IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	
Appellee,	)	UNITED STATES' ANSWER
	)	TO SUPPLEMENT TO PETITION
	)	FOR GRANT OF REVIEW
v.	)	
	)	Crim. App. Dkt. No. 40481
	)	
Major (O-4)	)	USCA Dkt. No. __-____/AF
KRIS A. HOLLENBACK	)	
United States Air Force	)	15 October 2024
Appellant.	)	

BRIEF ON BEHALF OF THE UNITED STATES

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v.	)	
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Major (O-4) **KRIS A. HOLLENBACK** United States Air Force *Appellant*.	)	USCA Dkt. No. __-____/AF
	)	15 October 2024

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

ISSUES PRESENTED

I.[1]

WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO PROVIDE APPROPRIATE RELIEF UNDER ARTICLE 66(D)(2), UCMJ, FOR THE ERRONEOUS AND UNCONSTITUTIONAL FIREARM PROHIBITION NOTED ON THE STAFF JUDGE ADVOCATE'S INDORSEMENT COMPLETED AFTER THE ENTRY OF JUDGMENT.

II.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS

[1] The United States responds to Issue I of Appellant's Supplement to Petition for Grant of Review in this Answer, and otherwise enters its general opposition to the other issues raise. The United States relies on its briefs filed with AFCCA on 10 July 2024, unless requested to do otherwise by this Court.

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.

III.

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.

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). If it grants review of this case, this Court will have jurisdiction over this matter under Article 67(a)(3), UCMJ. 10 U.S.C. 867(a)(3).

STATEMENT OF THE CASE

At a general court-martial, Appellant pleaded guilty to one specification of possession of child pornography and one specification of viewing child pornography, in violation of Article 134, UCMJ. 10 U.S.C. § 934; (R. at 105; *Entry of Judgment*, dated 28 March 2023, ROT, Vol. 1). A military judge sitting alone convicted Appellant, consistent with his pleas. (Id.). The military judge sentenced Appellant to three years confinement and a dismissal. (R. at 134). The

convening authority took no action on the findings or adjudged sentence but waived the automatic forfeitures for the benefit of Appellant's dependent children. (*Convening Authority Decision on Action*, dated 16 March 2023, ROT, Vol. 1).

At AFCCA, Appellant submitted a merits brief and one issue pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982). AFCCA considered the issue and summarily decided that Appellant was not entitled to relief citing to its published opinions in United States v. Vanzant, 84 M.J. 671 (A.F. Ct. Crim. App. 28 May 2024) and United States v. Lepore, 81 M.J. 759 (A.F. Ct. Crim. App. 16 September 2021) (en banc). AFCCA decided, "The findings and sentence as entered are correct in law and fact, and no error materially prejudicial to Appellant's substantial rights occurred. Articles 59(a) and (d), UCMJ, 10 U.S.C. §§ 859(a), 866(d)." United States v. Hollenback, 2024 CCA LEXIS 323, *2 (A.F. Ct. Crim. App. 2 August 2024) (unpub. op.).

STATEMENT OF THE FACTS

During the guilty plea inquiry, Appellant admitted that he viewed and possessed child pornography between on or about 29 April 2020 to 29 April 2021 at or near Minot Air Force Base, North Dakota. (R. at 37-38). The maximum punishment authorized based on his guilty plea was "a dismissal, 20 years confinement, total forfeitures, and a reprimand." (R. at 77). All the parties agreed that was the maximum punishment. (Id.).

At AFCCA, Appellant argued the 18 U.S.C. § 922 firearm prohibition for felons was unconstitutional as applied to him. But Appellant never argued that the 18 U.S.C. § 922 annotation on either the Statement of Trial Results (STR) or the Entry of Judgment (EOJ) was a post-trial processing error under Article 66(d)(2). AFCCA summarily denied Appellant's Grostefon issue.

