IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 40171
First Lieutenant (O-2) **RYAN PARINO-RAMCHARAN** United States Air Force *Appellant.*	)	USCA Dkt. No. 23-0245/AF

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INDEX OF BRIEF

TABLE OF AUTHORITIES v

GRANTED ISSUE 1

STATEMENT OF STATUTORY JURISDICTION 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 7

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

ARGUMENT 7

Standard of Review 7

Law and Analysis *8*

A. The Plain Lanugage of Article 69 Did Not Permit TJAG Review of This Case 12

B. Only Summary Courts-Martial & Waiver Cases Can Be Reviewed Under Article 69 13

C. The CCA Failed To Apply the Plain Language of the Statute 17

D. The CCA Failed to Distinguish Jurisdiction and Authority 19

E. The CCA Failed to Give Effect to Their Own Jurisdictional Limits 19

F. Article 69 of the UCMJ is Not Absurd 21

G. Absurdity Is About Results, and The Results Are Not Absurd 26

H. Congress's Purpose Does Not Matter In This Case 27

I. **Neither The CCA Nor This Court Has Jurisdiction to Review This Case** 31

Conclusion 33

CERTIFICATE OF FILING AND SERVICE 34

TABLE OF AUTHORITIES

Page(s)

SUPREME COURT CASES

Crooks v. Harrelson,
140 S. Ct. 1731 (2020) 11,12, 22

Crooks v. Harrelson,
282 U.S. 55 (1930) 12, 28

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 29

Niz-Chavez v. Garland,
141 S. Ct. 1474 (2021) 23

Oncale v. Sundowner Offshore Servs., Inc.,
523 U.S. 75, 79 (1998) 28

Williams v. Taylor,
529 U.S. 362 (2000) 14, 17

United States v. Kirby,
74 U.S. 482 (1868) 26

United States v. X-Citement Video,
513 U.S. 64, 69 (1994) 27

COURT OF APPEALS FOR THE ARMED FORCES

United States v. Adams,
81 M.J. 475 (C.A.A.F. 2021) 14, 17

United States v. Atchak,
75 M.J. 193 (C.A.A.F. 2016) 7

United States v. Brubaker-Escobar,
81 M.J. 471 (C.A.A.F. 2021) 7

United States v. LaBella,
75 M.J. 52 (C.A.A.F. 2015) 32

United States v. McPherson,
81 M.J. 372 (C.A.A.F. 2021) 12, 22-23, 25, 26-29

United States v. Mooney,
77 M.J. 252 (C.A.A.F. 2018) 30, 31

United States v. Ortiz,
76 M.J. 189 (C.A.A.F. 2017) 12, 28

United States v. Wilson,
76 M.J. 4 (C.A.A.F. 2017) 7

COURT OF MILITARY APPEALS

United States v. Kossman,
38 M.J. 258 (C.M.A. 1993) 12

United States v. Powell,
38 M.J. 153 (C.M.A. 1993) 26

COURTS OF CRIMINAL APPEALS

United States v. Csady,
2021 CCA LEXIS 516 (A. F. Ct. Crim. App. 2021) (unpub.) 20, 21

United States v. Howard,
2022 CCA LEXIS 193 (N.M.Ct. Crim App. 2022) (unpub.) 20, 21

United States v. Tate,
2022 CCA LEXIS 543 (Army Ct. Crim App. 2022) (unpub.) 20, 21, 30, 31

United States v. Zier,
2023 CCA LEXIS 178 (A.F. Ct. Crim. 2023) (unpub.) 16-18, 20, 29

STATE COURTS

Scurto v. Le Blanc,
184 So. 567 (La. 1938) 25

STATUTES

UCMJ Article 44 ..... 6, 8, 23

UCMJ Article 57 31

UCMJ Article 64 ..... passim

UCMJ Article 65 ..... passim

UCMJ Article 66 ..... passim

UCMJ Article 67 ..... 1, 25, 32

UCMJ Article 69 ..... passim

UCMJ Article 112a 2

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UNITED STATES, Appellee	)	BRIEF ON BEHALF OF THE UNITED STATES
v.	)	Crim. App. No. 40171
First Lieutenant (O-2) **RYAN PARINO-RAMCHARAN** United States Air Force Appellant.	)	USCA Dkt. No. 23-0245/AF

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

ISSUE PRESENTED

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

STATEMENT OF STATUTORY JURISDICTION

If the Air Force Court of Criminal Appeals (AFCCA) properly had jurisdiction to review this case under Article 66(d), UCMJ, this Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.[1]

1. Unless otherwise noted, all references to the UCMJ are to 10 U.S.C. §§ 801-946a (2019).

STATEMENT OF THE CASE

Appellant's statement of the case is correct.

STATEMENT OF THE FACTS

On the night of 4-5 July 2020 civilian law enforcement in New Mexico apprehended Appellant shortly after Appellant informed them "[he] and his buddy w[ere] on LSD." (JA at 257.) A general court-martial found Appellant guilty of one specification in violation of Article 112a, UCMJ. (JA at 237.) The military judge sentenced Appellant to forfeiture of $2000.00 pay per month for three months and a reprimand. (Id.) The convening authority took no action on the finding or sentence. (Id.) On 14 September 2021, a designated judge advocate completed a review of the record of trial in accordance with Article 65(d)(2). (JA at 001.) On 11 August 2022, Appellant was notified that The Judge Advocate General (TJAG) had reviewed his case pursuant to Article 69, UCMJ. (JA at a005.) The Air Force TJAG took no action. (Id.) On 28 September 2023, Appellant applied for Grant of Review by The Air Force Court of Criminal Appeals. (JA at 007.) The CCA granted the application and determined that "we are satisfied that pursuant to Article 69(d), UCMJ, this court has jurisdiction to review TJAG's determination." (JA at 138.) Subsequently, the CCA issued an unpublished opinion on 25 July 2023, affirming the findings and sentence. (JA at 136.)

a. Senate Armed Services Report

On 28 May 2016, the same day that Senate Bill 2943 (S. Res. 2943) was introduced into the Senate, the Senate Armed Services Committee issued its report to accompany the Bill. S. Rept. 114-255 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017 REPORT, S. Rept. 114-255, 114th Cong. (2016), https://www.congress.gov/congressional-report/114th-congress/senate-report/255/1. The Senate Committee Report made recommendations about provisions necessary for inclusion in the act. Regarding Article 65, UCMJ, the committee recommended:

> A provision that would amend section 865 of title 10, United States Code, (Article 65, Uniform Code of Military Justice (UCMJ)) to require that the record of trial be forwarded to appellate defense counsel for review whenever the case is eligible for an appeal under Article 66, and to require a review by the Judge Advocate General of all general and special court-martial cases not eligible for direct appeal under Article 66. The provision would require a review of all general and special courts-martial cases that are eligible for an appeal under Article 66, but where an appeal has been waived, withdrawn, or not filed.

