 National Defense Authorization Act (NDAA) amended Article 67(c)(1)(B) to grant this Court the authority to address a military judge's decision or order on interlocutory questions. It did not imbue this Court with carte blanche authority to independently modify any part of the EOJ outside the findings and sentence.

Whether this Court has the authority to order the modification of the firearms annotation to the First Indorsement to the EOJ turns on whether AFCCA had the authority to do the same. United States v. Williams, No. 24-0015, 2024 CAAF LEXIS 501, * 8 (C.A.A.F. Sep. 5, 2024). But AFCCA had no authority to act on the firearms annotation. Since Williams already held that AFCCA has no such authority under Article 66(d)(1), Id. at *11, Appellant shifts his focus to Article 66(d)(2). This argument also fails. Article 66(d)(2) enables a Court of Criminal Appeals (CCA) to provide appropriate relief for an error in post-trial processing occurring after the entry of judgment. To invoke the CCA's error correction authority under Article 66(d)(2), Appellant bears the burden of raising the issue before the CCA. Id. at* 14. Appellant never raised an 18 U.S.C. § 922 issue at AFCCA at all, let alone one invoking the Court's authority under Article 66(d)(2). Thus, AFCCA's error correction authority was never invoked, and it

lacked the authority to modify the First Indorsement. Because this Court's authority to act is premised upon the CCA having authority to act, Williams, 2024 CAAF LEXIS 501, at *8, this Court also lacks the authority to modify the First Indorsement.

This Court should deny Appellant's request to remand the case to AFCCA to permit him to raise the issue with the CCA in the first instance because there is no good cause to do so. Appellant had the opportunity to raise an issue under Article 66(d)(2) during his initial Article 66 review, but failed to do so.

Moreover, remand would be futile. Appellant cannot demonstrate an error occurred, nor that an error occurred *after* the judgment was entered into the record—prerequisites to invoking the Court's Article 66(d)(2) authority. Id. The firearms annotation on the First Indorsement to the STR is entered into the record *before* the EOJ. And the firearms annotation on the First Indorsement to the EOJ occurs *simultaneously* with the EOJ, so the Court's error correction authority under Article 66(d)(2) would not be triggered. Finally, the distribution of the disposition documents—the STR and the EOJ and their respective First Indorsements—was required by Air Force regulation and federal criminal indexing guidelines regardless of whether the documents contained the firearms annotation. *See* Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, para. 15.34 (18 January 2019) ("[T]he following documents are distributed…Statement of Trial

Results…Entry of Judgment"); Brady Handgun Prevention Act of 1993. PUB. L. NO. 103-159, 107 Stat. 1536. Thus, the distribution of the documents themselves was not an error that could be corrected under Article 66(d)(2).

In light of the above, this Court lacks the authority to order modification of the First Indorsement to the EOJ and remand to AFCCA would be fruitless, since AFCCA has no such authority under Article 66(d)(2) either.

Issue II - Case or Controversy Doctrine

This Court's review of the firearms annotation noted on the First Indorsement to the EOJ would not satisfy this Court's prudential Case or Controversy doctrines. In order to comply with this Court's Case or Controversy doctrines, (1) the issue must be ripe for decision and (2) the Appellant must have standing. *See* B.M., 84 M.J. at 317 (stating this Court does not answer questions that are not ripe, and that, as a prudential matter, this Court follows the principals of standing that apply to Article III courts). In accordance with those principles, this Court only addresses claims "raised by the parties who can show 'an injury in fact, causation, and redressability.'" Id. (citing Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269, 273 (2008)). Appellant lacks standing because he cannot establish either: (1) a causal connection or (2) redressability.

Appellant's alleged injury—his inability to possess firearms—is caused by 18 U.S.C. § 922 itself, not the firearms annotation on the EOJ. Even if the firearms

annotation was removed from all post-trial court-martial documents, 18 U.S.C. § 922 would still prevent Appellant from lawfully owning firearms. Moreover, many States independently prohibit felons from possessing firearms. *See e.g.* Ga. Code Ann. § 16-11-131(b) (Lexis Advance through 2024 Regular and Extraordinary Session of the General Assembly) (prohibiting any person convicted of a felony from possessing a firearm). Appellant, who has the burden to establish standing, has failed to show that he resides in a State that does not independently prohibit him from possessing a firearm. Where "a party's constitutional rights are already limited by the acts of a third party not before the Court, the party cannot make the required showing of causation." United States v. Terry, No. 2:20-CR-43, 2023 U.S. Dist. 163609 (W.D. Pa. Sep. 14, 2023) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). Here, Appellant has failed to show that his injury is not the result of some third party not before the Court, such as the State where he resides. Thus, Appellant has failed to demonstrate the causation element necessary for standing.

