

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES,)	UNITED STATES' ANSWER TO
<i>Appellee,</i>)	TO SUPPLEMENT TO PETITION
)	FOR GRANT OF REVIEW
v.)	
)	USCA Dkt. No. 25-0005/AF
Senior Airman (E-4))	
BRANDON A. WOOD,)	Crim. App. No. 40429
United States Air Force,)	
<i>Appellant.</i>)	7 November 2024

BRIEF ON BEHALF OF THE UNITED STATES

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel
Government Trial and
Appellate Operations Division
United States Air Force
1500 W. Perimeter Re., Ste. 1190
Joint Base Andrews, MD 20762
(240) 612-4800
Court Bar No. 30478

MARY ELLEN PAYNE
Associate Chief
Government Trial and
Appellate Operations Division
1500 W. Perimeter Re., Ste. 1190
Joint Base Andrews, MD 20762
United States Air Force
(240) 612-4800
Court Bar No. 34088

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

ISSUES PRESENTED

I.¹

WHETHER, IN LIGHT OF UNITED STATES V. WILLIAMS, __ M.J. __, CAAF LEXIS 501 (C.A.A.F. 2024), THE AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION UNDER ARTICLE 66(D)(2), UNIFORM CODE OF MILITARY JUSTICE, TO PROVIDE APPROPRIATE RELIEF FOR THE ERRONEOUS FIREARM PROHIBITION ON THE INDORSEMENT TO THE ENTRY OF JUDGMENT.

¹ The United States responds to Issue I of Appellant's Supplement to Petition for Grant of Review in this Answer, which is the only issue upon which Appellant focuses. (See Supp. to Pet. at p. 6 n. 5.) The United States otherwise enters its general opposition to the other issues raised. The United States relies on its brief filed with the Air Force Court of Criminal Appeals (AFCCA) on 26 June 2024, unless requested to do otherwise by this Court.

II.

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES HAS JURISDICTION AND AUTHORITY TO DIRECT THE MODIFICATION OF THE 18 U.S.C. § 922 PROHIBITION NOTED ON THE INDORSEMENT TO THE ENTRY OF JUDGMENT.

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 INDORSEMENT TO THE ENTRY OF JUDGMENT WOULD SATISFY THIS COURT'S PRUDENTIAL CASE OR CONTROVERSY DOCTRINES.

IV.

AS APPLIED TO SENIOR AIRMAN WOOD, WHETHER 18 U.S.C. § 922 IS CONSTITUTIONAL IN LIGHT OF RECENT PRECEDENT FROM THE SUPREME COURT OF THE UNITED STATES.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d), UCMJ. 10 U.S.C. § 866(d). If this Court grants review of this case, it will have jurisdiction over this matter under Article 67(a)(3), UCMJ. 10 U.S.C. § 867(a)(3).

STATEMENT OF CASE

A court-martial composed of a military judge sitting alone convicted Appellant, pursuant to his plea agreement, of one specification of one charge of possession of child pornography in violation of Article 134, Uniform Code of Military Justice (UCMJ). (R. at 20-21, 78, 120; App. Ex. XXXI; *Statement of Trial Results* (STR), dated 18 October 2022; *Entry of Judgment* (EOJ), dated 13 December 2022). The military judge sentenced Appellant to be reprimanded, to be reduced to the grade of E-1, to be confined for a total of 12 months, and to be discharged with a dishonorable discharge. (R. at 155; *STR*; *EOJ*.) The convening authority took no action on the findings or sentence but approved waiver of automatic forfeitures for a period of six months so pay and allowances could be directed to Appellant's fiancé for the benefit of Appellant's dependent child. (*Convening Authority Decision on Action Memorandum*, dated 17 November 2022).

The First Indorsement to the EOJ contains the following statements: "Firearm Prohibition Triggered Under 18 U.S.C. § 922: Yes." (*EOJ*.)

At AFCCA, Appellant's counsel submitted a merits brief, but Appellant personally submitted, pursuant to United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982), one assignment of error, "As applied to [Appellant], 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 [Appellant] was not

convicted of a violent offense.” He did not raise Article 66(d)(2) to support his argument. 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*). United States v. Wood, No. ACM 40429, 2024 CCA LEXIS 334, *2 (A.F. Ct. Crim. App. 13 August 2024) (unpub. op.). AFCCA decided, “The findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of Appellant occurred.” Id. at *5.