Id. at 609-610. The Senate Committee Report regarding Article 69, UCMJ, recommended:

> 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.

Id. at 610-611 (emphasis added).

b. Conference Report to Senate Resolution 2943.

The House agreed to the Conference Report to Senate Resolution 2943 on 2 December 2016. The Senate agreed to the Conference Report to Senate Resolution 2943 on 8 December 2016. Actions — S.2943 — 114th Congress (2015-2016): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, S.2943, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2943/actions.

Directly thereafter, on 23 December 2016 the President signed Senate Bill 2943 into Public Law No. 114-328, the Fiscal Year 2017 National Defense Authorization Act. Text — S.2943 — 114th Congress (2015-2016): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, S.2943, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2943/text. (FY 2017 NDAA). The agreed-upon language from the Conference Report concerning Articles 65, 66, and 69 matches exactly the final language of the FY2017 NDAA.

Regarding §865, Art. 65, "transmittal and review of records," the agreed upon language stated:

> (a) TRANSMITTAL OF RECORDS.—

> (1) FINDING OF GUILTY IN GENERAL OR SPECIAL COURT MARTIAL.—If the judgment of a general or special court-martial entered under section 860c of this title (article 60c) includes a finding of guilty, the record shall be transmitted to the Judge Advocate General.
>
> (2) OTHER CASES.—In all other cases, records of trial by court-martial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.
>
> **(b)** CASES [2]FOR DIRECT APPEAL.—
>
> . . . (B) INAPPLICABILITY.—Subparagraph (A) shall not apply if the accused— (i) waives the right to appeal under section 861 of this title (article 61); or (ii) declines in writing the detailing of appellate defense counsel under subparagraph (A)(i).

Actions — S.2943 — 114th Congress (2015-2016): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, S.2943, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2943/actions, at 933 (emphasis added).

Regarding §869, Art. 69, "Review by Judge Advocate General," the agreed-upon language stated:

> (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

[2] Article 65 subsection (b) is titled "Cases Eligible For Direct Appeal" in the Manual for Courts-Martial, United States, Appendix 2 (2019 ed.).

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.

(B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

(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 of an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

Id. at 939 (emphasis added).

SUMMARY OF THE ARGUMENT

This Court should decline Appellant's invitation to rewrite the statute substituting a "d" for a "b" in Article 69(c)(1), UCMJ. Congress considered multiple versions of Article 69, but Appellant's desired statutory language did not become law. Congress and the President passed a statute with a "b" and not a "d" in Article 69(c)(1). The final statute which is the result of the deliberative legislative process is not so gross as to shock the general moral or common sense. The plain language of Article 69(c) does not authorize the Judge Advocate General (TJAG) to review Appellant's case. In addition, the plain language of Article 69(d) does not authorize the Air Force Court of Criminal Appeals to review this case. The Air Force Court of Criminal Appeals appeared to misapprehend this Court's precedent by beginning its analysis with a review of the legislative history. By affirming the plain language of Article 69, UCMJ, this Court will reaffirm its precedents and add clarity for attorneys, judges, and reviewing courts. Strict adherence to the statutory text also encourages Congressional diligence and honors the legislative process in our Government.

ARGUMENT

Standard of Review

Jurisdiction is a legal question reviewed de novo. United States v. Brubaker-Escobar, 81 M.J. 471, 474 (C.A.A.F. 2021). Questions 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 and Analysis

It is worthwhile to state plainly the language from the applicable version of the UCMJ. Article 69, UCMJ reads as follows:

> (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).
>
> (b) Timing. To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than one year after the date of completion of review under section 864 or 865 of this title (article 64 or 65), as the case may be. The Judge Advocate General may, for good cause shown, extend the period for submission of an application, but may not consider an application submitted more than three years after such completion date.
>
> (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.
>
> (B) In setting aside findings or sentence, the

Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).

(C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.

(D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.

(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 of an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.

Article 65, UCMJ subsection (b) reads as follows:

(b) CASES FOR DIRECT APPEAL.

(1) Automatic review. 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 2 years or more, 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—

(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and

(ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

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

(i) waives the right to appeal under section 861 of this title (article 61) [10 USCS § 861]; or

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

Article 65, UCMJ subsection (d) reads as follows:

(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 direct appeal 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 61); or

(ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A), (B), or (C) of section 866(b)(1) of this title (article 66(b)(1)).

> **(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). (FY2017 NDAA).

The Plain Language of Article 69 Did Not Permit TJAG Review of This Case

"This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end." United States v. McPherson, 81 M.J. 372 (C.A.A.F. 2021) (Ohlson, C.J., dissenting) (quoting Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)). As this court has noted "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). Indeed, the preference for the plain language of a statute is so strong that "a departure from the letter of the law "may only be justified to avoid an absurd result if 'the absurdity . . . is so gross as to shock the general moral or common sense.'" McPherson, 81 M.J. at 379-80 (C.A.A.F. 2021) (citing Crooks v. Harrelson, 282 U.S. 55 (1930)). This Court should stop its analysis here at the plain language of the statute.

The language in Appendix 2 regarding Article 69, UCMJ, in the 2019 Manual, is incorrect. The 2019 Manual does not include Article 69©'s reference to Article 65(b). Rather the Manual, without explanation, substitutes "Article

65(d)" for "Article 65(b)." This substitution was in error and, importantly, not authorized by Congress. The actual statute references Article 65(b) in Article 69(c). Section 5333 of the National Defense Authorization Act for Fiscal Year 2017 (2017 NDAA); codified at 10 U.S.C. §869. The Article 69 language published in the 2019 Manual for Courts-Martial is not authoritative. The Manual is13ubliccation of the Joint Service Committee on Military Justice, a division of the Executive Branch, and the language of its publications cannot supersede an act of Congress. *See* United States v. Kossman, 38 M.J. 258, 260 (C.M.A. 1993) (noting that the President "cannot overrule or diminish an Act of Congress"). It is the codified language of 10 U.S.C. §869 that should be read and evaluated in this case.

The plain language of Article 69 subsection © only authorizes TJAG to review summary courts-martial (Article 64) and cases eligible for direct appeal (Article 65(b)). Article 69(c)(1), (2), UCMJ. This case was not a summary court-martial, nor was it eligible for direct appeal. (JA at 001.) This case is a sub-jurisdictional case reviewed by an attorney "designated under regulations prescribed." (JA at 001); Article 65(d), UCMJ. Accordingly, TJAG had no authority under Article 69 to review it.

