

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

UNITED STATES,
Appellee,

v.

RYAN PARINO-RAMCHARAN,
First Lieutenant (O-2),
United States Air Force,
Appellant.

USCA Dkt. No. 23-0245/AF

Crim. App. Dkt. No. 40171

BRIEF ON BEHALF OF APPELLANT

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GRANTED ISSUE

WHETHER THE JUDGE ADVOCATE GENERAL AND THE AIR FORCE COURT OF CRIMINAL APPEALS LACKED JURISDICTION TO REVIEW APPELLANT’S CASE.

STATEMENT OF STATUTORY JURISDICTION

The Judge Advocate General [TJAG] of the Air Force reviewed Appellant’s case pursuant to Article 69(a), Uniform Code of Military Justice [UCMJ], 10 U.S.C. § 869(a).¹ The Air Force Court of Criminal Appeals [CCA] reviewed TJAG’s action pursuant to Article 69(d)(1)(B), UCMJ, 10 U.S.C. § 869(d)(1)(B). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

STATEMENT OF THE CASE

On April 26-28, 2021, Appellant was tried at Vance Air Force Base [AFB], Oklahoma, before a military judge sitting as a general court-martial. Contrary to his plea, Appellant was convicted of one specification of wrongful use of a controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced Appellant to forfeiture of \$2000.00 pay per month for three months and a reprimand. (JA 234-35, 237-39). On May 18, 2021, the

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

convening authority took no action on the findings or sentence and issued the adjudged reprimand. (JA 236).

On September 14, 2021, a designated judge advocate completed a review of the record of trial [ROT] pursuant to Article 65(d), UCMJ, 10 U.S.C. § 965(d). He found the findings correct in law and fact. (JA 001-004).

On November 23, 2021, Appellant submitted an application to TJAG pursuant to Article 69, UCMJ, 10 U.S.C. § 869. On August 11, 2022, TJAG denied relief. (JA 005-006).

On September 28, 2022, Appellant applied to the CCA for a grant of review pursuant to Article 69(d)(1)(B), UCMJ, 10 U.S.C. § 869(d)(1)(B). (JA 007-072).

On January 5, 2023, the CCA specified four issues for the parties regarding whether TJAG and the CCA had jurisdiction over Appellant's case based on a discrepancy between the text of Article 69(c), UCMJ, 10 U.S.C. § 869(c), as amended by Section 5333 of the National Defense Authorization Act for Fiscal Year 2017 [FY17 NDAA], and the text of Article 69(c), UCMJ, 10 U.S.C. § 869(c), as reprinted in Appendix 2 to the 2019 MCM; what relief, if any, the CCA had authority to order if the application was not properly before the court; and what the CCA's scope of review was under Article 69(d), UCMJ, if the application was properly before the court. (JA 073-077).

On March 3, 2023, the CCA granted the application for a grant of review. (JA 135).

On July 25, 2023, the CCA concluded, “we are satisfied that pursuant to Article 69(d), UCMJ, this court has jurisdiction to review TJAG’s determination.” (JA 138). The CCA affirmed the findings and sentence. (JA 136-46).

Appellant petitioned this Court for a grant of review. The Government moved to dismiss for lack of jurisdiction. (JA 148-70). This Court granted review of the jurisdictional issue on November 1, 2023. (JA 147).

SUMMARY OF ARGUMENT

The text of Article 69(c)(1)(A) and (c)(2) differs in the statute and in the 2019 MCM. Under the plain language of the statute, neither TJAG nor the CCA had jurisdiction over Appellant’s case, such that the only level of review available to Appellant was a cursory review by a designated judge advocate pursuant to Article 65(d)(2)(B). The plain language of the statute produces an absurd result. The 2019 MCM captures the correct result envisioned by Congress, namely that Appellant was entitled to seek review of TJAG’s action before the CCA.

Accordingly, additional statutory interpretation is necessary. The starting point for additional statutory interpretation is consideration of other sections of the statute dealing with the same topic to ascertain Congress’ intent. When considering the text and purpose of Articles 65, 66, and 69, UCMJ, the proposed legislative

amendments, the reasoning behind the proposed amendments, other sources of military law, and the decisions of this Court and three CCAs, it is clear that Congress intended to vest jurisdiction in TJAG and the CCA over Appellant's case. Finally, the Government has conceded to the CCA and to this Court that the statute contains scriveners' errors. For these reasons, this Court should conclude that TJAG and the CCA had jurisdiction over Appellant's case.

STATEMENT OF THE FACTS

1. Background

Appellant stayed with his friend, First Lieutenant [Lt] JD, for the July 4, 2020, weekend. (JA 250-251). Shortly after midnight on July 5, 2020, Lt JD exhibited bizarre behavior, made a series of nonsensical statements in the street, and declared that he and his "buddy" were high on LSD. (JA 240, 254-57, 259-60). Civilian police responded to the scene. (JA 240, 257-58). Both police officers wore bodycams. (JA 240, 253).

During his interactions with the officers, Appellant repeated himself several times but he did not exhibit the same behavior of Lt JD; indeed, one officer observed Appellant and announced, "This dude's under the influence, they're saying on LSD, but I don't see anything." (JA 240, 253).

Appellant repeatedly denied ingesting LSD to a paramedic and the police officers. (JA 240, 253, 261). Under repeated questioning by an officer, Appellant speculated that he might have taken some acid. (JA 240, 261-62).

The military judge denied Appellant's motion to suppress his admissions for lack of corroboration under Military Rule of Evidence [Mil. R. Evid.] 304(c). (JA 241-49).

2. Pre-2019 Articles 64, 65, 66, and 69

a. Article 64

Prior to the enactment of the Military Justice Act of 2016 [MJA],² each case with a finding of guilty that was not eligible for review under Article 66 or Article 69(a), UCMJ, 10 U.S.C. §§ 866 and 869(a), was reviewed by a judge advocate pursuant to Article 64, UCMJ, 10 U.S.C. § 864 (2012). If the judge advocate recommended corrective action, the statute provided the convening authority with several options for any action. Moreover, TJAG, under Article 69(b), 10 U.S.C. § 869(b), was empowered to review cases in which the convening authority failed to take action that was at least as favorable to the accused as that recommended by the judge advocate. Article 64(c)(3), 10 U.S.C. § 864(c)(3).

² The MJA was enacted in the FY17 NDAA and became effective on January 1, 2019. National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, div. E, §§ 5001-5542, 130 Stat. 2000-2968 (Dec. 23, 2016); <https://www.congress.gov/114/plaws/publ328/PLAW-114publ328.pdf> (last visited Nov. 15, 2023). (JA 229).

b. Article 65

Article 65, UCMJ, 10 U.S.C. § 865 (2012), required the transmittal of the ROT to TJAG in cases subject to review under Article 66 or Article 69(a), UCMJ, 10 U.S.C. §§ 866, 869(a) (2012), in which the right to such review was not waived nor was the appeal withdrawn by the accused.

c. Article 66

Article 66(b), UCMJ, 10 U.S.C. § 866(b) (2012), required TJAG to refer to a CCA the ROT in cases in which (1) the approved sentence included death, dismissal, a dishonorable or bad-conduct discharge, or confinement for one year or more and (2) except in cases with an approved death sentence, the accused did not waive the right to appellate review or withdraw an appeal. These were the only circumstances under which a CCA could review a general or special court-martial conviction. 10 U.S.C. § 866(b) (2012).

d. Article 69

Article 69(a), UCMJ, 10 U.S.C. § 869(a) (2012), required a TJAG review in general courts-martial not reviewed by a CCA under Article 66, UCMJ, 10 U.S.C. § 866, provided that the accused did not waive or withdraw the right to appellate review. In those cases, TJAG was authorized to modify or set aside the findings or sentence, or both, if any part of the findings or sentence was unsupported in law or if sentence reassessment was appropriate.