On 19 September 2024, Appellant submitted a Motion to Reconsider Out of Time, mentioning Article 66(d)(2) for the first time, which the government opposed on 25 September 2024. On 30 September 2024, AFCCA denied Appellant’s Motion.

STATEMENT OF FACTS

Appellant possessed child pornography, that is, five videos of a 16-year-old girl, whom he had been dating, masturbating, and another video of a child between the ages of 10 and 12 years who was masturbating. (R. at 62-66; Pros. Ex. 1).

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 Section 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 properly the Section 922 annotation on the STR and EOJ as a post-trial processing error under Article 66(d)(2) at AFCCA until his Motion for Reconsideration Out of Time, which AFCCA denied. Third, and finally, the Section 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), UCMJ, AT AFCCA IN HIS ASSIGNMENT
OF ERROR, 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 AFCCA, except in his Motion for Reconsideration Out of Time, which AFCCA denied, 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 at *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. 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 at *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 Section 922 annotation was not an error, he did not raise the

Section 922 annotation as a post-trial processing error at AFCCA until filing an out-of-time motion for reconsideration, and the Section 922 annotation was entered into the record before the judgment and then again simultaneously with the judgment.

A. The Section 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 a maximum of 10 years in confinement for possession of child pornography. Manual for Courts-Martial, pt. IV, para. 93.d(1) (2019 ed.). Appellant’s convictions triggered the firearm prohibition under 18 U.S.C. § 922, so the First Indorsement to the STR that was incorporated into the EOJ, which included the firearm prohibition language, 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 Section 922 annotation on the STR or the EOJ as a post-trial processing error under Article 66(d)(2) in his Assignment of Error.

Appellant did not allege 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 First Indorsement that accompanies the EOJ constitutes a post-trial processing error. (Supp. to Pet. at 15-16.) 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, even though he could have done so. He only made a substantive constitutional claim under AFCCA's Article 66(d)(1) authority. His failed motion for reconsideration is insufficient to satisfy his burden under Williams to raise the issue, because AFCCA was well within their discretionary authority to deny the motion. United States Air Force Court of Criminal Appeals, Rules of Practice and Procedure, Rule 31(a) (23 December 2020, as amended through 15 April 2021); United States v. Navarette, 81 M.J. 400, 409 n.2 (C.A.A.F. 2021) (noting CAAF denies motions for reconsideration when losing party primarily seeks reconsideration based on information that losing party could have presented at an earlier time but did not) (Maggs, J., dissenting) (citation omitted).

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 presumably because Appellant did not meet his burden of raising or 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 at *14. If AFCCA had corrected the STR or EOJ even though Appellant did not properly 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 properly belongs to the Appellant – "the Court may provide appropriate relief if the accused demonstrates error," but the Appellant never demonstrated that the Section 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 Section 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 Section 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 Section 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 15); 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, it could not remove the firearms annotation from the STR that was incorporated into the EOJ, 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 request for review.

Appellant failed to meet the three prerequisites for Article 66(d)(2) review. So AFCCA was correct in not reviewing Appellant’s Section 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) did not grant AFCCA authority to correct the STR or EOJ in this case, because Appellant did not properly raise or demonstrate error, and the Section 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 regarding Article 66(d)(2) in Issue I is without merit, and this Court should decline to review it. Regarding the other issues raised

in the petition, the United States acknowledges that this Court has granted review of similar issues in United States v. Johnson, Dkt. No. 24-0004/SF. Thus, granting review of Issues II-IV only would be appropriate in this case.

CONCLUSION

The Court should grant review only for Issues II-IV and only to the extent this Court has granted review in United States v. Johnson regarding the Court's authority to review the EOJ under Article 67(c)(1)(C), UCMJ.



STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800



MARY ELLEN PAYNE
Associate Chief
Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

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 (Capt Samantha M. Castanien) on 7 November 2024.

A handwritten signature in black ink, appearing to read 'SRK', is centered above the printed name.

STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800

CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 2,896 words. This brief complies with the typeface and type style requirements of Rule 37.

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STEVEN R. KAUFMAN, Col, USAF
Appellate Government Counsel
Government Trial and Appellate Operations
Division
Military Justice and Discipline Directorate
United States Air Force
(240) 612-4800