Only Summary Courts-Martial & Waiver Cases Can Be Reviewed Under Article 69

Article 69, UCMJ, permits the Judge Advocate General to review certain

cases. Article 69, UMCJ. These reviews are distinct from the reviews conducted by an attorney under Article 65, UCMJ. *See* Article 65, 69, UCMJ. Article 69(a), UCMJ, places three limitations on the cases TJAG can review. First, subsection (a) forbids TJAG review of cases reviewed by the Court of Criminal Appeals. Article 69(a), UCMJ. Second, subparagraph (b) forbids TJAG review if a year has passed since "the completion of review under section 864 or 865 of this title (article 64 or 65)" unless "good cause" is shown. Article 69(b), UCMJ. Finally, subparagraph (c), limits TJAG review to summary courts-martial (Article 64) and cases eligible for direct appeal in which the Appellant has waived the appeal (Article 65(b)). Article 69(c), UCMJ. A careful read of both Article 69(c) and its reference to Article 65(b) reveals the meaning.

Proper understanding of Article 69(c) requires that it be read in conjunction with the remainder of Article 69 and alongside the Articles referenced within. "It is a 'cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute.'" United States v. Adams, 81 M.J. 475, 479-480 (C.A.A.F. 2021) (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)). At first glance, Article 69(c), by referring to "Article 65(b)," appears to authorize TJAG review of cases eligible for direct appeal. (App. Br. at 36). The title of section (b) of Article 65 is: "Cases for direct appeal." Direct appeals are cases reviewed under Article 66. One might be forgiven for wondering, why if Article 69(a) forbids the

review of cases reviewed under Article 66 do Article 69(c)(1)(A) and Article(c)(1)(B) both refer to a section titled "Cases for direct appeal"? The reference to and title of section (b) Article 65 has predictably frustrated some readers of the statute. (App. Br. at 36). One must continue reading past the section titles.

One category of cases is eligible for direct appeal review under Article 66 but does not receive a review under Article 66 – waiver cases under Article 65(b). Although section (b) of Article 65 is titled "Cases for direct appeal," the subsequent internal subsections discuss the review and transmittal procedures for three types of cases. Article 65(b)(1), (2). Those three cases are: the "Automatic Review" cases, Article 65(b)(1); the "Cases Eligible For Direct Appeal Review" cases, Article 65(b)(2); and, finally those cases without Article 66 review or transmittal—the waiver cases. Article 65(b)(2)(B), UCMJ. Stated another way, the internal subsections of Article 65(b) describe both cases reviewed under Article 66 by the CCA and cases that are not reviewed by the CCA under Article 66. Accordingly, as drafted, these "waiver" cases are the category of cases TJAG may review under Article 69(c). They are captured by the reference to Article 65(b), yet are not reviewed under Article 66. As written, the statute ensures cases with sentences serious enough to be eligible for direct appeal are still thoroughly examined even if the Accused waives that appeal. In the event of a waiver, the accused receives both a complete review under Article 65(d) and may receive a subsequent review under

Article 69(c).

The conclusion that Article 69, UCMJ, subsection "(c)" reference to Article 65(b) describes waiver cases is also supported by Article 69(c)(2)'s description of TJAG's review: "In a case reviewed under ***section 865(d) of this title (article 65)***, review under this section is limited to the issue of whether ***the waiver*** or withdrawal of appeal was invalid under the law." (emphasis added). Article 69(c)(2) solidifies that any reference in the article to a case "reviewed under" Article 65(b) is a reference to a case where the accused was eligible for Article 66 review, but waived that review.

Indeed, in Appellant's Answer to the Government's Motion to Dismiss before this Court, Appellant agreed with this conclusion. (JA at 204). In discussing the typographical errors in the 2019 Manual, Appellant argued that the reference to Article 65(b) in Article 69(c) was to waiver cases: "The second scrivener's error occurs in Appendix 2 of the 2019 MCM in which Article 69(c)(2), UCMJ, references Article **65(d)**, UCMJ, when discussing an Accused's waiver . . . [the] reference should be to **Article 65(b)**(2)(B), UCMJ." (JA at 204) (emphasis added). Appellant's reference to Article 65(b)(2)(B) is the specific subsection for waiver cases. A complete read of Article 69(c) and Article 65(b) reveals that TJAG is only authorized to review direct appeal waiver cases. TJAG had no authority to review Appellant's case, where there was no direct appeal eligibility to waive.

The CCA Failed to Apply the Plain Language of The Statute

Although the CCA in this case provided scant analysis to support their conclusion that they had jurisdiction to review this case, an earlier unpublished AFCCA opinion did. (JA at 136); United States v. Zier, ACM 21014, 2023 CCA LEXIS 178 (A.F. Ct. Crim. App. 2023) (unpub.) Contrary to this Court's precedent, the Court in Zier did not focus on the plain language of the statute. Zier, 2023 CCA LEXIS 178 *13. Rather AFCCA began their analysis focused on the legislative history of the statute. Id. The Court in Zier started by reviewing the Military Justice Act of 2019, proceeding to the competing proposals for TJAG review in the House and Senate. Id. at *5-10. Satisfied by this review, the Court opined that Article 69(a) "most directly" provides for TJAG authority to review. Id. at *14. This observation fails to address the significance of the other plain language in the same section. Article 69(a) also states that TJAG's reviews are "**subject to** subsections (b),(c), and (d)." (emphasis added).

Importantly, as explained above, subsection (c), the ""Scope" section, limits reviews to Article 65(b) and Article 64. Article 69(c), UCMJ. This limitation-- which is critical to resolving the jurisdictional issue-- was not addressed by the Court in Zier. Id. at *14. Rather the Court noted that a version of the House Bill and a version of the Senate Bill would have "vest[ed] jurisdiction in TJAG to review the findings and sentence in a case like Applicant's." Id. AFCCA did not address the

fact that neither version of the House Bill nor the Senate Bill referenced by the CCA became law. Id. Neither version referenced by the CCA was signed by the President. Text - S.2943 - 114th Congress (2015-2016): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, S.2943, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2943/text. In terms of legislative history, the CCA also failed to consider the impact of the final Senate Conference Report. Zier at *14. The Senate Conference Report agreed to by both the Senate and House --drafted **after** the versions cited by the CCA-- matches the final language of the statute. Actions - S.2943 - 114th Congress (2015-2016): NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, S.2943, 114th Cong. (2016), https://www.congress.gov/bill/114th-congress/senate-bill/2943/actions. Rather than resolving the meaning of the plain language of the statute, the CCA simply rewrote the statute consistent with their incomplete reading of the legislative history. Id. at *14. Such analysis is not helpful here.

By ignoring this Court's dictate to "give effect, if possible, to every clause and word of a statute," the CCA's analysis was doomed. Adams, 81 M.J. at 479-480 (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)). Without completing an analysis of Article 69(c), its reference to Article 65(b), and the subsections of Article 65(b), the Zier court failed to determine the plain and unambiguous meaning of the statute. Id. at *14. Article 69(c) references Article 65(b). It does not reference

Article 65(d). The CCA never addressed the effect of this difference in the statutory language.