Article 69(b), UCMJ, 10 U.S.C. § 869(b) (2012), permitted TJAG to modify or set aside the findings or sentence or both in cases not reviewed under Article 66 or Article 69(a), UCMJ, 10 U.S.C. §§ 866 and 869(a) (2012) but only on the ground of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the accused's substantial rights, or sentence appropriateness. An accused could submit an application to TJAG alleging the aforementioned errors or TJAG could make these findings sua sponte.

Article 69(d), UCMJ, 10 U.S.C. § 869(d) (2012), permitted a CCA to review, under Article 66, UCMJ, 10 U.S.C. § 866 (2012), any case (1) subject to action by TJAG, (2) sent to the CCA by order of TJAG, and (3) any action taken by TJAG in such case. CCA review was limited to matters of law. Article 66(e), UCMJ, 10 U.S.C. § 866(e) (2012).

3. Proposed Legislative Amendments to the UCMJ in the Report of the Military Justice Review Group

On December 22, 2015, the Military Justice Review Group [MJRG], a body appointed by the Secretary of Defense to conduct a holistic review of the UCMJ and to propose UCMJ amendments to Congress, issued its report containing legislative proposals for the MJA and its inclusion in the FY17 NDAA. Report of the Military Justice Review Group, Part I: UCMJ Recommendations, at 3, 5, <https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf> (Dec. 22, 2015) (last visited November 14, 2023) [MJRG Report].

a. Proposed Amendments to Article 64

The MJRG proposed amending Article 64, UCMJ, to limit its applicability to the initial review of summary courts-martial because the proposed Article 65 addressed the review of all general and special courts-martial that did not qualify for direct review by the CCAs. MJRG Report at 591-94.

b. Proposed Amendments to Article 65

The MJRG proposed amending Article 65(b), UCMJ, to require a review by TJAG of all general and special court-martial cases not eligible for direct appeal under Article 66. *Id.* at 596.

The proposed amendment for Article 65(b), UCMJ, required TJAG to forward the ROT to the CCA for review under Article 66(b)(2) in cases of mandatory review because of an adjudged death sentence. If the case was eligible for direct appeal under Article 66(b)(1), TJAG would be required to forward the ROT to detailed appellate defense counsel. TJAG would not, however, need to forward the ROT when the accused waived the right to appeal or declined in writing the detailing of appellate defense counsel. *Id.* at 598-99.

The proposed amendment for Article 65(d)(2), UCMJ, authorized a review by an attorney in the Office of TJAG or another attorney designated under regulations prescribed by the Secretary concerned of cases not eligible for direct appeal under the proposed Article 66(b)(1) or (2), UCMJ. The proposed review

required a written decision regarding (1) a conclusion as to whether the court had jurisdiction over the accused and the offense; (2) a conclusion as to whether the charge and specification stated an offense; (3) a conclusion as to whether the sentence was within the limits prescribed as a matter of law; and (4) a response to each allegation of error made in writing by the accused. *Id.* at 600. These three proposed conclusions and the proposed response mirrored the conclusions and response previously required in Article 64(a)(1) and (2), UCMJ, 10 U.S.C. § 864(a)(1) and (2) (2012). *Id.* at 599-600.

The MJRG explained:

General and special courts-martial reviewed under this proposal also would be eligible for further review by the Judge Advocate General under the standards set forth in the proposed revision to Article 69. All cases reviewed under Article 69, including summary courts martial, would then become eligible for appellate review by the Courts of Criminal Appeals, either by certification of the Judge Advocate General or through an application from the accused for discretionary review.

Id. at 597.

The MJRG also proposed that Article 65(d)(3), UCMJ, be amended to provide for review by an attorney within the Office of TJAG or another designated attorney with the three aforementioned proposed conclusions, but not the aforementioned proposed response, in each general and special court-martial if the

accused waived the right to appeal, withdrew the appeal, or did not file a timely appeal in a case eligible for direct appeal.

After setting forth the proposed legislative amendment, the MJRG explained:

Article 65(b) would address the processing of records of trial in cases eligible for direct appeal to a Court of Criminal Appeals. Under paragraph (1), consistent with current practice, if the judgment of the court-martial included a sentence of death, the Judge Advocate General would be required to forward the record of trial to the Court of Criminal Appeals for automatic review. Paragraph (2) would address processing of records of trial in cases eligible for direct review by a Court of Criminal Appeals under Article 66(b)(1). The Judge Advocate General would be required to forward a copy of the record to an appellate defense counsel, who would be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals. The appellate defense counsel would review the record, advise the accused on the merits of an appeal, and, upon request, file the appeal with the Court of Criminal Appeals. The accused would be able to request that a copy of the record of trial be forwarded to civilian counsel provided by the accused. These provisions would not apply if the accused waived the right to appeal under Article 61 or declined representation by appellate defense counsel.

....

Article 65(d) would provide for limited review by an attorney within the Office of Judge Advocate General, or another attorney designated under service regulations, in cases not eligible for direct appeal to a Court of Criminal Appeals under Articles 66(b). Cases not eligible for direct review under Article 66 would be those in which a

punitive discharge was not imposed and confinement imposed was for six months or less. The review would focus on three issues: whether the court-martial had jurisdiction over the accused and the offense; whether each charge and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. The review also would include a response to any allegation of error submitted by the accused in writing. Under paragraph (3), this limited review—except for the response to allegations of error—also would be provided when an accused who is eligible to file an appeal for direct review under Article 66 waives or withdraws from appellate review, and when an accused fails to file an appeal under Article 66. This limited and expeditious review would satisfy a condition precedent to execution of certain sentences under Article 57 (Effective date of sentences), as amended. *See* Section 802, *supra*.

....

General and special courts-martial reviewed under Article 65, as well as summary courts-martial reviewed under Article 64, would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra*. Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Id. at 602-603.

c. Proposed Amendments to Article 66

The MJRG proposed amending Article 66(b), UCMJ, to confer authority to the CCA to review a case in which the accused filed an

application for review with the CCA under Article 69(d)(1)(B), UCMJ, 10 U.S.C. § 869(d)(1)(B) and the CCA granted the application. *Id.* at 613.

The MJRG explained:

This proposal would expand the opportunity for servicemembers to request review by the Courts of Criminal Appeals, through an appeal of right, in cases that are not now eligible for direct review at the request of the accused. Currently, direct review in non-capital cases is limited to cases in which the sentence includes confinement for a year or more or a punitive separation. Under this proposal, cases with a sentence that includes confinement for more than six months, or a punitive separation, would be eligible for direct appellate review.