Further, nothing in Article 66 or Article 67 would authorize this Court or AFCCA to enjoin either federal or state prosecutors from prosecuting—or a federal or state court from convicting—Appellant if they deemed he was in violation of either 18 U.S.C. § 922 or state law. Thus, nothing this Court could do would enable Appellant to lawfully possess firearms.

In the absence of standing, any judgment from this Court would be a ruling on a legal question "which cannot affect the rights of the litigants in the case before [the court]. B.M., 84 U.S. at 317 (citing St. Pierre v. United States, 319 U.S. 41, 42 (1943)). This Court should adhere to its precedent and decline to issue an advisory opinion. *See* United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003) (explaining that this Court "generally adhere[s] to the prohibition on advisory opinions as a prudential matter."). This Court should find that it lacks the authority to act on the firearms annotation, that Appellant lacks standing, and affirm the decision of the AFCCA.

ARGUMENT

I.

THIS COURT LACKS AUTHORITY TO DIRECT THE MODIFICATION OF THE STAFF JUDGE ADVOCATE'S INDORSEMENT TO THE ENTRY OF JUDGMENT. REMAND TO AFCCA WOULD BE FRUITLESS, BECAUSE AFCCA COULD NOT CHANGE THE FIREARMS ANNOTATION UNDER ARTICLE 66(D)(2).

Standard of Review

This Court has an independent obligation to satisfy itself of its own jurisdiction. M.W. v. United States, 83 M.J. 361, 363 (C.A.A.F. 2023). This Court reviews issues of jurisdiction de novo. United States v. Begani, 81 M.J. 273, 276 (C.A.A.F. 2021). Questions of statutory construction are reviewed de novo.

United States v. Wilson, 76 M.J. 471, 474 (C.A.A.F. 2021) (citing United States v. Atchak, 75 M.J. 193, 195 (C.A.A.F. 2016)). CCAs are courts of limited jurisdiction, and this Court reviews the scope of a CCA's jurisdiction de novo. United States v. Brubaker-Escobar, 81 M.J. 471, 473-474 (C.A.A.F. 2021).

Law and Analysis

Whether this Court has the authority to order the modification of the firearms annotation on the SJA's First Indorsement to the EOJ turns on whether AFCCA had the authority to "act" on the same. Williams, 2024 CAAF LEXIS 501, at *8. AFCCA did not have that authority, therefore, this Court likewise lacks the authority to act. Id. As an Article I Court, this Court's authority "is not only circumscribed by the constitution, but limited as well by the powers given to it by Congress." In re United Mo. Bank, N.A., 901 F.2d 1449, 1452 (8th Cir. 1990). Congress has not granted this Court the authority to act in this case, therefore this Court should decline Appellant's invitation to commit an ultra vires act.

1. *Article 67(a) grants this Court jurisdiction to review Appellant's Case.*

Article 67(a), grants this Court jurisdiction to review three categories of cases. M.W., 83 M.J. at 364. This case falls squarely within Article 67(a)(3), which gives this Court jurisdiction over "all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review." AFCCA had

jurisdiction to review Appellant's case under Article 66(b)(3), because Appellant was sentenced to a bad-conduct discharge. While this Court has jurisdiction over the case, this Court lacks statutory authority to act with respect to the firearms annotation.

2. *Article 67(c)(1)(B) Does not Confer Authority on this Court to Act.*

Appellant contends that this Court's analysis in Williams, 2024 CAAF LEXIS 501, demonstrates that due to the unique nature of the Air Force's post-trial processing, this Court has the authority to correct the EOJ under Article 67(c)(1)(B). (App. Br. at 11.) According to Appellant, since the First Indorsement containing the firearms annotation is part of the EOJ – a judgment by the military judge – this Court may act upon it. (Id.) Appellant is incorrect. Article 67(c)(1)(B), states that this Court may act with respect to "a decision, judgment, or order by a military judge, *as affirmed or set aside as incorrect in law by the [CCA]*." 10 U.S.C. § 867(c)(1)(B) (emphasis added). In Williams, this Court held that the CCAs lack jurisdiction to modify the firearms annotation on the STR, based on the statutory language of Article 66. 2024 CAAF LEXIS 501 at *14-15. This Court reasoned that Article 66(d)(1) authorizes a CCA to act only with respect to the findings and sentence in the EOJ. Id. at *11. Although the firearms annotation from the STR must be included in the EOJ, the annotation constitutes "other information—*outside of the findings and sentence*." Id. at *12-15.

(emphasis added.) As a result, a CCA has no authority under Article 66(d)(1) to act on a firearms annotation, whether it is included on the STR or EOJ or both.