The CCA Failed to Distinguish Jurisdiction and Authority

By confusing authority with jurisdiction, AFCCA seemed to suggest that TJAG had jurisdiction to review this case even if it was not within his "Scope" to review. Zier, 2023 CCA LEXIS 178 at *14. The CCA confused both TJAG's role and the concept of jurisdiction. Id. Without explanation, the CCA somewhat confusingly stated, "the 'scope' of TJAG review, as may be distinct from jurisdiction." Id. at *14. By confusing authority with jurisdiction, the Court seemed to hold that the limits on the "scope" of TJAG's review do not affect TJAG's "jurisdiction." Id. This point reveals critical errors in the CCA's analysis. First, TJAG has no "jurisdiction." He is not a court. TJAG has authorities, and those authorities can be limited by Congress, as Congress did. In Article 69(a), UCMJ, Congress limited TJAG by limiting the timing and scope of TJAG's permissible reviews. There can be no question Congress had the authority to limit the scope of a TJAG's review.

The CCA Failed To Give Effect to Their Own Jurisdictional Limits

Importantly, even assuming arguendo that TJAG had broad authority to review cases outside the "Scope" of his authority, it would not alter the result here. Another error fatally doomed AFCCA's analysis. AFCCA failed to give effect to the

statutory language in Article 69(d), UCMJ. The CCA in this case concluded that "we are satisfied that **pursuant to Article 69(d)**, UCMJ, this court has jurisdiction to review TJAG's determination." (JA at 138.)(emphasis added). Subsection (d) of Article 69 is titled "Court of Criminal Appeals." Sensibly, Subsection (d) outlines the circumstances and rules for the court of criminal appeal's reviews of TJAG cases. The first subsection "(d)(1)" states, "A Court of Criminal Appeals may review the action taken by the Judge Advocate General under **subsection (c).**" (emphasis added). Worth noting, Article 69(d)(1) does not authorize the court of criminal appeals to review **any case** reviewed by TJAG. It only authorizes review of *"***cases reviewed under [Article 69] subsection (c).***"* (emphasis added). For CCA purposes, Article 69(c), UCMJ, is the complete list of cases TJAG may review.

Article 69(d)(1) plainly states "A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)." Appellant's case simply was not reviewed under subsection (c) of Article 69. (JA at 001). Appellant's case was neither a waiver case nor was it a summary court-martial. (Id.) Appellant's case was a sub-jurisdictional case reviewed under Article 65(d). (Id.)

Even if this case were reviewed under some notional, plenary TJAG review authority under Article 69(a) as AFCCA suggested in Zier, 2023 CCA LEXIS 178 *13, it would have been a review outside of subsection (c), since Appellant's case was reviewed under Article 65(d), UCMJ. (JA at 001). Article 65(d), UCMJ, is not

mentioned in Article 69 subsection (c). Accordingly, Appellant's case was not reviewable by the CCA even if TJAG was authorized to review it.

The Other CCA Decisions Are Not Helpful

Arguably other CCA panels have reached the same conclusion as the Zier Court. United States v. Howard, 2022 CCA LEXIS 193 (N.M.Ct. Crim App. 2022)(unpub.); United States v. Tate, 2022 CCA LEXIS 543 (Army Ct. Crim App. 2022)(unpub.); United States v. Csady, 2021 CCA LEXIS 516 (A. F. Ct. Crim. App. 2021)(unpub.). Like the Zier Court, each CCA that has potentially addressed this issue has done so without analysis of the plain statutory language. One explanation exists to resolve these repeated mistakes. There is a distinct possibility that the other CCA panels did not notice this issue because of the typographical errors in the version of Article 69 contained in the 2019 Manual. Manual for Courts-Martial, United States, Appendix 2 (2019 ed.). The 2019 Manual contains a genuine scrivener's error. It does not include Article 69(c)'s reference to Article 65(b). Id. Rather the 2019 Manual, without explanation, substitutes "Article 65(d)" for "Article 65(b)." Id. This substitution likely explains Appellant's initial decision to seek TJAG review. Similarly, this error perhaps, inspired the Zier court decision to interpret Article 69(c) as if it referenced "Article 65(d)." Zier, 2023 CCA LEXIS 178 (commenting that substituting Article 65(d) for Article 65(b) in Article 69(c) "seems logically correct.") Despite this possibility, the reasons for the mistakes of

the other CCA panels remain unclear because the other CCA panels did not analyze the issue. Howard, 2022 CCA LEXIS 193; Tate, 2022 CCA LEXIS 543; Csady, 2021 CCA LEXIS 516. Regardless, TJAG simply has no statutory authority to review a case previously reviewed only under Article 65(d).

Article 69 of the UCMJ Is Not Absurd

Given the plain language of Article 69, Appellant's case hinges upon this Court's willingness to abandon and rewrite that language. The law has a strong preference for the plain language of a statute. Ortiz, 76 M.J. at 192. To overcome that preference, Appellant must convince this Court that Article 69, UCMJ, is so absurd that its plain language "shocks the moral and common sense." McPherson, 81 M.J. at 379-80. To attempt to meet that burden, Appellant raises two arguments. (App. Br. 36-38.) First, he claims that the plain language of Article 69 is absurd because it only permits the review of cases already reviewed by the CCA. (Id.) Second, he argues that Article 69(c)(1) and Article 69(c)(2) are absurd because they appear to articulate two different standards of review for waiver cases. (Id.) Neither argument holds merit.

First, the plain language of Article 69 does not permit the review of cases already reviewed by the CCA. Article 69(a), UCMJ, explicitly forbids such reviews by TJAG: "the Judge Advocate General may [review] . . . a court-martial that is not reviewed under section 866 of this title (article 66)." As previously discussed, it may

initially appear that a reference to Article 65(b) is about direct appeals reviewed by the CCA under Article 66. That initial misunderstanding is a result of the title: "Cases for direct appeal." Article 65(b), UCMJ. But the remainder of Article 69(b) goes on to describe a category of cases that are not reviewed by the CCA – waiver cases. Since Article 69(c) deals with "waiver cases," Appellant's alleged "absurdity" --that Article 69(c) authorizes TJAG reviews of cases already reviewed by the CCA-- simply does not exist.

Second, Appellant claims the different standards for TJAG review of waiver cases articulated in Article 69(c)(1) and Article 69(c)(2) will create absurd results. (App. Br. 36-38). Preliminarily, it is unclear that this Court needs to resolve this discrepancy in Appellant's case. The plain language of Article 69(c) establishes that Appellant's case – which was not reviewed under Article 65(b) – is not entitled to Article 69 review. For reasons explained in more detail below, it is not absurd that Congress would have wanted to exclude sub-jurisdictional sentence cases like Appellant's from TJAG's Article 69 authority. The plain language of Article 69, excluding Appellant's case from TJAG review, can and should end this inquiry. This Court can leave for another day – when an Article 65(b) "waiver" case is actually before it – the question of what standard of review TJAG should apply when evaluating a case "reviewed under . . . article 65(b)."