Id. at 609.

The MJRG also explained that the amendment would “provide for discretionary review by the [CCAs] in cases that are not eligible for an appeal as of right” and “[t]he amendments would provide every servicemember found guilty of an offense by a court-martial with a pathway to review by a court of record.” *Id.* at 618.

d. Proposed Amendments to Article 69

The proposed amendments to Article 69(c), UCMJ, authorized TJAG to set aside the findings or sentence “[i]n a case reviewed under [the proposed] section 864 or 865(d) of this title (article 64 or 65(d)),” in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the

accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. *Id.* at 638.

The MJRG also proposed amending Article 69(d)(1)(B) so that a CCA “may review the action taken by [TJAG] under [proposed Article 69] (c)” in “a case submitted to the [CCA] by the accused in an application for review.” *Id.* at 639.

The CCA may grant such an application only if “the application demonstrates a substantial basis for concluding that TJAG’s action on review under subsection (c) constituted prejudicial error. . . .” *Id.*

The MJRG explained:

Section 913 would amend Article 69 to more closely align appellate review of minor offenses with the practice in the federal civilian courts. Presently, Article 69 authorizes the Judge Advocate General to conduct a post-final review of courts-martial that are not subject to direct review by the Courts of Criminal Appeals under Article 66 and that were not previously reviewed under Article 69. As amended, the accused would have a one-year period in which to file for review under Article 69 in the Office of the Judge Advocate General, extendable to three years for good cause. The three-year upper limit for filing is consistent with the proposed amendments to Article 73 (Petition for a new trial) to allow an accused to petition for a new trial based on newly discovered evidence or fraud on the court. See Section 916, *supra*. A review under Article 69, as amended, could consider issues of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. The statute would permit the accused, after a decision is issued by the Office of the Judge Advocate General, to apply for discretionary review by the Court of

Criminal Appeals under Article 66. The Judge Advocate General's authority to certify cases for review at the appellate courts would be retained.

Id. at 640.

4. FY17 NDAA Legislative History.

a. House of Representatives

On April 12, 2016, the FY17 NDAA was introduced in the House of Representatives [House] as H.R. 4909. <https://www.congress.gov/bill/114th-congress/house-bill/4909/actions?q=%7B%22search%22%3A22HR+4909%22%7D> (last visited Nov. 20, 2023). The House passed the bill as engrossed on May 18, 2016. *Id.*

Section 6809 of the bill amended Article 65, UCMJ. *Id.* It states, in pertinent part:

“(b) REVIEW BY JUDGE ADVOCATE GENERAL.—³

“(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

“(2) REVIEW OF CASES NOT ELIGIBLE FOR APPELLATE REVIEW BY A COURT OF CRIMINAL APPEALS.—

³ Relevant to the text of the proposed legislation, all quotation marks and capitalization are from the original.

“(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for appellate review under paragraph (1) or (2) of section 866(b) of this title (article 66(b)).

<https://www.congress.gov/114/bills/hr4909/BILLS-114hr4909pcs.pdf> (last visited Nov. 20, 2023).

This amendment required the review by an attorney in the Office of TJAG or a designated attorney in cases involving a subjurisdictional sentence to include a written decision regarding conclusions as to whether the court had jurisdiction over the accused and the offense; whether the charges and specification stated an offense; whether the sentence was within the limits prescribed as a matter of law; and a response to each allegation of error made in writing by the accused. *Id.*

Section 6809 continued:

“(3) REVIEW WHEN APPELLATE REVIEW BY A COURT OF CRIMINAL APPEALS IS WAIVED OR WITHDRAWN.—

“(A) A review under subparagraph (B) shall be completed in each general and special court-martial if the accused waives the right to appellate review or withdraws appeal under section 861 of this title (article 61).

The amendment required the review by an attorney in the Office of TJAG or a designated attorney in cases in which the accused waives or withdraws the right to appellate review to include a written decision regarding conclusions as to

whether the court had jurisdiction over the accused and the offense; whether the charges and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. *Id.*

Section 6813 of the bill amended Article 69, UCMJ. It states, in pertinent part:

“(a) IN GENERAL.—Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

“(c) SCOPE. – (1)(A) In a case reviewed under section 864 or 865(b) of this title (article 64 or 65(b)), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

“(2) In a case reviewed under section 865(b) of this title (article 65(b)), review under this section is limited to the issue of whether the waiver or withdrawal of an appeal was invalid under the law. If the Judge Advocate General determines that the waiver or withdrawal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

“(d) COURT OF CRIMINAL APPEALS. – (1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c) –

“(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

“(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

“(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if –

“(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error. . . .

“(e) ACTION ONLY ON MATTERS OF LAW. – Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.”.

Id.

b. Senate

On May 18, 2016, Senate Bill 2943 [S. Res. 2943] was introduced in the Senate by the Armed Services Committee.

<https://www.congress.gov/114/bills/s2943/BILLS-114s2943pcs.pdf>. (last visited Nov. 20, 2023).

Section 5289 of the bill amended Article 65, UCMJ. *Id.* It states, in pertinent part:

“(b) CASES ELIGIBLE FOR DIRECT APPEAL.—

“(1) MANDATORY REVIEW.—If the judgment includes a sentence of death, the Judge Advocate General shall forward the record of trial to the Court

of Criminal Appeals for review under section 866(b)(3) of this title (article 66(b)(3)).

“(2) CASES ELIGIBLE FOR DIRECT APPEAL REVIEW.—

“(A) IN GENERAL.—If the case is eligible for direct review under section 866(b)(1) of this title (article 66(b)(1)), the Judge Advocate General shall

“(B) INAPPLICABILITY.—Subparagraph (A) shall not apply if the accused—

“(i) waives the right to appeal under article 861 of this title (article 861); or

“(ii) declines in writing the detailing of appellate defense counsel under subparagraph (A)(i).

“(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

“(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

“(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

“(A) IN GENERAL.— A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for appellate review under paragraph (1) or (3) of section 866(b) of this title (article 66(b)).

Id.

The amendment addressed the “scope of review” in subparagraph (B). It required the review by an attorney in the Office of TJAG or a designated attorney in cases in which the accused is ineligible for direct appeal under Article 66(b)(1) or (3) to include a written decision regarding conclusions as to whether the court had jurisdiction over the accused and the offense; whether the charges and specification stated an offense; whether the sentence was within the limits prescribed as a matter of law; and a response to each allegation of error made in writing by the accused. *Id.*

The amendment also modified Article 65(d)(3):

“(3) REVIEW WHEN DIRECT APPEAL IS WAIVED,
WITHDRAWN, OR NOT FILED.—

“(A) IN GENERAL.—A review under
subparagraph (B) shall be completed in each
general and special court-martial if—

“(i) the accused waives the right to
appeal or withdraws appeal under
section 861 of this title (article 861); or

“(ii) the accused does not file a timely
appeal in a case eligible for direct
appeal. . . .

Id.