Appellant correctly acknowledges that this Court's authority to act is conditioned upon the CCA having had the authority to act. (App. Br. at 11.) In Williams, this Court found that it had jurisdiction under Article 67(c)(1)(B) to "vacate the ACCA's action" of modifying the firearms prohibition on the STR in the appellant's case. 2024 CAAF LEXIS 501 at *10. This Court premised its authority to vacate the CCA's action on the basis that the STR was part of the trial court's "judgment." Id. And when the CCA (erroneously) modified the STR, the CCA "set aside as incorrect in law" the judgment of the military judge. Id. This Court concluded that its authority to vacate the CCA's action hinged on its determination that the CCA "lacked the authority to engage in such action." Id.

Here, the CCA did not modify the STR or the EOJ, therefore it did not "set aside as incorrect in law, the judgment of the military judge." Id. The CCA also did not affirm the part of the STR or EOJ that related to the firearms prohibition because Appellant never raised the issue at AFCCA. (App. Br. at 17.) And AFCCA could not have affirmed the firearms prohibition in any event, because it had no jurisdiction to affirm parts of the STR or EOJ that were not the findings or sentence. Williams, 2024 CCA LEXIS 501, *13. Since the CCA neither affirmed

nor set aside the firearms annotation on the EOJ, Article 67(c)(1)(B) does not give this Court independent authority to act on the First Indorsement to the EOJ.

Appellant appears to concede that Article 67(c)(1)(B) does not endow this Court with the authority to independently modify all portions of an EOJ. (App. Br. at 11.) This interpretation accords with the statutory canon of construction against surplusage. To find that this Court has independent authority under Article 67(c)(1)(B) to correct parts of the EOJ other than the findings and sentence would render Article 67(c)(1)(A) superfluous. Article 67(c)(1)(A) states this Court may act only with respect to "the findings and sentence set forth in the entry of judgment, as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." If this Court were to find that Article 67(c)(1)(B) authorizes this Court to modify all parts of the EOJ—and not just the findings and sentence—then there would have been no need for Congress to provide in Article 67(c)(1)(A) that this Court can only act with respect to "the findings and sentence set forth in the entry of judgment." Any other interpretation is therefore contrary to the canon against surplusage. *See* Marx v. General Revenue Corp., 568 U.S. 371, 386 (2013) ("[T]he canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme.").

The better interpretation of Article 67(c)(1)(B) was the one this Court adopted in Fink v. Y.B.. 83 M.J. 222. In Fink, this Court noted that prior to the

2017 NDAA, this Court did not have the authority to act on writ-appeals filed by an accused. Id. at 224-225. But the changes to Article 67(c)(1)(B) as amended by the 2017 NDAA changed this Court's jurisdiction. This Court interpreted the amendment to Article 67(c)(1)(B) to mean that this Court could now address a military judge's decision or order on interlocutory questions. Id. at 225. Congress did not intend the amendment to Article 67(c)(1)(B) to swallow Article 67(c)(1)(A). Thus, Article 67(c)(1)(B) does not grant this Court independent authority to act on matters other than the findings and sentence where the CCA lacked such authority to act.

This Court should decline Appellant's invitation to commit an ultra vires act and should find that Article 67(c)(1)(B) does not grant this Court the independent authority to modify any part of the EOJ that does not relate to the findings and sentence—including the firearms prohibition on the EOJ.

3. *This Court lacks the authority to act because AFCCA lacked the authority to act under Article 66(d)(2).*

Appellant asserts Article 66(d)(2) would have allowed AFCCA to affirm or set aside as incorrect in law the firearms annotation. (App. Br. 15.) But Appellant concedes the firearm annotation was not raised before AFCCA. (App. Br. at 16.) Because Appellant never alleged a post-trial processing error under Article 66(d)(2) at AFCCA, AFCCA did not have authority to review the firearms annotation under Article 66(d)(2). "[E]ven if there was an error, Article 66(d)(2),

UCMJ, places the burden on the accused to raise the issue before the CCA." Williams, 2024 CAAF LEXIS 501, *14. Not only did Appellant not allege a post-trial processing error under Article 66(d)(2), he never raised an 18 U.S.C. § 922 issue before AFCCA at all. (App. Br. at 21.) While Appellant asserts he "was in a position on appeal where he could not raise this issue to the AFCCA," he provides no support for that claim. (App. Br. at 18.) Nothing prevented Appellant from raising an 18 U.S.C. § 922 issue under Article 66(d)(2). Appellant had the opportunity to raise this issue; he simply failed to do so. Thus, due to his failure to invoke AFCCA's jurisdiction under Article 66(d)(2), even if AFCCA could have theoretically reviewed the firearms annotation under Article 66(d)(2), the Court could not sua sponte do so. Because AFCCA lacked the authority to act on the firearms annotation in Appellant's case, this Court also lacks the authority to do so.