Should this Court decide to address this issue, Appellant still has not identified

an "absurdity" sufficient to justify this Court rewriting the statute. Two distinct standards for the same review at first does seem concerning. However, there is at least one non-absurd reading of the statute. In a nutshell, the statute may provide two different standards for two different reviews. Article 69(c)(1) and Article 69(c)(2) work in succession to describe the two-step process of reviewing a waiver case in which the waiver was determined to be "invalid under the law." While Article 69(c)(2) limits TJAG's initial review of waiver cases to "whether the waiver or withdrawal of appeal was invalid under the law" the rule does not address under what circumstances TJAG can grant corrective actions if the waiver is invalid. Id. That explanation exists in Article 69(c)(1). That is why Article 69(c)(1) references Article 65(b). Within that context, Article 69(c)(1), UCMJ, is the standard for TJAG's reviews of those **invalid** waiver cases. Stated another way, Article 69(c)(2), UCMJ, applies to waiver cases. Article 69(c)(1), UCMJ, applies to invalid waiver cases. This possible interpretation of the two standards is not absurd nor is it irrational. Accordingly, this Court should not stray from the plain language. As this Court held "courts should not reject the plain meaning of a statute if "[a] rational Congress 'could have intended that meaning.'" McPherson, 81 M.J. at 392 (quoting Niz-Chavez v. Garland, 141 S. Ct. 1474, 1484 (2021)).

Necessarily, invalid waiver cases will require further review. Article 69(c)(1),(2). The notification and transmittal rules for post-trial review presume

waivers are valid. Article 65, UCMJ. Article 65, UCMJ has no provision for determining or processing "invalid" waivers. Id. As a result, for invalid waiver cases, Appellant's are not notified of their appellate rights pursuant to Article 65(c)(2), UCMJ, and the records of trial are not provided to their counsel pursuant to Article 65(b)(2)(B)), UCMJ. To ensure rules are in place to effectuate review of invalid waiver cases, Article 69(c)(2) permits "rules prescribed by the President" to fill the gap. Although the President may prescribe some rules, Article 69 review, of course, would still be limited by the rules that Congress provided In Article 69(c)(1). For example, the President's rules could not authorize corrective actions for invalid waiver cases regardless of the timing. Article 69(a), UCMJ. Similarly, for waiver cases, the President could not permit a TJAG to authorize a rehearing in violation of Article 44 which is forbidden by Article 69(c)(1)(B), UCMJ, nor could the President authorize a TJAG to refuse to dismiss charges absent a rehearing when the findings and sentence are set aside. Article 69(c)(1)(C), UCMJ. Therefore, the most logical reading of Article 69 that does not involve rewriting the statute is that Article 69(c)(2) is the first step in the review process for waiver cases. If the waiver was invalid, TJAG may take corrective action, including those listed in Article 69(c)(1)(A).

Article 69(c)(1) and Article 69(c)(2) can be interpreted such that they do not produce as absurd result. Not only are statutes "presumed not to have been intended

to produce absurd consequences but to have the most reasonable operation that its language permits. **If possible, doubtful provisions should be given a reasonable, rational, sensible, and intelligent construction**." United States v. Powell, 38 M.J. 153, 155 n.4 (C.M.A. 1993) (emphasis added). In sum, neither of Appellant's alleged absurdities, upon examination, even exist. TJAG cannot review cases already reviewed by a CCA, and there are not two standards for the same review under Article 69(c)(1) and (c)(2).

Absurdity Is About Results, and The Results Here Are Not Absurd

The effect of Article 69 does not create absurd results. Article 65(d)(2)(A), UCMJ, already ensures review of sub-jurisdictional cases: "review [is] completed in each general and special court-martial that is not eligible for direct appeal." Those cases with minor sentences are already reviewed by an attorney in the Office of the Judge Advocate or an attorney designated by a service regulation. Article 65(d), UCMJ. As drafted Article 69(c) does not permit TJAG to re-review cases with sub-jurisdictional sentences. The limitation is not absurd. Several rational justifications support such a limitation. First, it is a limitation that acknowledges that it may not be worthwhile for a TJAG to re-review a case with such a minor sentence. Second, the limitation acknowledges that it may not be worthwhile for TJAG to re-review a case already reviewed by an attorney from his office or an attorney designated by service rules. After all, if the attorney conducting an Article 65(d) review believes

corrective action may be warranted, TJAG will already have authority to set aside the findings or sentence under Article 65(e)(1). Finally, perhaps the limitation was to prevent CCA review of cases with such minimal sentences. Any authorized TJAG review could authorize further CCA review and even, potentially, review by this Court. Article 69(d), 67, UCMJ. Perhaps, Congress wished to prevent the CCA and this Court from reviewing cases with such minor sentences. Under Article 69(c), TJAG still retains the authority to review those cases with serious punishments if they are not reviewed under Article 66. This ensures that serious punishments receive more robust review, even if the accused waives review, withdraws from appeal, or fails to file an appeal. This also reflects reason—not absurdity. Regardless, of the wisdom of these justifications—none of them is absurd. Appellant has failed to articulate why the plain language of Article 69, only allowing TJAG to review waiver cases, creates absurd results.

Classic Examples of Absurdity Highlight How High The Standard Is

Absurdity is not a new doctrine. McPherson, 81 M.J. At 783. Classic examples include the statute that authorized impeachment of witnesses at a criminal trial by any "unlawful" means. Scurto v. Le Blanc, 184 So. 567 (La. 1938). The literal meaning of the statute appeared to authorize the impeachment of witnesses through—trial by ordeal. Id. Authorizing "unlawful" impeachment was sensibly determined to be absurd. Another classic case is the "Bolognian Law" which made a

criminal of the doctor "who drew blood" for an operation to save a life in direct violation of a statute against "drawing of blood in the street." William Blackstone, 1 Commentaries 60. Criminalizing medical treatment simply because "drawing blood" had a broad meaning was also determined to be absurd. Id. Finally, consider the statute that appeared to forbid a police officer from arresting a postal employee because it would violate a law against obstructing the delivery of the mail. United States v. Kirby, 74 U.S. 482 (1868). It is absurd to believe the legislature wanted to . . . . . These examples highlight genuinely absurd results.[3] In contrast, it is far from absurd to believe that Congress might have wanted to limit TJAG review under Article 69 to cases with sentences of a certain severity.