The amendment required the review by an attorney in the Office of TJAG or a designated attorney in cases in which the accused waived or withdrew the right to appellate review to include a written decision regarding conclusions as to whether

the court had jurisdiction over the accused and the offense; whether the charges and specification stated an offense; and whether the sentence was within the limits prescribed as a matter of law. *Id.*

Section 5293 amended Article 69, UCMJ. It states, in pertinent part:

“(a) IN GENERAL. – Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

“(c) SCOPE. – (1)(A) In a case reviewed under section 864 or 865(d) of this title (article 64 or 65(d)), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

“(2) In a case reviewed under section 865(d) of this title (article 65(d)), review under this section is limited to the issue of whether the waiver, withdrawal, or failure to file an appeal was invalid under the law. If the Judge Advocate General determines that the waiver, withdrawal, or failure to file an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

“(d) COURT OF CRIMINAL APPEALS. – (1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c) –

“(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

“(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

“(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if –

“(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error. . . .

“(e) ACTION ONLY ON MATTERS OF LAW. – Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal Appeals under subsection (d), the Court may take action only with respect to matters of law.”.

Id.

c. Additional Legislative History

On May 18, 2016, the Senate issued written report No. 114-255. Section 5293 states that the Senate Armed Services Committee:

recommends a provision that would amend section 869 of title 10, United States Code (Article 69, Uniform Code of Military Justice (UCMJ)) to authorize an accused, after a decision is issued by the Office of the Judge Advocate General under Article 69, to apply for discretionary review by the Court of Criminal Appeals under Article 66. The Judge Advocates General would retain authority to certify cases for review by the appellate courts.

S. REP. 114-255 (2016); <https://www.congress.gov/114/crpt/srpt255/CRPT-114srpt255.pdf> (last visited Nov. 20, 2023)

On June 14, 2016, the bill passed the Senate and the text of the bill as it pertains to Article 69(c)(1)(A) regarding cases reviewed by TJAG under Article 65(d), UCMJ, remained the same as in the proposed Senate bill.

<https://www.congress.gov/114/crec/2016/06/15/CREC-2016-06-15-pt1-PgS4011.pdf> (last visited Nov. 18, 2023).

On June 21, 2016, the bill was ordered to be printed as passed.⁴ Article 69(c)(1)(A) of the printed as passed bill provided that TJAG may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence “[i]n a case reviewed under section 864 or 865(d) of this title (article 64 or 65(d)).” Printed as Passed S. Res. 2943, 114th Cong. (2016);

<https://www.congress.gov/114/bills/s2943/BILLS-114s2943pap.pdf> (last visited Nov. 18, 2023).

On November 30, 2016, the House conference report No. 114-840 to accompany S. 2943 was filed. Section 5333 of the House conference report on S. 2943 states:

⁴ “Printed as passed” is the “version is a public print of a bill as passed. Generally, appropriation bills receive a PP designation while non-appropriation bills receive a PAP designation.” <https://www.govinfo.gov/help/bills> (last visited Nov. 20, 2023). This website provides the names and descriptions of bills as they go through the legislative process. *Id.*

The Senate bill contained a provision (sec. 5293) that would amend section 869 of title 10, United States Code, (Article 69, Uniform Code of Military Justice (UCMJ)), to authorize an accused, after a decision is issued by the Office of the Judge Advocate General under Article 69, UCMJ, to apply for discretionary review by the Court of Criminal Appeals under Article 66, UCMJ. The Judge Advocates General would retain authority to certify cases for review by the appellate courts.

The House amendment contained a similar provision (sec. 6813).

H.R. REP. 114-840, <https://www.congress.gov/114/crpt/hrpt840/CRPT-114hrpt840.pdf> (last visited Nov. 20, 2023).

On December 2, 2016, the conference report was agreed to in the House. <https://clerk.house.gov/Votes/2016600> (last visited Nov. 20, 2023).

On December 8, 2016, the conference report was agreed to in the Senate. <https://www.congress.gov/bill/114th-congress/senate-bill/2943/actions?q=%7B%22search%22%3A%22HR+4909%22%7D> (last visited Nov. 20, 2023).

d. Presidential signing

The President signed Senate bill 2943 on December 23, 2016, and FY17 NDAA, including the MJA, became Public Law No. 114-328. FY17 NDAA, Pub. L. 114-328, 130 Stat. 2000. (JA 229).

Section 5329, titled Transmittal and Review of Records, amended Article 65, UCMJ, 10 U.S.C. § 865. Under Article 65(b)(1), cases in which the judgment includes a sentence of death, dismissal, a punitive discharge, or confinement for

two years or more are automatically reviewed by a CCA under Article 66(b)(2), UCMJ, 10 U.S.C. § 866(b)(2). Under subparagraph (b)(2), TJAG shall forward a copy of the record of trial [ROT] in cases which are eligible for direct appeal under Article 66(b)(1) to an appellate defense counsel. This, however, is inapplicable if the accused waives the right to appeal or declines the detailing of appellate defense counsel in writing. *Id.* at 2930.

The amended Article 865(d) provides, in pertinent part:

“(d) REVIEW BY JUDGE ADVOCATE GENERAL.—

“(1) BY WHOM.—A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

“(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

“(A) IN GENERAL.— A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for appellate review under paragraph (1) or (3) of section 866(b) of this title (article 66(b)).

“(B) SCOPE OF REVIEW.—A review referred to in subparagraph (A) shall include a written decision providing each of the following:

“(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

“(ii) A conclusion as to whether the charge and specification stated an offense.

“(iii) A conclusion as to whether the sentence was within the limits prescribed as a matter of law.

“(iv) A response to each allegation of error made in writing by the accused.

“(3) REVIEW WHEN DIRECT APPEAL IS WAIVED, WITHDRAWN, OR NOT FILED.—

“(A) IN GENERAL.—A review under subparagraph (B) shall be completed in each general and special court-martial if—

“(i) the accused waives the right to appeal or withdraws appeal under section 861 of this title (article 861); or

“(ii) the accused does not file a timely appeal. . . .

“(B) Scope of Review.—A review referred to in subparagraph (A) shall include a written decision limited to providing conclusions on the matters specified in clauses (i), (ii), and (iii) of paragraph (2)(B).

Id. at 2931.

Section 5333, titled Review by Judge Advocate General, amended Article 69, UCMJ, 10 U.S.C. § 869, and provides, in pertinent part:

“§ 869. Art. 69. Review by Judge Advocate General

“(a) IN GENERAL. – Upon application by the accused and subject to subsections (b), (c), and (d), the Judge Advocate General may modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under section 866 of this title (article 66).

“(c) SCOPE. – (1)(A) In a case reviewed under section 864 or 865(b) of this title (article 64 or 65(b)), the Judge Advocate General may set aside the findings or sentence, in whole or in part on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

“(d) COURT OF CRIMINAL APPEALS. – (1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c) –

“(A) in a case sent to the Court of Criminal Appeals by order of the Judge Advocate General; or

“(B) in a case submitted to the Court of Criminal Appeals by the accused in an application for review.

“(2) The Court of Criminal Appeals may grant an application under paragraph (1)(B) only if –

“(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error. . . .

“(e) ACTION ONLY ON MATTERS OF LAW. – Notwithstanding section 866 of this title (article 66), in any case reviewed by a Court of Criminal

Appeals under subsection (d), the Court may take action only with respect to matters of law.”.