4. *Remand would be futile because Appellant can demonstrate neither (1) an error nor (2) an error occurring after the Entry of Judgment, thus AFCCA cannot grant relief under Article 66(d)(2).*

Appellant asserts that despite this Court's lack of jurisdiction, remand of this case for AFCCA to consider under Article 66(d)(2) would remedy the issue. (App. Br. at 18.) But again, Appellant has failed to show good cause for why this Court should remand this case to allow Appellant to raise an issue he could have raised the first time around.

At any rate, remand in this case would be fruitless because AFCCA could not correct the firearms annotation on the First Indorsement to the EOJ under Article 66(d)(2). "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 occurring after the judgment was entered into the record." Williams, 2024 CAAF LEXIS 501, *13. In Williams, this Court pointed to three statutory conditions that must be met before a CCA may review a post-trial processing error under Article 66(d)(2): (1) an error must have occurred, (2) the appellant must raise a post-trial processing error, and (3) the error must have occurred after the judgment was entered. Id. at *14. Assuming this Court were to remand Appellant's case so that he could raise this issue for the first time, he would not meet these conditions. The firearms annotation was not an error[3] and even if the firearms annotation was error, it was entered into the record *simultaneously* with

[3] The government maintains that 18 U.S.C. § 922 is a constitutional limitation on a felon's ability to possess a firearm. The Manual for Courts-Martial considers violations of Article 120 to be "violent offenses." MCM, Part IV, para. 78a.c.(1) (2024 ed.). This Court should be unconvinced by Appellant's argument that his offense was a "nonviolent offense." (App. Br. at 14, n. 8.) Moreover, historically the law has not distinguished between violent and non-violent felonies when imparting severe punishments, many far more severe than disarmament. For example, the crime of theft was considered a felony at the time of the Founding and was punished accordingly. *See* United States v. Diaz, 116 F.4th 458, 468-469 (5th Cir. 2024) (recognizing that historically theft was punishable be estate forfeiture, theft of chattels worth over five pounds was punishable by the death penalty, and horse theft was also punishable by the death penalty.)

the judgment being entered into the record. R.C.M. 1111(b)(3)(F); DAFI 51-201, para. 20.41 (requiring a First Indorsement to the EOJ be included as "other information"). Also, the First Indorsement to the STR contains the same annotation and is included in the EOJ. 10 U.S.C. § 860c(a)(1)(A). Both annotations occurred either prior to or simultaneously with the judgment being entered into the record.

The firearms 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(a)(1)(C) ("The military judge of a general or special court-martial shall enter into the record of a trial a document entitled "Statement of Trial Results.") Then the EOJ is entered into the record – after the STR. The EOJ is "the judgment of the court" referenced in Article 66(d)(2). *Compare* 10 U.S.C. § 866 *with* 10 U.S.C. § 860c. Because the STR and its First Indorsement are entered into the record before the EOJ is entered into the record under Article 60c, the firearms annotation on the STR's First Indorsement is not an error occurring "***after*** the judgment was entered into the record." 10 U.S.C. § 866(d)(2) (emphasis added). Even if AFCCA could correct the First Indorsement to the EOJ as occurring after the entry of the judgment into the record—which it cannot because it occurs simultaneous with the

EOJ—the firearms prohibition would still be incorporated through the STR, which cannot be corrected under Article 66(d)(2).

Perhaps recognizing the above, Appellant asserts that the error occurring after the judgment was entered into the record was the distribution of the EOJ to law enforcement and his ultimate entry into NICS. (App. Br. at 15.) But Appellant's argument stretches too far. He cannot show that these second order effects of his conviction qualify as "the processing of the court-martial" under Article 66(d)(2). Appellant's real complaint is with the contents of STR and EOJ. Distribution of those documents would happen anyway. After all, distribution of the EOJ and the STR, is mandated by Air Force regulation. DAFMAN 71-102, para. 1.5.3; AFI 51-201, para. 15.34 ("[T]he following documents are distributed…Statement of Trial Results…Entry of Judgment"). The distribution of post-trial documentation also allows for other indexing apart from the firearms prohibition, such as criminal history indexing. DAFMAN 71-102, para. 2.2. There was nothing erroneous about the distribution of the EOJ—it was legally mandated by Air Force regulation. And even if there had been no firearms annotation in the distributed documents, the documents still would have been forwarded to law enforcement to comply with other indexing requirements. Thus, the distribution of the post-trial documentation itself was not erroneous. Any error in the EOJ was one that occurred simultaneously with or prior to the judgment

being entered into the record. Thus, Appellant has failed to demonstrate an error occurring *after* the judgment was entered into the record. Even if the firearms annotation had been an error, AFCCA had no authority under Article 66(d)(2) to correct it.

