

## AMENDED ARTICLE 66, UCMJ

### PURPOSE

The Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA) expanded the right to direct appeal under Article 66, UCMJ for members convicted at a Special or General Court-Martial. The DAF is implementing administrative and policy changes to account for this new right.

### BACKGROUND

- On 23 December 2022, the President signed the FY23 NDAA, which amended Art. 66, UCMJ. The new Art. 66(b)(1)(A) provides that AFCCA shall have jurisdiction over appeals from all convictions at Special Courts-Martial (SPCMs) and General Courts-Martial (GCMs).

### RIGHTS OF THE ACCUSED PRIOR TO 23 DECEMBER 2022

- **Automatic review** by AFCCA under Art. 66(b)(3) was (and is currently) triggered if the sentence included death, dismissal, a dishonorable discharge, a bad conduct discharge, or confinement for two years or more.
- **Direct appeal** by the accused to AFCCA under Art. 66(b)(1)(A) was available in cases not subject to automatic review, where the sentence extended to confinement for more than six months.
- Cases **not qualifying for automatic review or direct appeal** under Art. 66(b) were reviewed under Art. 65(d) by “an attorney within the Office of The Judge Advocate General or other designated attorney.” After completion of Art. 65 review, the accused could apply for TJAG review under Art. 69, UCMJ. That application was required to be submitted “not later than one year after the date of completion of review under Art. 65.” The period could be extended by TJAG “for good cause shown.”

### RIGHTS OF THE ACCUSED AS OF 23 DECEMBER 2022

- Direct appeal by the accused to AFCCA under Art. 66(b)(1)(A) is now available in **all cases in which there was a conviction at a SPCM or GCM** not already subject to automatic review.
- To exercise the right to a direct appeal, the accused must file an application for review with AFCCA within 90 days of receiving notice of the right to do so under Art. 65(c)(1).

### FY23 NDAA, SECTION 544 APPLICABILITY STATEMENT

- The amendments to Art. 66 are contained in Section 544 of the FY23 NDAA. Section 544(d), *Applicability*, states the amendments made by that section *shall not apply to*:
  - (1) Any matter submitted before 23 December 2022 to AFCCA under Art. 66;
  - (2) Any matter submitted before 23 December 2022 to TJAG under Art. 69.

The applicability statement is silent as to convictions awaiting completion of Art. 65 review, or which received Art. 65 review but for which the one-year period to apply for TJAG review under Art. 69 had not expired as of 23 December 2022.

- The amended Art. 66(b)(1)(A) applies to all cases in which EoJ occurs on or after 23 December 2022. The text of the revised Art. 66(b)(1)(A) states that it applies to an appeal “from the judgment of the court entered...under Art. 60c(a).”
- The amended Art. 66(b)(1)(A) also applies to cases in which EoJ occurred prior to 23 December 2022, for which Art. 65 review was completed on or after 23 December 2021, and which had not been submitted for TJAG review as of 23 December 2022.

#### WAY FORWARD: POLICY CHANGE FOR IMMEDIATE DISSEMINATION

- Transition/Gap cases. Transition, or gap cases are GCMs and SPCMs with a conviction, not qualifying for automatic review, currently undergoing Art. 65 review or for which Art. 65 review was completed on or after 23 December 2021 (but which were not submitted for TJAG review as of 23 December 2022).
  - For these cases, a new notice is sent to the accused, by the responsible GCMCA legal office pursuant to Art. 65(c)(1), informing him/her of the expanded right to file a direct appeal under Art. 66(b)(1)(A). This notice triggers the 90-day period for submission.
- New cases. In addition to the transition cases identified above, the GCMCA legal office will, for all new cases with a conviction at a special or general court-martial, upon receipt of the Record of Trial (ROT) from the base legal office, send an Art. 65(c)(1) notice to the accused, informing him/her of the newly conferred right to file a direct appeal under Art. 66(b)(1)(A), and the 90-day time limit.
- ROT. When sending the Art. 65(c)(1) notice to the accused, the GCMCA legal office simultaneously forwards one copy of the ROT to AF/JAJM (with a copy of the notification and proof of certified mail service), who serves it appellate defense counsel, satisfying Art. 65(b)(2)(A)(i). The GCMCA legal office maintains a copy of the ROT.
  - If the accused affirmatively waives appellate review under Art. 61 or fails to appeal within the 90-day window, the GCMCA conducts Art. 65 review (if not previously completed) using their copy of the ROT, and sends a notice to the accused when the review is complete, re-informing him/her of the right to file for TJAG review within one year after the conclusion of the previous 90-day window.
  - If the accused invokes the right to direct appeal under Art. 66, the GCMCA forwards a copy of the ROT to the appellate government division. The GCMCA no longer has responsibility for the case, unless returned for subsequent action as a result of their appeal.
- Transcription. Presently, both Rule for Courts-Martial 1114(a)(1) and DAFMAN 51-203, *Records of Trial*, para. 11.1.1.1 require verbatim transcription when the sentence includes death, dismissal, a punitive discharge, or confinement for more than six months. Summarized transcripts are prepared for all other cases. It is possible, however, AFCCA will require a verbatim transcript to conduct their review for Art. 66 cases not resulting in sentences as listed above.
  - Unless and until a policy change is implemented, legal offices continue to create ROTs in accordance with RCM 1114, which requires verbatim transcription only when the sentence includes death, dismissal, a punitive discharge, or confinement for more than six months.

AFCCA currently does perform some functions without verbatim transcription (for example, interlocutory appeals by the government under Article 62).