SUMMARY OF THE ARGUMENT

Appellant failed to demonstrate that the 18 U.S.C. § 922 firearm prohibition annotations on the STR and EOJ were post-trial processing errors occurring after the judgment of the court-martial was entered into the record. 10 U.S.C. 866(d)(2). Article 66(d)(2) provides three prerequisites that an appellant must meet before AFCCA has jurisdiction to review a case for post-trial processing error: (1) an error occurred; (2) the appellant met his burden to demonstrate an error occurred and raised the issue at the Court of Criminal Appeals; and (3) the error occurred "after the judgment was entered into the record" via the EOJ. 10 U.S.C. § 866(d)(2). Appellant did not meet any of the three prerequisites to trigger Article 66(d)(2) review. First, the § 922 annotation was not an error because it accurately notified Appellant that his conviction triggered the firearms prohibition under federal law. Second, Appellant failed to raise the § 922 annotation on the STR and EOJ as a post-trial processing error under Article 66(d)(2) at AFCCA. Third, and finally, the § 922 annotation on the First Indorsement to the STR was entered into

the record before the judgment of the court was entered via the EOJ and again simultaneously with the EOJ when the EOJ was entered into the record.

ARGUMENT

I.

AFCCA HAD NO AUTHORITY TO CORRECT THE 18 U.S.C. § 922 ANNOTATION ON THE STATEMENT OF TRIAL RESULTS OR THE ENTRY OF JUDGMENT BECAUSE APPELLANT DID NOT RAISE OR DEMONSTRATE POST-TRIAL PROCESSING ERROR UNDER ARTICLE 66(D)(2) AT AFCCA, AND THE ANNOTATION DOES NOT CONSTITUTE AN ERROR IN THE PROCESSING OF THE COURT-MARTIAL AFTER THE JUDGMENT WAS ENTERED INTO THE RECORD.

Standard of Review

Courts of Criminal Appeals (CCA) 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

A CCA "***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(d)(2) (emphasis added). The military judge enters the court-martial judgment into the record via the EOJ. 10 U.S.C. § 860c(a)(1). By statute, the EOJ includes the STR.

10 U.S.C. § 860c(a)(1)(A). 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(a)(1). 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). This Court determined an annotation on the STR notifying the Appellant of an 18 U.S.C. § 922 firearm 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 "other information" be provided in a First Indorsement attached to the STR. Department of the Air Force Instruction (DAFI) 51-201, *Administration of Military Justice*, para. 20.6 (dated 14 April 2022). On the STR, the SJA must annotate whether "firearm prohibitions are triggered." Id. The Secretary of the Air Force also requires a First Indorsement to the EOJ that also states whether a firearm prohibition is triggered by a conviction. DAFI 51-201, para. 20.41. "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. 20.39.

Analysis

Article 66(d)(2) did not grant AFCCA jurisdiction in Appellant's case to correct the 18 U.S.C. § 922 annotation on the First Indorsement of the STR or the EOJ. Appellant did not request relief under Article 66(d)(2) at the CCA, and the 18 U.S.C. § 922 firearm annotation was neither an error, nor one that occurred after the judgment of the court-martial was entered on the record. "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." Williams, 2024 CAAF LEXIS 501, *14. 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). 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.

In Williams, this Court reiterated the statutory language identifying the three triggers required for Article 66(d)(2) review by a CCA. 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) review. Id. In this case, Appellant did not meet any of these conditions because the § 922 annotation was not an error, he did not raise the § 922 annotation as a post-trial processing error, and the § 922 annotation was entered into the record before the judgment and then again simultaneously with the judgment.

A. 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 on the First Indorsement of the EOJ were not errors because they 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. 29.30.1.; *see also* 18 U.S.C. § 922(g)(1). Appellant faced, *inter alia*, a maximum of 20 years in confinement. Manual for Courts-Martial, pt. IV, ¶95.d.(1) (2019

ed.). The military judge convicted Appellant of one specification of possession of child pornography and one specification of viewing child pornography. (*Entry of Judgment*, dated 28 March 2023, ROT, Vol. 1.). The military judge sentenced Appellant to three years of confinement and a dismissal. (Id.). 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 at AFCCA to address Appellant's arguments about the constitutionality of 18 U.S.C. § 922.

B. At AFCCA, Appellant failed to raise the § 922 annotation on the STR or the EOJ as a post-trial processing error under Article 66(d)(2).

Appellant never alleged a post-trial processing error under Article 66(d)(2) in his brief at AFCCA, and because he never met his burden to demonstrate error, AFCCA did not have authority to review his case under Article 66(d)(2). Appellant argues, "The AFCCA did not evaluate jurisdiction under Article 66(d)(2), UCMJ, despite [Appellant] demonstrating a post-trial processing error

that occurred after the judgment was entered into the record under Article 60c, UCMJ." (Supp. to Pet. at 5). But Appellant never claimed in his brief to AFCCA that he experienced a post-trial processing error under Article 66(d)(2). In fact, he never cited Article 66(d)(2) in his brief at AFCCA. He only made a substantive constitutional claim under AFCCA's Article 66(d)(1) authority.