Id. at 2935-36. (JA 22-30).

5. 2019 Manual for Courts-Martial

The 2019 edition of the Manual for Courts-Martial, published by the Joint Service Committee on Military Justice [JSC] on January 8, 2018, “contains amendments to the [UCMJ] made by Military Justice Act of 2016” and the FY 2017-2019 NDAAs. *Manual for Courts-Martial, United States* (2019 ed.) [2019 MCM], Preface.

a. Appendix 2

Appendix 2 of the 2019 MCM contains the UCMJ. *Id.* at App. 2, A2-1-53.

(1). Article 65

Article 65(b), UCMJ, mandates automatic review of general and special courts-martial if the judgment includes a sentence of death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable discharge or bad-conduct discharge, or confinement for two years or more unless the accused waives the right to appeal under Article 61, UCMJ, or declines in writing the detailing of appellate defense counsel. *Id.* at A2-26.

Article 65(d), UCMJ, titled Review by Judge Advocate General, provides:

(1) BY WHOM.⁵ – A review conducted under this subsection may be conducted by an attorney within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.

(2) REVIEW OF CASES NOT ELIGIBLE FOR DIRECT APPEAL.—

(A) A review under subparagraph (B) shall be completed in each general and special court-martial that is not eligible for direct appeal under paragraph (1) or (3) of section 866(b) of this title (article 866(b)).

(B) SCOPE OF REVIEW. – A review referred to in subparagraph (A) shall include a written decision providing each of the following:

(i) A conclusion as to whether the court had jurisdiction over the accused and the offense.

(ii) A conclusion as to whether the charge and specification stated an offense.

(iii) A conclusion as to whether the charge and specification was within the limits prescribed as a matter of law.

(iv) A response to each allegation of error made in writing by the accused.

Id.

⁵ All capitalization in the Appendix is from the original.

(2). Article 69

The 2019 MCM incorrectly recites Article 69(c)(1)(A) and (c)(2), as follows:

(c) Scope.—

(1)(A) In a case reviewed under *section 864* or *865(d)* of this title (*article 64* or *65(d)*), the Judge Advocate General may set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence.

. . . .

(2) In a case reviewed under *section 865(d)* of this title (*article 65(d)*), review under this section is limited to the issue of whether the waiver, withdrawal, *or failure to file an appeal* was invalid under the law. If the Judge Advocate General determines that the waiver, withdrawal, *or failure to file an appeal* was in-valid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

Id. at A2-29 (emphasis added). (JA 228).

Article 69(d) provides that a CCA may review the action taken by the Judge Advocate General under subsection (c) in a case submitted to the CCA by the accused in an application for review and that the CCA may grant an application only if the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error. *Id.* Article

69(e) limits the CCA to “take action only with respect to matters of law.” *Id.* (JA 228).

b. R.C.M 1201

Rules for Courts-Martial [R.C.M.] 1201(a) and (b) mandate a review by an attorney in the Office of TJAG or another attorney designated by TJAG under regulations prescribed by the Secretary concerned for each general and special court-martial case not eligible for review by a CCA under Article 66(b)(1) or (3), UCMJ, and for each general and special court-martial eligible for review by the CCA but which the CCA does not review because the accused withdraws direct appeal or waives the right to appellate review, except in cases with a death sentence.

The aforementioned review “shall include a written conclusion” for each of the following:

- (1) Whether the court had jurisdiction over the accused and the offense;
- (2) Whether each charge and specification stated an offense;
- (3) Whether the sentence was within the limits prescribed as a matter of law; and
- (4) When applicable, a response to each allegation of error made in writing by the accused.

R.C.M. 1201(d).

After the aforementioned review, TJAG may, upon application of the accused or a person with authority to act for the accused, modify or set aside the findings or sentence, in whole or in part, of a general or special court-martial previously reviewed under R.C.M. 1201(a)(1) or (2) on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence. R.C.M. 1201(h)(1)(B), (4)(A).

Actions taken by TJAG under R.C.M. 1201(h) may be reviewed by a CCA under Article 69(d), UCMJ, if TJAG forwards the case or if the accused submits an application for review to the CCA, which may grant such an application only “if the application demonstrates a substantial basis for concluding that the Judge Advocate General’s action under this rule constituted prejudicial error. . . .” R.C.M. 1201(k)(1). In this situation, the CCA may take action only with respect to matters of law. R.C.M. 1201(k)(3).

c. Updated Appendix 2

The JSC published an updated Appendix 2 of the MCM, effective December 20, 2019. The updated Appendix 2 contains the entire UCMJ and includes updates from FY18-20 NDAAAs. 2019 MCM A2-1-54.

<https://jsc.defense.gov/Portals/99/Documents/UCMJ%20-%202020December2019.pdf> (last visited Nov. 15, 2023).

The text of Article 65(b) and (d), UCMJ and Article 69(c)(1)(A), 69(c)(2), (d), and (e) are the same as in the original Appendix. *Id.* at A2-27, 29-30.

6. Air Force Instruction 51-201

Section 24E of Air Force Instruction [AFI] 51-201, Administration of Military Justice, dated April 14, 2022, provides guidance for review by attorneys within the Office TJAG under Article 65(d), UCMJ, of general courts-martial and special courts-martial not eligible for automatic or direct appeal to the CCA. AFI 51-201, Administration of Military Justice, § 24E (Apr. 14, 2022).

The instruction also provides guidance for the scope of an Article 69(a), UCMJ, TJAG review of an Article 65(d), UCMJ, review and for CCA review of an application for review under Article 69(d)(1)(B), UCMJ.. *Id.* at §§ 24F, 24G.

All references to Article 65, UCMJ, reviews in these sections are to Article 65(d). *Id.* at §§ 24E-G.

ARGUMENT

THE JUDGE ADVOCATE GENERAL AND THE AIR FORCE COURT OF CRIMINAL APPEALS HAD JURISDICTION TO REVIEW APPELLANT’S CASE.

STANDARD OF REVIEW

“The [C]ourts of [C]riminal [A]ppeals are courts of limited jurisdiction, defined entirely by statute.” *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015) (citation omitted). Jurisdiction is a legal question reviewed de novo. *United*

States v. Brubaker-Escobar, 81 M.J. 471, 474 (C.A.A.F. 2021) (per curiam). “The burden to establish jurisdiction rests with the party invoking the court’s jurisdiction.” *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

Issues of statutory construction are reviewed de novo. *United States v. Wilson*, 76 M.J. 4, 6 (C.A.A.F. 2017) (citing *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016)).

LAW

As a first step in statutory construction, courts are obligated to engage in a "plain language" analysis of the relevant statute. *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017) (citing *United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013)). “From the earliest times, we have held to the ‘plain meaning’ method of statutory interpretation. Under that method, if a statute is unambiguous, the plain meaning of the words will control, so long as that meaning does not lead to an absurd result.” *United States v. Ortiz*, 76 M.J. 189, 192 (C.A.A.F. 2017), *aff’d*, 138 S. Ct. 2165 (2018). *See also Schell*, 72 M.J. at 343 (quoting *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012)) (additional citation omitted).