In sum, Appellant failed to raise an Article 66(d)(2) argument at AFCCA, thus, even if it could have granted relief under Article 66(d)(2), AFCCA lacked the authority to act in this case. Since AFCCA lacked authority to act, this Court lacks the authority to act as well. Moreover, remanding Appellant's case so he can raise the issue in the first instance would be futile because the conditions for error correction under Article 66(d)(2) are not met. Any correction made by AFCCA to the EOJ would be an ultra vires act. Appellant's argument is without merit, and this Court should find that it lacks the authority to act on the firearms annotation and decline to remand Appellant's case.

II.

REVIEW OF THE 18 U.S.C. § 922 ANNOTATION TO THE EOJ WOULD NOT SATISFY THIS COURT'S PRUDENTIAL CASE OR CONTROVERSY DOCTRINE BECAUSE APPELLANT LACKS STANDING TO CHALLENGE THE 18 U.S.C. § 922 FIREARM ANNOTATION CONTAINED IN THE EOJ.

Standard of Review

Appellate courts review questions of standing, subject matter jurisdiction, and ripeness de novo. Elend v. Basham, 471 F.3d 1199, 1204 (11th Cir. 2006).

Law & Analysis

Review of the firearms annotation by this Court would not satisfy this Court's prudential Case or Controversy doctrine. In order to comply with this Court's Case or Controversy doctrine, (1) the issue must be ripe for decision and (2) the Appellant must have standing. *See* B.M., 84 M.J. at 317 (stating this Court does not answer questions that are not ripe, and that, as a prudential matter, this Court follows the principals of standing that apply to Article III courts). Article III of the Constitution confines the federal judicial power to "Cases" and "Controversies." United States v. Texas, 599 U.S. 670, 675 (2023). As the Supreme Court noted in DaimlerChrysler Corp. v. Cuno, "[i]n our system of government, courts have 'no business' deciding legal disputes or expounding on law in the absence of such a case or controversy." 547 U.S. 332, 341 (2006). In

accordance with those principles, this Court only addresses claims "raised by the parties who can show "an injury in fact, causation, and redressability. Id. (citing Sprint Commc'ns Co., 554 U.S. at 273). Appellant lacks standing because he cannot establish either: (1) a causal connection or (2) redressability. Absent standing, any decision by this Court would be a ruling "which cannot affect the rights of the litigants in the case before [the Court]" which this Court does not issue. B.M., 84 M.J. at 321. Thus, this Court should deny Appellant's moot request for remand to AFCCA.

A. The issue of whether review of the firearms annotation to the EOJ would satisfy this Court's Case or Controversy doctrine is ripe for decision.

Here, the question of whether review of the firearms annotation on the EOJ satisfies this Court's case and controversy doctrine is ripe for decision. The ripeness doctrine originates in the Constitution's Article III Case or Controversy language. This Court "generally adhere[s] to this doctrine and ordinarily declines to consider an issue that is "premature." Chisholm, 59 M.J. at 152. In United States v. Wall, this Court defined "ripeness" as the "state of a dispute that has reached, but has not passed the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made." 79 M.J. 456, 459 (C.A.A.F. 2020) (citing BLACK'S LAW DICTIONARY 1524 (10th ed. 2014)). Appellant requests this Court remand his case so that he can raise this issue under Article 66(d)(2) for the first time before AFCCA. (App. Br. at 23.) But as discussed

below, Appellant lacks standing before this Court and, for the same reasons, would also lack standing to raise this issue at AFCCA. It would not serve the interests of judicial economy for this Court to remand this case to AFCCA. The facts of this case have developed sufficiently to permit an intelligent and useful decision on standing to be made by this Court. This Court should find that this issue is ripe for determination and find that Appellant lacks standing to challenge the firearms annotation to the EOJ.

B. Appellant lacks standing in military courts to challenge 18 U.S.C. § 922.

Appellant's attack on the firearms annotation is nonjusticiable because he lacks standing in military courts to mount such a challenge. Appellant contends that "the Government's distribution of the SJA's erroneous 18 U.S.C. § 922 notation…deprived him of his right to bear arms." (App. Br. at 21.) Yet, to raise this argument in military court Appellant must have standing to challenge the firearms annotation to the First Indorsement of the EOJ. To demonstrate standing, Appellant must prove that he "(1) suffered an injury in fact, (2) that is fairly traceable to the [conduct complained of], and (3) that is likely to be redressed by a favorable judicial decision." Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016). Appellant has the burden of establishing each element. Id. At the very least, Appellant has failed to demonstrate (1) a causal connection between the injury and

the conduct complained of; and (2) that a ruling by this Court in his favor would "redress his injury." Lujan, 504 U.S. at 560.