Congress's Purpose Does Not Matter In This Case

Appellant's brief dedicates nearly half of its pages to recounting the legislative history of Article 69 and Article 65 to persuade this Court to abandon the plain language of the statute. (App. Br. 4-32). The implied argument from Appellant is to abandon the plain language because it differs from their reading of the legislative history. This exact line of argument was carefully considered and rejected by this Court in McPherson, 81 M.J. 378. In reviewing the relevant Supreme Court case law on statutory interpretation this Court noted that "the absurdity doctrine focuses on the

[3] For a more thorough discussion of the history and application of the Absurdity doctrine consider the following law review. Gold, Andrew S., *Absurd Results, Scriveners' Errors, and Statutory Interpretation,* 75 U. Cin. L. Rev. 25 (Fall 2006).

inherent absurdity of the results of interpreting statutes according to their plain meaning." Id. at 381 (citing United States v. X-Citement Video, 513 U.S. 64, 69 (1994) (disapproving interpreting statutes in a way that "would produce results that were not merely odd, but positively absurd")). Just as in McPherson, here Appellant is arguing that this Court should rewrite the statute such that the "likely legislative purpose should prevail over the plain language." Id. at 382. In rejecting this same argument in McPherson this Court noted that "the Supreme Court has repeatedly rejected this method of interpreting statutes. '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" 81 M.J. at 382 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

Even if some members of the 114th Congress personally intended for Article 69 to operate differently, this does not matter. As this Court recognized in McPherson, "[t]he question for absurdity purposes is not whether the 114th Congress in fact intended the five-year period of limitations when it enacted § 5225 of the NDAA 2017, but instead whether a Congress could have done so." McPherson, 81 M.J. at 380 (emphasis omitted). Similarly, here, the question is not whether the 114th Congress intended Article 69 to exclude Article 65(d) cases from TJAG Article 69 review, but whether a Congress could have done so. Id. The reference to Article 65(b) in Article 69(c) may have resulted in consequences unintended by some

members of Congress. This does not provide a "justification for wrenching from the words of a statute a meaning which literally they [do] not bear in order to escape consequences thought to be absurd or to entail great hardship." McPherson, 81 M.J. at 374 (quoting Crooks v. Harrelson, 282 U.S. 55, 60, (1930)). In McPherson, the government urged this Court to interpret a statute of limitations inconsistent with the plain language of the statute to avoid violating Congress's intent. Id. This Court began by noting its agreement in part with the Government's position: "We see no reason to doubt the Government's theory about what Congress was attempting to accomplish." Id. at 378. "Congress may not have realized the importance of continuing to include [certain language]." Id. This Court further noted that it was possible, that "Congress made a substantive oversight in drafting the statute." Id. Notwithstanding this agreement, this Court held "we cannot take upon ourselves the task of rewriting" the statute at issue in the case. Id. For similar reasons, this Court should decline to "rewrite" Article 69(c) in this case.

Like the Government in McPherson, the CCA in Zier attempted to justify rewriting the statute with congressional purpose. Zier, 2023 CCA LEXIS 178 *17. Also, just as the Government requested in McPherson, the CCA relied in part upon what Congress was "attempting to accomplish." McPherson, 81 M.J. 379; Zier, 2023 CCA LEXIS 178 *13. This Court should decline once again this invitation to "correct" the alleged Congressional error. Id. As the Supreme Court has made clear,

"correction is the province of Congress in cases where an admittedly 'anomalous' result 'may seem odd, but . . . is not absurd.'" Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 565-66 (2005). Even if this Court concluded that Congress erred in drafting Article 69, that error is insufficient to justify this Court rewriting the statute.

Neither The CCA Nor This Court Has Jurisdiction to Review This Case

The plain language of Article 69(c), UCMJ, did not authorize TJAG's review of Appellant's case. TJAG's scope of authorized review does not include cases reviewed under Article 65(d) like Appellant's case. TJAGs have post-trial authorities like convening authorities have post-trial authorities. Neither have "jurisdictions." In United States v. Mooney, this Court considered the effect of a convening authority acting without authority to defer confinement. United States v. Mooney, 77 M.J. 252 (C.A.A.F. 2018). This Court noted that convening authorities do not have unlimited authority to defer confinement. Id. at 257. First, this Court noted, that Congress had developed "a comprehensive statutory scheme for deferring and interrupting sentencing" citing Articles 14, 57, and 57a, UCMJ. Id. This Court then determined, in the facts of that case, that the convening authority was not authorized to defer confinement. Id. As a result, the Court held, his unauthorized action was "void ab initio." Id. Like Mooney, Congress has developed a comprehensive statutory scheme for post-trial reviews. Article 64-76, UCMJ. Similarly, TJAGs also do not

have unlimited post-trial authorities. Id. This Court should conclude a TJAG's unauthorized post-trial action is void ab initio.

Consistent with Mooney, 77 M.J. at 257, in United States v. Tate, the Army Court explained that because TJAG's action to delegate review to a JAG was without authority the resulting review was without legal effect. Tate, 2022 CCA LEXIS *9-13. Applying the reasoning of Mooney and Tate, this Court should conclude any unauthorized actions taken by a TJAG post-trial are void ab initio. United States v. Mooney, 77 M.J. at 255; Tate, 2022 CCA LEXIS *9-13.

Worth noting, this Court additionally found no jurisdiction to review Tate, Tate, 2022 CCA LEXIS *13, presumably, for the same, related reason—the CCA lacked jurisdiction in the first place. United States v. Tate, 83 M.J. 138 (C.A.A.F. 2022). In this case, TJAG lacked the authority to review, deny relief, or act. As a result, any subsequent action of TJAG was of no legal effect and did not trigger jurisdiction for the Air Force Court of Criminal Appeals or this Court. Article 66(b)(1)(D), UCMJ. Finally, this Court lacks jurisdiction to review the decision of the CCA under Article 67(a)(3) because the CCA never had jurisdiction. United States v. LaBella, 75 M.J. 52 (C.A.A.F. 2015). Without jurisdiction to consider this case, this Court should dismiss Appellant's petition for grant of review.

Conclusion

For these reasons, the United States requests that this Honorable Court determine it has no jurisdiction over Appellant's case and grant the United States' Motion to Dismiss.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, to Civilian Defense Counsel, and to the Appellate Defense Division on 3 January 2024.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)because:

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/s/
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Attorney for USAF, Government Trial and Appellate Operations Division

Date: 3 January 2024

United States v. Csady

United States Air Force Court of Criminal Appeals

September 30, 2021, Decided

No. ACM 39869

Reporter
2021 CCA LEXIS 516 *; 2021 WL 4521086

UNITED STATES v. Brandon C. CSADY, Staff Sergeant (E-5), U.S. Air Force, Applicant

Subsequent History: Petition for review filed by United States v. Csady, 2021 CAAF LEXIS 1021, 2021 WL 5832266 (C.A.A.F., Nov. 29, 2021)

Motion granted by United States v. Csady, 2021 CAAF LEXIS 1032, 2021 WL 5763000 (C.A.A.F., Nov. 30, 2021)

Motion granted by United States v. Csady, 2021 CAAF LEXIS 1064 (C.A.A.F., Dec. 15, 2021)

Review dismissed by, Motion granted by United States v. Csady, 2022 CAAF LEXIS 10 (C.A.A.F., Jan. 5, 2022)

Opinion

[*1] ORDER

Judgment was entered in Applicant's general court-martial on 23 December 2019. Applicant then sought review under Article 69(c), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 869(c), *Manual for Courts-Martial, United States* (2019 ed.). On 12 August 2020, The Judge Advocate General denied relief, finding "no error prejudicial to the substantial rights of the Applicant."