Appellant states, "The language used by the AFCCA in the cited opinions indicates the lower court only assessed jurisdiction under Article 66(d)(1), UCMJ . . . " and AFCCA cited to precedent discussing its jurisdiction under Article 66(d)(1) without mention of Article 66(d)(2). (Supp. to Pet. at 7). AFCCA's opinion accurately cited to its review authority triggered by Appellant's brief, and the court declined to invoke Article 66(d)(2) review because Appellant did not meet his burden demonstrating post-trial error to trigger such review. "[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. If AFCCA had corrected the STR or EOJ even though Appellant did not address Article 66(d)(2) jurisdiction or raise any post-trial processing error, then this Court would have likely found AFCCA operated outside the scope of its authority in making the correction, because one of the three prongs triggering Article 66(d)(2) review was missing.

The burden to trigger Article 66(d)(2) review belongs to the Appellant – "the Court may provide appropriate relief if the accused demonstrates error," but the Appellant never demonstrated that the § 922 annotations constituted a post-trial processing error at AFCCA. 10 U.S.C. 866(d)(2). Thus, he did not meet one of the three required prongs triggering AFCCA's Article 66(d)(2) review. AFCCA did not have jurisdiction to review the § 922 firearm annotations on the STR and the EOJ as a post-trial processing error. Appellant cannot now claim that AFCCA erred, when the burden fell squarely upon him to raise an error.

C. The § 922 annotation on the First Indorsement to the STR was entered into the record before the judgment of the court was entered via the EOJ.

The 18 U.S.C. § 922 annotation was entered into the record before the EOJ was entered into the record. 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(a)(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 entered into the record before the EOJ is entered into the record under Article 60c, the § 922 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).

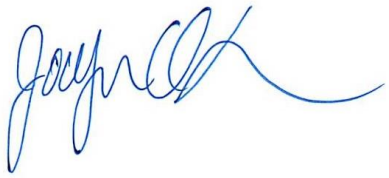
Then the STR and its First Indorsement are entered into the record again as attachments to the EOJ. 10 U.S.C. § 860c(a)(1)(A). Because they are entered again as attachments to the EOJ they are simultaneous with the judgment of the court. The STR and the STR's First Indorsement are not errors occurring after the judgment was entered into the record. 10 U.S.C. § 860c(a)(1)(A); 10 U.S.C. § 866(d)(2).

Appellant argues that AFCCA could correct the First Indorsement to the EOJ because it is attached to the EOJ after the military judge signs it. (Supp. to Pet. at 8); DAFI 51-201, para. 20.41. ("After the EoJ is signed by the military judge and returned to the servicing legal office, the SJA signs and attaches to the EoJ a first indorsement.") But a correction to the EOJ's First Indorsement would be a pyrrhic victory. Even if AFCCA 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 was entered into the record. Thus, Appellant would remain in the same situation he is in now – having a firearms prohibition annotated on the EOJ. Since AFCCA's intervention under Article 66(d)(2) would not provide meaningful relief, this Court should deny Appellant's claim.

Appellant failed to meet the three prerequisites for Article 66(d)(2) review. So AFCCA was correct in not reviewing Appellant's § 922 firearm prohibition claim as a post-trial processing error. The CCA did not have authority to review and correct the STR and EOJ under Article 66(d)(2) because they are entered into the record before or simultaneously with the judgment of the court-martial. Article 66(d)(2) does not grant AFCCA authority to correct the STR or EOJ in this case because Appellant did not raise or demonstrate error and the § 922 annotations were not errors that occurred "after the judgment was entered into the record." Thus, any correction made by AFCCA to the STR and EOJ would be an ultra vires act. Appellant's argument in Issue I is without merit, and this Court should decline to review it.

CONCLUSION

For these reasons, the United States respectfully requests that this Honorable Court deny Appellant's petition for grant of review as to Issue I.



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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 transmitted by electronic means with the consent of the counsel being served via email to samantha.castanien.1@us.af.mil on 15 October 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 2,883 words. This brief complies with the typeface and type style requirements of Rule 37.

/s/ Jocelyn Q. Wright, Maj, USAF

Attorney for the United States (Appellee)

Dated: 15 October 2024