1. *Nothing in the record supports a finding that Appellant has suffered an injury. But even if this Court were to find Appellant has shown an injury, Appellant lacks standing.*

To establish injury in fact, an Appellant must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560. The government acknowledges that Appellant's firearms prohibition implicates his Second Amendment rights. But nothing in the record of trial demonstrates an injury. On 17 October 2024, Appellant filed a Motion to Supplement the Record which this Court has not yet granted. (*Appellant's Motion to Supplement the Record*, dated 17 October 2024.) The government maintains its opposition to Appellant's Motion to Supplement, on the grounds that Appellant should not be able to raise a case or controversy based on matters outside the original record of trial. (*United States' Response to Appellant's Motion to Supplement Record*, dated 24 October 2024).

In the appendix to his motion, Appellant articulated he would "immediately" purchase a firearm if allowed to do so. (Id. at Appx. 1.) But even if this Court were to grant Appellant's motion and find that Appellant has articulated an actual and concrete deprivation of his Second Amendment Rights, that would not end the

inquiry. Appellant has failed to and cannot demonstrate a causal connection between the action complained of and his injury and this Court's ability to redress that injury.

2. *Appellant cannot demonstrate a causal connection between his alleged injury and the firearms annotation on his EOJ.*

There is no causal connection between the firearms annotation on the EOJ and Appellant's inability to possess a firearm. The firearms annotation to the EOJ is not what prohibits Appellant's right to possess a firearm; it merely ensures compliance with federal criminal titling and indexing requirements. *See* AFI 51-201, para. 15.34 ("In order to ensure that titling and indexing requirements…are met, SJAs must ensure the following documents are distributed…Statement of Trial Results…Entry of Judgment"). It is 18 U.S.C. § 922 itself that prohibits Appellant from possessing a firearm. Moreover, Appellant has not established that the state where he was current resides does not also prohibit him from possessing a firearm. Thus, Appellant cannot meet his burden to establish the causation element required for standing.

a. *Appellant is prohibited from possessing a firearm by virtue of his conviction and 18 U.S.C. § 922, not the firearms annotation to the EOJ.*

Appellant fundamentally misapprehends the nature of 18 U.S.C. § 922. Appellant asserts that "[t]hrough the indorsement on the EOJ, the Government has deprived [Appellant] of the ability to purchase or own firearms." (App. Br. at 24.)

However, it is not the First Indorsement that has deprived Appellant of his right to bear arms. The prohibition stems from 18 U.S.C. § 922 itself. Title 18 of the United States Code is a federal criminal provision. Section 922, titled "Unlawful acts," details circumstances under which possession of a firearm is unlawful. Relevantly, Section 922(g)(1) provides that it is unlawful for any person:

> who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year…to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g).

The maximum punishment available at his general court-martial was seven years confinement. By the plain language of 18 U.S.C. § 922(g)(1), even if the firearms annotation was removed from the EOJ, it would be a federal crime for Appellant to "immediately" purchase and possess a firearm. (App. Br. at 24.)

Appellant asserts that if the EOJ were amended, he would know "that his status was not qualifying," and thus he could not be prosecuted under 18 U.S.C. § 922 because the government would be unable to establish that "he knew he had the relevant status." (App. Br. at 29.) While the Supreme Court has found knowledge of a person's prohibited status under 18 U.S.C. § 922 an essential element, the Court left open the question of what constitutes notice. "We express no view, however, what precisely the government must prove to establish a defendant's

knowledge of status in respect to other 922(g) provisions not at issue here." Rehaif v. United States, 588 U.S. 225, 236 (2019). At his court-martial, Appellant was properly advised by the military judge that the maximum punishment for his offense included seven years of confinement. (R. 1148.) Thus, regardless of whether the firearms annotation to the EOJ is modified, Appellant has knowledge that his offense would qualify under the plain language of 18 U.S.C. § 922(g)(1).

Even assuming that this Court directed the modification of the firearms annotation to the EOJ, that does not change the fact that Appellant could be prosecuted in federal court for a violation of 18 U.S.C. § 922, if he were to possess a firearm. And even if this Court were to find that 18 U.S.C. § 922 is unconstitutional as applied to Appellant, neither this Court, nor AFCCA, has the authority to bind federal prosecutors or other federal courts. As Courts of limited jurisdiction that are entirely dependent on statute, nothing in Article 66 or Article 67 authorizes either AFCCA or this Court to issue injunctions to other federal entities or states outside of the military justice system. Thus, there is no causal connection between the annotation to the First Indorsement and Appellant's alleged injury. The First Indorsement is not what prohibits Appellant from possessing firearms. As a result, Appellant lacks standing to raise the issue before either this Court or AFCCA.

b. The firearms annotation in the EOJ ensures the government complies with federal indexing requirements, but it does not directly prohibit Appellant from possessing a firearm.