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).

Accordingly, it is by the court on this 30th day of September, 2021, **ORDERED**:

The Application for Grant of Review is **DENIED**.

End of Document

[*] The court docketed the application for review on 9 October 2020, and, on 8 December 2020, granted Applicant's motion for leave to file a supplemental brief. On 30 March 2021, the court accepted the supplemental brief.

United States v. Farnum

United States Navy-Marine Corps Court of Criminal Appeals

November 11, 2021, Decided

NMCCA No. 202000120

Reporter
2021 CCA LEXIS 597 *

UNITED STATES v. Cory J. FARNUM, Hull Maintenance Technician Second Class (E-5) U.S. Navy, Applicant

Prior History: [*1] Denying Application for Review.

Opinion

Panel 1

ORDER

Applicant was tried by special court-martial at Naval Station Everett, Washington. On 20 March 2019, Military Judge Lawrence Lee, sentenced Applicant to reduction to E-2 and confinement for 89 days. The convening authority approved the sentence and ordered it executed.[1]

On 9 July 2019, a judge advocate reviewed the case, in accordance with Article 64(a), Uniform Code of Military Justice [UCMJ] (2012 & Supp. IV 2017),[2] and determined that the court-martial had jurisdiction over Applicant and each offense of which he was found guilty, that each specification of which was found guilty stated an offense, and that the sentence was legal.

On 8 January 2020, Applicant applied for review by the Judge Advocate General, in accordance with Article 69(a), UCMJ (2018).[3] 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).[4]

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 **[*2]** a substantial basis for concluding that the action under review constituted prejudicial error.[5]

Accordingly, it is by the Court on this 11th day of November, 2021, **ORDERED**:

The Application for Review is **DENIED**.

End of Document

[1] Pursuant to a pretrial agreement, the convening authority suspended confinement in excess of 45 days.

[2] 10 U.S.C. § 864(a) (2012 & Supp. IV 2017).

[3] 10 U.S.C. § 869(a) (2018).

[4] 10 U.S.C. § 869(d)(1)(B) (2018).

[5] Article 69(d)(2)(A), 10 U.S.C. § 869(d)(2)(A) (2018).

United States v. Howard

United States Navy-Marine Corps Court of Criminal Appeals

March 29, 2022, Decided

NMCCA No. 202000251

Reporter
2022 CCA LEXIS 193 *

UNITED STATES v. Aaron T. HOWARD, Special Warfare Operator First Class (E-6) U.S. Navy, Applicant

Opinion

[*1] Panel 1

ORDER

Denying Application for Review

Applicant was tried by general court-martial at Naval Station Norfolk, Virginia, Military Judge Michael J. Luken presiding.[1] On 7 February 2020, the court-martial members sentenced Applicant to reduction to E-5, forfeiture of $500.00 per month for three months, and confinement for 30 days. The convening authority approved the sentence and ordered it executed.[2]

On 15 July 2020, a judge advocate reviewed the case, in accordance with Article 65, Uniform Code of Military Justice [UCMJ],[3] and determined that the court-martial had jurisdiction over Applicant and each offense of which he was found guilty, that each specification of which he was found guilty stated an offense, and that the sentence was legal. The judge advocate also responded to each allegation of error raised by the Accused, finding no error.

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 **[*2]** 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.[4]

Accordingly, it is by the Court on this 29th day of March, 2022,

ORDERED:

The Application for Review is **DENIED**.

End of Document

[1] Judge Hayes C. Larsen completed the Entry of Judgment.

[2] The convening authority suspended the $500.00 forfeiture for three months, provided SO1 Howard maintain an allotment for his wife in the amount of $500.00 for three months.

[3] 10 U.S.C. §865.

[4] Article 69(d)(2)(A), UCMJ.

United States v. Tate

United States Army Court of Criminal Appeals

September 9, 2022, Decided

ARMY 20200590

Reporter
2022 CCA LEXIS 543 *; 2022 WL 4232403

UNITED STATES, Appellee v. Chief Warrant Officer Two ANDRE X. TATE, United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Petition for review filed by United States v. Tate, 2022 CAAF LEXIS 785, 2022 WL 17574083 (C.A.A.F., Nov. 4, 2022)

Motion dismissed by, Without prejudice, Motion denied by, As moot United States v. Tate, 2022 CAAF LEXIS 887 (C.A.A.F., Dec. 13, 2022)

Prior History: [*1] Headquarters, 82nd Airborne Division. J. Harper Cook, Military Judge. Colonel Jeffrey S. Thurnher, Staff Judge Advocate.

Counsel: For Appellant: Captain Sean P. Flynn, JA (argued); Robert Feldmeier, Esquire (on brief); Carol Longenecker Schmidt, Esquire; Robert Feldmeier, Esquire (reply brief and answer to specified issues).

For Appellee: Major Pamela L. Jones, JA (argued); Colonel Christopher B. Burgess, JA; Captain Andrew M. Hopkins, JA; Major Pamela L. Jones, JA (on brief and brief on specified issues).

Judges: Before WALKER, EWING,[1] and PARKER, Appellate Military Judges. Senior Judge WALKER and Judge PARKER concur.

Opinion by: EWING

Opinion

MEMORANDUM OPINION

EWING, Judge:

Following appellant's conviction at a general court-martial, a military judge sentenced him to six months of confinement and a reprimand. Because this sentence fell below the threshold for us to otherwise review his case, appellant petitioned our court for review under Article 69, Uniform Code of Military Justice, 10 U.S.C. § 869 (2018) [UCMJ]. We now hold that we lack jurisdiction in this case, and dismiss appellant's appeal.

I. BACKGROUND

A. The Trial

In October 2020, a military judge sitting as a general court-martial convicted appellant, contrary to his pleas, of failing to obey a lawful order or regulation, assaulting **[*2]** his wife, and conduct unbecoming an officer, in violation of Articles 92, 128b, and 133, UCMJ. The military judge sentenced appellant to six months of confinement and a reprimand. This sentence fell below our Article 66 threshold for automatic appellate review of appellant's court-martial by this court, because the sentence contained neither a punitive discharge nor at least two years of confinement. UCMJ art. 66(b)(3).[2] It also precluded appellant from filing a direct appeal to this court, as it did not include

[1] Judge Ewing decided this case while on active duty.