When a party asks the court to apply the absurdity doctrine, it should explain in detail why following the plain meaning of the statute would produce absurd results. *United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021).

“Whether the statutory language is ambiguous is determined ‘by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.’” *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). When the parties contend that an ambiguity exists and that additional statutory interpretation is necessary, this Court considers the ambiguity within the larger legislation. *Id.* “When a statute is a part of a larger Act . . . the starting point for ascertaining legislative intent is to look to other sections of the Act in pari materia with the statute under review.” *Id.* at 395-96 (quoting *United States v. Diaz*, 69 M.J. 127, 133 (C.A.A.F. 2010) (alteration in original) (internal quotation marks and citations omitted)). “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Buffington v. McDonough*, 143 S. Ct. 14, 17 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)). Indeed, this Court cautions that it “has no license . . . to construe statutes in a way that ‘undercut[s] the clearly expressed intent of Congress.’” *Id.* at 396 (alteration in original) (quoting *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008)).

ANALYSIS

1. Introduction

Article 69(c), UCMJ, as amended by the MJA and explicated in the statutory language of 10 U.S.C. § 869(c), permits TJAG to review cases reviewed under 10 U.S.C. §865(b) and take certain actions.

Article 69(d), UCMJ, as amended by the MJA in 10 U.S.C. § 869(d), authorizes CCA review of TJAG’s Article 69(c), UCMJ review upon application of the accused provided that the application demonstrates a substantial basis for concluding that the TJAG review constituted prejudicial error.

The statute differs in three ways from the language of Article 69 in the 2019 MCM:

- Subsection (c)(1)(A) of the statute references actions TJAG may direct on appeal by reference to a case reviewed under Article 65(b), UCMJ; however, the MCM references such actions regarding a case reviewed under Article 65(d).
- Subsection 69(c)(2) of the statute references the limited scope of review of a case under Article 65(b), UCMJ; however, the MCM references such limited review regarding a case reviewed under Article 65(d).
- The MCM includes within the scope of TJAG’s authority to order appropriate corrective action whether an accused’s “failure to file an appeal” was invalid. This language is not included in Article 69(c)(2), UCMJ, as amended by the MJA in 10 U.S.C. § 869(c)(2).

Only the first two errors are relevant to the granted issue.

2. The plain language of the statute produces an absurd result.

The absurdity is that the plain reading suggests that TJAG may set aside the findings or sentence on the grounds of newly discovered evidence, fraud on the court, lack of court-martial jurisdiction over the accused, error prejudicial to the accused's substantial rights, or sentence appropriateness in cases that are *automatically reviewed* by the CCA or are *eligible for direct appeal review* by the CCA. In other words, this reading limits TJAG to only setting aside the findings or sentence in cases that will already be reviewed by the CCA. For example, an officer convicted by a general court-martial of sexual assault in 2021 and sentenced to dismissal is entitled to automatic review by the CCA under Article 66(b)(3), UCMJ, 10 U.S.C. § 866(b)(3). Under a plain reading of Article 69(c), UCMJ, 10 U.S.C. § 869(c), TJAG may set aside the findings or sentence, in whole or in part, based only on the aforementioned five grounds in this case. There is no need for TJAG to review this case because the CCA will automatically review the case. Moreover, the CCA can order remedies, such as a factfinding inquiry to develop facts for appellate review pursuant to *United States v. DuBay*,⁶ that TJAG cannot order. The plain reading of the statute produces an illogical result and serves no meaningful purpose. Indeed, the plain language expressly thwarts Congress' intent. *See infra*.

⁶ 17 CMA 147, 37 C.M.R. 411 (1967).

Turning to the language of the amended statute, Article 69(a), UCMJ, 10 U.S.C. § 869(a), titled “Review by Judge Advocate General,” permits TJAG to modify or set aside, in whole or in part, the findings and sentence in a court-martial that is not reviewed under Article 66, UCMJ. This review, however, is “subject to subsections (b), (c), and (d) . . .” of the statute. 10 U.S.C. § 869(a). Subsection (b) concerns the timing of an application submitted to TJAG under Article 64 or 65. *Id.* at (b). Notably, subsection (b) covers all of Article 65 and not just Article 65(b) or Article 65(d). *Id.*

Subsection (c) of the statute concerns the scope of the TJAG review. 10 U.S.C. 869(c). In subsection (c)(1)(A), the focus of the TJAG review is on the remedies TJAG may grant on the grounds of newly discovered evidence, fraud on the court, lack of court-martial jurisdiction over the accused, error prejudicial to the accused’s substantial rights, or sentence appropriateness. In subsection (c)(2), the focus of the TJAG review is whether the accused’s waiver or withdrawal of an appeal eligible for Article 66, UCMJ, review was invalid.

Read in conjunction, these provisions demonstrate that Congress intended for 10 U.S.C. 869(c) to authorize a review in cases that are either ineligible for direct review or are eligible but in which the accused waived or withdrew the appeal. However, the reference to Article 65(b) in 10 U.S.C. 869(c)(1)(A) leads to an absurd result that is in conflict with Congress’ intent. *See infra.*

The reference to Article 65(b) in 10 U.S.C. 869(c)(2), however, is logically correct because it makes sense for TJAG to review cases which are eligible for either automatic review or direct appeal to the CCA but which are waived or withdrawn by the accused. In the latter situation, under Article 65(b)(2)(B), UCMJ, TJAG need not forward the ROT to a detailed appellate defense counsel because the accused waived or withdrew the appeal or declined in writing the detailing of appellate defense counsel.

Here, the CCA recognized that the plain language of 10 U.S.C. 10 U.S.C. 869(c) produces an absurd result. In the order specifying issues for the parties, the CCA observed:

The UCMJ is reprinted at Appendix 2 to the [2019 MCM]. Unlike the text in the FY17 NDAA, the version of Article 69(c), UCMJ, found in the 2019 *MCM* refers to “section 865(d)” and “article 65(d)” rather than “865(b)” and “65(b).” Article 65(b), UCMJ, relates to cases automatically eligible for direct appeal to a Court of Criminal Appeals (i.e., those cases involving a punitive discharge or confinement for two years or more), while Article 65(d), UCMJ, covers cases which are not automatically reviewed by a Court of Criminal Appeals or when such review is waived, withdrawn, or not filed. **While the reference to Article 65(d), UCMJ, in the 2019 MCM seems to be logically correct,** the congressional statute under Section 5333 of the FY17 NDAA, which refers to Article 65(b), would ordinarily take precedence over language in the *Manual*.

(JA 074-075). (*italics in original*) (*emphasis added*).

Conversely stated, the reference to Article 65(b) in 10 U.S.C. 869(c)

produces an illogical result.

3. Congress intended for TJAG and the CCA to have jurisdiction to review Appellant's case.

The plain language of the statute produces an absurd result. Accordingly, the next step in statutory interpretation is to ascertain the legislature's intent. *See McPherson*, 73 M.J. at 395.

a. Other sections of the statute dealing with the same subject matter confirm that Congress intended to vest jurisdiction in TJAG and in the CCA.