Further, distribution of Appellant's EOJ or the information contained therein to the National Instant Criminal Background Check System (NICS) is not what restricts Appellant's ability to bear arms. As discussed above, his conviction alone constitutes a qualifying offense under the plain language of 18 U.S.C. § 922(g)(1). In support of his argument Appellant cites Range v. AG United States. 69 F.4th 96 (3d Cir. 2023). Yet, Appellant fails to recognize the crucial distinction between his argument and that of the appellant in Range. In Range, the appellant recognized that it was 18 U.S.C. § 922 itself that was prohibiting him from possessing a firearm: "but for § 922(g)(1), he would 'for sure' purchase a firearm." Id. at 99. Notably, the appellant in Range did not blame federal reporting requirements. Appellant misapprehends the function of the firearms annotation to the First Indorsement.

The firearms annotation to the EOJ is not a direct prohibition on the right to bear arms, but rather a required notification that an individual who has a qualifying offense under 18 U.S.C. § 922(g) is prohibited by federal law from possessing a firearm. The Brady Handgun Prevention Act of 1993 requires the reporting of individuals with qualifying offenses under 18 U.S.C. § 922. PUB. L. NO. 103-159, 107 Stat. 1536. The NICS was created as a system for the indexing of persons

with a qualifying prohibition under 18 U.S.C. § 922. DAFMAN 71-102, *Air Force Criminal Indexing*, para. 4.1. The FBI maintains the NICS on behalf of the Department of Justice. (Id.) The Department of the Air Force Criminal Justice Information Cell (DAF-CJIC) is responsible for DAF criminal indexing and oversees NICS entries required by law. DAFMAN 71-102, para. 1.4.

Pursuant to official Air Force guidance, the SJA is responsible for distributing disposition documentation to DAF-CJIC to facilitate their reporting requirements. DAFMAN 71-102, para. 1.5.3. The required disposition documents following a general court-martial are the STR and the EOJ and their respective First Indorsements. (Id. at T. 1.1). Thus, the First Indorsements and the firearms annotations thereto, are notifications required by the Brady Handgun Prevention Act of 1993 and 18 U.S.C. § 922. While they have the practical effect of ensuring Appellant's qualifying offense is properly input into the NICS system, they are not the source of the prohibition on Appellant's right to bear arms. The statute itself – 18 U.S.C. § 922 – drives the prohibition.

Moreover, because Appellant was convicted of a crime punishable by more than one year in confinement, independent of the EOJ and STR, DAFMAN 71-201, paras. 4.3.1; 4.6.3, required the SJA to fill out an DAF Form 177[4] and send it

[4] Available online at https://static.e-publishing.af.mil/production/1/saf_ig/form/daf177/daf177.pdf

to DAF-CJIC. The purpose of that form is to "record offender's notice of qualification for prohibition of firearms…and information pertaining to this prohibition; and to provide the DAF NICS Program manager with data required for NICS reporting." *See* AF Form 177, dated 30 July 2020. Even if the EOJ and STR were not annotated, the AF Form 177 with Appellant's information would be sent to DAF-CJIC for reporting to NICS. This Court has no authority to police such action. *See* Clinton v. Goldsmith, 526 U.S. 529, 536 (1999) ("the CAAF is not given authority . . . to oversee all matters arguably related to military justice, or to act as a plenary administrator even of criminal judgments it has affirmed). Even if this Court took action on the firearms annotation in the EOJ here, Appellant's information would still be reported to NICS based on an AF Form 177, and he would be criminally indexed as prohibited from owning a firearm. The source of Appellant's injury is the same as the appellant in Range, 18 U.S.C. § 922 itself, not the firearms annotation to the EOJ.

c. Appellant has failed to demonstrate that he resides in a State that does not independently prohibit him from possessing a firearm. Thus, Appellant cannot demonstrate that the actions of the United States have caused his injury.

Appellant bears the burden of demonstrating causation. Spokeo, Inc., 578 U.S. at 338. Appellant has failed to demonstrate that his inability to possess firearms is traceable solely to 18 U.S.C. § 922(g)(1). Causation "demands a causal connection between the injury and the conduct complained of that is attributable to

the [United States], and not the result of the independent action of some third party not before the court." Siegel v. U.S. Dept. of Treas., 304 F.Supp. 3d 45, 50 (D.D.C. 2018). Thus, where "a party's constitutional rights are already limited by the acts of a third party not before the court, the party cannot make the required showing of causation."

Many States have laws prohibiting felons from possessing firearms akin to 18 U.S.C. § 922. For example, Georgia law states: "Any person who…has been convicted of a felony by a court of this state or any other state; by a court of the United States…who receives, possesses, or transports a firearm commits a felony." Ga. Code Ann. § 16-11-131(b). The Georgia statute defines felony as "any offense punishable by imprisonment for a term of one year or more and includes conviction by a court-martial under the Uniform Code of Military Justice for an offense which would constitute a felony under the laws of the United States." Ga. Code Ann. §16-11-131(a)(1). Here, Appellant has not demonstrated that his State of residence does not, like the State of Georgia, independently prohibit felons from possessing firearms. Appellant has failed to demonstrate that his injury is not the result of a third party before the Court, and thus has not demonstrated causation. Without causation, Appellant has not met his burden to demonstrate standing.

3. *Appellant has not demonstrated that this Court can provide meaningful relief. Thus, Appellant has failed to establish standing.*

The injury Appellant alleges he suffers would not be cured by a favorable decision from this Court, because Appellant was deprived of his Second Amendment protections by virtue of his conviction alone.

a. *Even if this Court modified the EOJ, the STR would still reflect the firearms prohibition.*

Appellant argues that AFCCA or this Court could correct the First Indorsement to the EOJ and that would remedy his injury. (App. Br. at 30.) But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Appellant acknowledges the STR in his case contains an indorsement indicating Appellant is prohibited from possessing firearms. (App. Br. at 30.) Per R.C.M. 1111(b)(4), the STR is a required part of the EOJ. Even if AFCCA or this Court had authority to remove the firearms annotation from the First Indorsement to the EOJ, no Court could remove the firearms annotation from the STR that was incorporated into the EOJ. Williams, 2024 CAAF LEXIS 501, *14. Thus, Appellant would be in the same situation he is in now—having a firearms prohibition annotated within the EOJ. Since this Court's intervention under Article 67 and AFCCA's intervention under Article 66(d)(2) would not provide meaningful relief, this Court cannot redress Appellant's injury and providing him the remand he requests would be futile.

b. This Court lacks the power to enjoin other federal authorities from enforcing 18 U.S.C. § 922 or state authorities from enforcing their own law.

At bottom, there is nothing this Court can do to enable Appellant to lawfully possess firearms. Neither Article 66 nor Article 67 authorize this Court to enjoin federal or state prosecutors—or federal and state courts—from pursuing charges against Appellant if they deem he is in violation of 18 U.S.C. § 922 or state law, thus this Court cannot redress his injury. *See* Daogaru v. Brandon, 683 Fed. Appx. 824 (11th Cir. 2017) (holding that where appellant was prohibited by Georgia law from possessing a firearm, the Court could not redress his injury). Because Appellant has not pleaded any facts that confer standing, this Court should find that Appellant has not presented a justiciable case and dismiss his challenge to 18 U.S.C. § 922.

4. Because Appellant lacks standing, any judgment from this Court would be nothing more than an advisory opinion, which this Court does not issue.[5]

Appellant lacks standing, and any decision by this Court regarding the firearms annotation would amount to an advisory opinion. Appellant is essentially asking this Court for a declaration that his conviction does not trigger the 18 U.S.C. § 922 firearm prohibition. (App. Br. at 28.) Yet, as discussed above, even if this Court made such a declaration, it could not prevent 18 U.S.C. § 922 from being applied to Appellant. An advisory opinion is a ruling on a legal question

[5] B.M., 84 M.J. at 321.

"which cannot affect the rights of the litigants in the case before [the court]." B.M., 84 M.J. at 317. While courts established under Article III of the Constitution may not issue advisory opinions, courts established under Article I of the Constitution generally adhere to the prohibition on advisory opinions as a prudential matter. Chisholm, 59 M.J. at 152 (citing U.S. Const., Art III § 2; United States v. Clay, 10 M.J. 269 (C.M.A. 1981). More importantly, "this Court does not issue advisory opinions." B.M., 84 M.J. at 321.

Here, where the Court cannot enjoin either federal or state authorities from prosecuting Appellant under 18 U.S.C. § 922 or state law, any judgment from this Court would be without preclusive effect. *See* Goldsmith, 526 U.S. at 531. "When it is impossible for a court to grant any effectual relief whatever to the prevailing party," the case is moot, and this Court has no power to decide it. Chafin v. Chafin, 568 U.S. 165, 172 (2013) (internal quotation marks omitted). This Court should decline Appellant's invitation to sit "as a moot court, deciding cases 'in the rarified atmosphere of a debating society,'" uphold its own precedent against issuing advisory opinions, and decline to opine on the constitutionality of Section 922 as applied to Appellant. Id. at 296.

In sum, Appellant has not established causation or redressability. He has no standing, and thus, this Court's review of the firearms prohibition on the First

Indorsement to the EOJ would not satisfy this Court's prudential Case or Controversies Doctrines.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's claims and affirm the decision of the Court of Criminal Appeals.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was transmitted by electronic means to the Court and the Appellate Defense Division by electronic means on 20 December 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c)

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Dated: 20 December 2024