The starting point is to look at other sections of the statute dealing with the same subject matter, which is the review of the findings and sentence in cases not eligible for automatic review or direct appeal by the CCAs. *See id.* A review of these sections confirms Congress' intent to vest jurisdiction in TJAG and in the CCA.

First, "the words of the title [in 10 U.S.C. § 869], held to their ordinary meaning, manifest the clearest intent that Congress vested jurisdiction in TJAG to review a case." *United States v. Zier*, 2023 CCA LEXIS 178, *19 (A.F. Ct. Crim. App. Apr. 18, 2023) (unpub.) (citing *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (internal quotation marks omitted))). The title of 10 U.S.C. § 869 is "Review by Judge Advocate General," which makes clear that Congress intended for TJAG to review

cases ineligible for automatic review or direct appeal to the CCAs. Additionally, the title of 10 U.S.C. § 865 is “Transmittal and review of records” and the title of subsection (b) is “Cases for Direct Appeal,” which supports the conclusion that the purpose of that subsection within the larger section is for TJAG to forward a copy of the ROT to an appellate defense counsel in cases eligible for direct appeal review. The title of subsection (d) is “Review by Judge Advocate General,” which supports the conclusion that the purpose of that subsection within the larger section is for a review by an attorney within the Office of TJAG or another designated attorney in cases ineligible for automatic review or direct appeal or for such a review in cases eligible for direct appeal when the accused waives the right to appeal, withdraws the appeal, or fails to file a timely appeal. Thus, when considering the larger statute, it is clear that Congress intended to vest jurisdiction in TJAG to review a case such as Appellant’s.

Next, the title of 10 U.S.C. § 866 is “Courts of Criminal Appeals” and the title of subsection (b)(1) is “Appeals by Accused.” That subsection confers jurisdiction on the CCAs over a timely appeal from the judgment of a court-martial “[i]n a case in which the accused filed an application for review with the Court under section 869(d)(1)(B) of this title (article 69(d)(1)(B) and the application has been granted by the Court.”

b. The legislative history of the statute confirms Congress’ intent to vest jurisdiction in TJAG and in the CCA.

The November 30, 2016, House conference report which accompanied the Senate version of the bill noted that the Senate bill sought to amend 10 U.S.C. § 869 in section 5293 “to authorize an accused, after a decision is issued by the Office of the Judge Advocate General under Article 69, UCMJ, to apply for discretionary review by the Court of Criminal Appeals under Article 66, UCMJ. . . . The House amendment contained a similar provision (sec. 6813).” This report makes clear that Congress intended to authorize a discretionary CCA review following a review in the Office of TJAG for cases ineligible for automatic review or direct appeal to the CCA.

This Court can also discern Congress’ intent from the MJRG’s legislative proposals to Congress. First, the MJRG recommended that Congress amend Article 65(b) to address the processing of records of trial in cases eligible for either automatic review or direct appeal to a CCA. MJRG Report at 602. The MJRG recommend that Congress amend Article 65(d) to provide a limited review by an attorney within the Office of TJAG or another designated attorney in cases with subjurisdictional sentences and in cases in which the accused waives or withdraws appellate review from a case that is eligible for direct review under Article 66. *Id.*

Crucially, the MJRG explained that general and special courts-martial reviewed under Article 65 and summary courts-martial reviewed under Article 64

would be eligible for further review by the Judge Advocate General under the standards set forth in Article 69, as amended. *See* Section 913, *supra*. Those cases would then become eligible for appellate review by the Court of Criminal Appeals, either by certification of the Judge Advocate General or through application of the accused for discretionary review.

Id. at 603.

Next, the MJRG recommended that Congress amend 10 U.S.C. § 869(c)(1)(A) to authorize a limited review by TJAG in cases reviewed under “section 864 or section 865(d) of this title (article 64 or 65(d))” and amend 10 U.S.C. § 869(c)(2) to authorize TJAG review for the validity of an accused’s waiver, withdrawal, or failure to file an appeal in cases eligible for direct appeal.

Finally, the MJRG recommended that Congress amend 10 U.S.C. § 869(d) to authorize a discretionary CCA review upon application by the accused to “expand the opportunity for servicemembers to request review by the [CCAs]. . . . in cases that are not now eligible for direct review at the request of the accused.”

Id. at 609.

Read in conjunction, the MJRG’s proposed legislative amendments intended for Congress to vest jurisdiction in TJAG and the CCA in Appellant’s case. Yet, this intention can only be realized through a reading of Article 69(c)(1) that is made in reference to Article 65(d). Conversely, a reading that incorporates Article 65(b) completely obscures this intention.

4. The statute contains scrivener's errors.

Given the examination of other sections of the statute dealing with the same subject matter – TJAG and CCA review of the findings and sentence in cases not eligible for automatic review or direct appeal by the CCAs – and Congress' intent to authorize such reviews, it follows that the final text of the enacted legislation contained scrivener's errors in 10 U.S.C. §§ 869(c)(1)(A) and (c)(2), which reference Article 65(b). There are three reasons supporting the conclusion that the statute contains scriveners' errors in the transposition of Article "65(b)" and "65(d)."

First, as discussed above, the MJRG's proposed legislation provided for TJAG review of (1) cases not eligible for either automatic review or direct appeal to the CCA and (2) for cases eligible for direct appeal but in which the accused waived or withdrew the appeal or declined in writing the detailing of appellate defense counsel in Article 65(d), UCMJ, 10 U.S.C. § 865(d).

Second, as discussed above, the plain language of the statute produces an absurd result. The absurdity is that under Article 69(c)(1)(A), UCMJ, 10 U.S.C. § 869(c)(1)(A), TJAG may set aside the findings or sentence on the grounds of newly discovered evidence, fraud on the court, lack of court-martial jurisdiction over the accused, error prejudicial to the accused's substantial rights, or sentence

appropriateness in cases that are automatically reviewed by the CCA or are eligible for direct appeal review by the CCA.

Third, other sources of military law, including this Court and three CCAs have recognized that Congress intended to authorize TJAG review and a subsequent CCA review upon application by the accused. *See* R.C.M. 1201(a), (b), (h), (k); AFI 51-201, §§ 24E-G; 2019 MCM, App. 2 at A2-29; 2019 MCM Updated App. 2 at A2-29-30.

In *United States v. Brown*, this Court recognized Congress' intent when it stated:

Congress created a bifurcated statutory scheme for the appellate review of completed courts-martial, depending upon the sentence approved by the convening authority. A court of criminal appeals exercises jurisdiction over a broad range of cases under Article 66(b), UCMJ, including every case in which the approved sentence extends to a punitive separation or confinement for a year or more unless mandatory review is waived. Because Appellee's sentence is below the Article 66(b), UCMJ, threshold for mandatory review at the lower court, the Article 66(b), UCMJ, pathway to appellate review is unavailable to Appellee.

Article 69, UCMJ, however, provides a second pathway to review before the Court of Criminal Appeals for an accused convicted and sentenced at a special court-martial. Cases not reviewed by the lower court pursuant to Article 66(b), UCMJ, such as the instant case tried at a special court-martial, can still be reviewed by TJAG “upon application of the accused” for, *inter alia*, “error prejudicial to the substantial rights of the accused.” Article 69(b), UCMJ.

81 M.J. 1, 4 (C.A.A.F. 2021).⁷

In a footnote to the final sentence of the above passage, this Court noted:

The instant case was referred on January 12, 2018. For cases referred on or after January 1, 2019, pursuant to Article 66(b)(1)(D), 10 U.S.C. § 866(b)(1)(D), an accused is now entitled to have the courts of criminal appeals review his case with respect to matters of law if the accused applies for review from a decision of TJAG under Article 69(d)(1)(B) “and the application has been granted by the Court.” Thus, it is no longer the case that only those cases that TJAG elects to refer to the court of criminal appeals under Article 69(d), UCMJ, may be heard by the lower court.

Id. at n.5.

The CCA recognized Congress’ intent to provide TJAG review under Article 65, UCMJ. In denying an application for grant of review in *United States v. Csady*, the CCA stated:

We have reviewed the action taken by The Judge Advocate General in this case and the Application for Grant of Review timely submitted to this court under Article 69(d)(1)(B), UCMJ, 10 U.S.C. § 869(d)(1)(B), dated 9 October 2020. The court determines the application has not demonstrated a substantial basis for concluding that the action under review constituted prejudicial error. Article 69(d)(2)(A), UCMJ, 10 U.S.C. § 869(d)(2)(A).

⁷ In *Brown*, this Court considered a writ-appeal petition about whether the CCA erred in finding that it had potential jurisdiction in a case involving the 2012 version of Article 69(d), UCMJ, 10 U.S.C. § 869(d). 81 M.J. at 2.

2021 CCA LEXIS 516 (A.F. Ct. Crim. App. Sep. 30, 2021) (unpub.) (footnote omitted).

The Navy-Marine Corps CCA has also determined that it had jurisdiction to review subjurisdictional cases in which TJAG took no action, denied relief, and found no error prejudicial to an applicant's rights under Article 69(c), UCMJ. *See United States v. Howard*, No. 202000251, 2022 CCA LEXIS 193 at *1-2 (N.M. Ct. Crim. App. 29 Mar. 2022) (unpub.) ("On 17 September 2020, Applicant applied for review by the Judge Advocate General, in accordance with Article 69(a), UCMJ. On 20 October 2021, the Judge Advocate General denied the Application for Relief. On 20 December 2021, Applicant timely submitted to this Court an Application for Review of the Judge Advocate General's Action, in accordance with Article 69(d)(1)(B), UCMJ. We have reviewed the Action taken by the Judge Advocate General in this case and the Application for Review, and have determined that the Application does not demonstrate a substantial basis for concluding that the Action under review constituted prejudicial error."); *United States v. Farnum*, No. 202000120, 2021 CCA LEXIS 597 at *1-2 (N.M. Ct. Crim. App. Nov. 11, 2021) (unpub.) ("On 10 August 2021, the Judge Advocate General approved the findings and sentence as adjudged. On 5 October 2021, Applicant timely submitted to this Court an Application for Review of the Judge Advocate General's action, in accordance with Article 69(d)(1)(B), UCMJ (2018). We have

reviewed the action taken by the Judge Advocate General in this case and the Application for Review and have determined that the Application does not demonstrate a substantial basis for concluding that the action under review constituted prejudicial error.”).

The Army CCA has also recognized Congress’ intent to provide TJAG review under Article 65, UCMJ. In *United States v. Tate*, the CCA explained:

The first pertinent 2019 change [in cases referred on or after 1 January 2019] provided that the initial review of appellant's court-martial was a “Review by [The] Judge Advocate General” (TJAG) under Article 65, UCMJ. UCMJ art. 65(d). Article 65 mandates that such reviews “shall be completed in each general and special court-martial that is not eligible for direct appeal” to this court under Article 66. UCMJ art. 65(d)(2)(A). The black letter of Article 65 gives TJAG the authority to delegate Article 65 reviews to attorneys “within the Office of the Judge Advocate General or another attorney designated under regulations prescribed by the Secretary concerned.” UCMJ art. 65(d)(1).

2022 CCA LEXIS 543, *3 (Army Ct. Crim. App. Sep. 9, 2022) (unpub.)⁸

⁸ The issue of what constitutes “the action taken by the Judge Advocate General” under Article 69(c), UCMJ, for review by the CCAs under Article 69(d), UCMJ, is a novel issue. The Army CCA declined to address the issue in *Tate*:

There is a second jurisdictional question present in the post-2019 Article 69. Namely, Article 69(d) requires a TJAG “action” under Article 69(c) to vest this court with jurisdiction. But all of the “actions” listed in Article 69(c) are *favorable* to an appellant, giving rise to the question of whether a *denial* of relief (as here) constitutes a TJAG “action” under Article 69(c), even if personally acted on

This Court should conclude that Section 5333 of the enacted statute contains a scriveners' errors in the transposition of Article 65(b) and (d) because of the placement of the text within the larger statute; the MJRG's recommendations and proposed legislation; and the understanding by this Court, three CCAs, and other sources of military law that Congress intended to authorize an Article 69(c), UCMJ, TJAG review of cases ineligible for automatic review or direct appeal to the CCA and an Article 69(d), UCMJ, CCA review of that Article 69(c), UCMJ, review.

5. The Government acknowledged the scriveners' errors to the CCA and to this Court.

In its brief to the CCA on the specified issues, the Government conceded that Article 69(c), UCMJ, 10 U.S.C. § 869(c), contained scriveners' errors when it wrote "the plain language of Article 69 seemingly contains a scrivener's error in its internal reference to Article 65(b). . . ." (JA 118). Later in the brief, the Government acknowledged "this possible scrivener's error." (JA 120). In its brief to the CCA in *United States v. Zier*, the Government made the same concession.

by TJAG. Because our answer to this question would have no effect on our holding here that we lack jurisdiction, anything we say on this subject would be in the nature of an "advisory opinion."

Id. at *13, n.9 (citation omitted) (emphasis in original).

2023 CCA LEXIS 178, *16 (A.F. Ct. Crim. App. Apr. 18, 2023) (unpub.).

In its motion to dismiss Appellant’s petition for grant of review before this court, the Government did not explicitly concede that scriveners’ errors occurred; instead, the Government allowed that “[t]he reference to Article 65(b) in Article 69(c) could have been a drafting error.” (JA 163). Appellant avers that a drafting error and scrivener’s error are the same thing. Thus, the Government agrees with Appellant that scriveners’ errors exist in the enacted legislation.

CONCLUSION

For the foregoing reasons and because of the Government’s concessions before this Court and the CCA, this Court should conclude that TJAG and the CCA had jurisdiction to review Appellant’s case.

PRAYER FOR RELIEF

WHEREFORE, appellant respectfully requests that this Honorable Court hold that TJAG and the CCA had jurisdiction over Appellant's case, grant the Petition for Grant of Review on the Issue Presented, and set aside and dismiss the finding and sentence.

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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via email to the Court and served on Air Force Appellate Government Division and the Air Force Appellate Defense Division on November 30, 2023.

CERTIFICATE OF COMPLIANCE WITH RULE 21(B)

1. This brief complies with the type-volume limitation of Rule 21(b) because it contains 11,087 words.
2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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