[2] Unless otherwise specified, all references here to Articles 65, 66, and 69 refer to the versions of those Articles that took effect on 1 January 2019.

confinement for "*more than* six months." UCMJ art. 66(b)(1)(A) (emphasis added). Thus, following his court-martial, appellant had no direct path to appeal to our court.

B. The Article 65 Review

The process for reviewing such so-called "sub-jurisdictional" general courts-martial changed in several respects for cases referred on or after 1 January 2019.[3] Because, to our knowledge, no appellate court has yet discussed these changes in a written opinion, we do so here both by way of background and to explain the procedural posture of appellant's case.[4]

The first pertinent 2019 change 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 **[*3]** "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). Article 65 requires that this review include a "written decision" addressing: (1) whether the court-martial's jurisdiction was proper; (2) whether the charges and specifications of conviction stated an offense; (3) a conclusion as to whether the sentence was within legal limits; and (4) "[a] response to each allegation of error made in writing by the accused." UCMJ art. 65(d)(2)(B). If the delegated attorney conducting the Article 65 review "believes corrective action may be required," the case is then forwarded to TJAG "who may set aside the findings or sentence, in whole or in part." UCMJ art. 65(e)(1).

In June 2021 Colonel CD, at the time a reserve member of the U.S. Army Trial Judiciary, performed the Article 65 review in appellant's case. This was in accordance with Article 65's express delegation provision, and the subsequent regulatory designation of officers like Colonel CD as **[*4]** individuals authorized to conduct Article 65 reviews. *See* Army Reg. 27-10, Legal Services: Military Justice, para. 5-60 (20 Nov. 2020) (delegating Article 65 review authority to attorneys in the Criminal Law Division of the Office of The Judge Advocate General (OTJAG-CLD), attorneys in the Office of the Clerk of Court of this court, any attorney in the U.S. Army Trial Judiciary, and appellate military judges). Colonel CD's Article 65 review found no irregularities with appellant's court-martial and provided appellant with no relief.

C. The Article 69 Review

Following Colonel CD's Article 65 review, a second 2019 change to the subjurisdictional review process—this time to Article 69—provided appellant with the ability to apply within one year of the Article 65 review to the Judge Advocate General for an *additional* review. UCMJ art. 69(b). Specifically, Article 69(c)(1)(A) provides that in cases reviewed under Article 65, TJAG:

> [M]ay 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.

Id. Appellant, believing his court-martial contained **[*5]** multiple legal errors, presented a timely Article 69 petition to TJAG requesting relief under this provision.

[3] The changes discussed here were part and parcel to the numerous changes included in the Military Justice Act of 2016.

[4] The Navy and Air Force appellate courts have issued short unpublished opinions, with no analysis, denying relief under the post-2019 Article 69. *See United States v. Howard*, No. 202000251, 2022 CCA LEXIS 193 (N.M. Ct. Crim. App. 29 Mar. 2022); *United States v. Csady*, No. ACM 39869, 2021 CCA LEXIS 516 (A.F. Ct. Crim. App. 30 Sep. 2021); *United States v. Farnum*, No. 202000120, 2021 CCA LEXIS 597 (N. M. Ct. Crim. App. 11 Nov. 2021).

Unlike Article 65, the post-2019 version of Article 69 contains no language authorizing TJAG to delegate Article 69 reviews to officers in OTJAG-CLD, or to anyone else. This lack of delegation language also stands in contrast to the *pre*-2019 version of Article 69, which provided for review of sub-jurisdictional general courts-martial "*in the office of* the Judge Advocate General." UCMJ art. 69(a) (2012) (emphasis added). Notwithstanding this, TJAG delegated—by memorandum—the authority to *deny* relief under the post-2019 Article 69 to attorneys assigned to OTJAG-CLD, but withheld authority to *grant* relief to his personal level. Pursuant to TJAG's delegation, Lieutenant Colonel JR, an attorney assigned to OTJAG-CLD, conducted the Article 69 review in appellant's case. In November 2021, in a document entitled "Action Pursuant to Article 69," Lieutenant Colonel JR stated in pertinent part the following:

> I find that [appellant] has not established a proper and specific basis for relief under one or more of the enumerated statutory grounds. Accordingly, the Application for Relief is denied.[5]

*D. Appellant's **[*6]** Application to This Court*

Before 2019, Lieutenant Colonel JR's denial would have been the end of the road for appellant. This is because before 2019, unless TJAG personally certified a sub-jurisdictional case to our court for review, there was no mechanism for an appellant to further appeal TJAG's (or, more accurately, OTJAG-CLD's) decision. But in the *third* important 2019 change, Article 69 now allows for appellants themselves to apply to our court for further review following a qualifying TJAG "action" under Article 69. Specifically, Article 69(d)(1)(B) provides that the Courts of Criminal Appeals:

> [M]ay review the action taken by the Judge Advocate General under [Article 69(c)] . . . in a case submitted to the Court of Criminal Appeals *by the accused* in an application for review.

Id. (emphasis added).[6]

On the same day in November 2021 that Lieutenant Colonel JR denied appellant's Article 69 application, he sent appellant a letter informing him both of the denial decision and appellant's right to petition our court for additional review "of the action taken by the Judge Advocate General . . . under Article 69(c)" within 60 days of TJAG's "action."[7] Appellant **[*7]** timely petitioned our court for further review, alleging multiple assignments of error. We granted review of appellant's case but specified the following question for briefing and argument:

> WHETHER THIS COURT HAS JURISDICTION TO REVIEW APPELLANT'S CASE FOR FURTHER REVIEW UNDER ARTICLE 69(d) WHEN THE JUDGE ADVOCATE GENERAL OF THE ARMY HAS NOT TAKEN AN ACTION OUTLINED IN ARTICLE 69(c).

See, e.g., Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541, 106 S. Ct. 1326, 89 L. Ed. 2d 501 (1986) (courts have a "special obligation" to determine the question of jurisdiction, regardless of the parties' positions); *see also, e.g., Iasu v. Smith*,

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[5] While the November document included the phrase "FOR THE JUDGE ADVOCATE GENERAL" above Lieutenant Colonel JR's signature block, the most natural reading of this document along with TJAG's blanket delegation of the authority to deny relief under Article 69 is that TJAG took no personal action regarding appellant's Article 69 application.

[6] In the Report of the Military Justice Review Group (MJRG)—the group responsible for the bulk of the changes Congress ultimately adopted in the Military Justice Act of 2016—the MJRG explained that the intended purpose of this change to Article 69 was to "improve the appellate process by providing an accused who believes that his case includes legal error with an opportunity to apply directly to a court for appellate review." *Report of the Military Justice Review Group, Part I: UCMJ Recommendations*, at 636 (last visited August 4, 2022), https://dacipad.whs.mil/reading/2-uncategorised/36-mjrg-report .

[7] In contrast to our normal Article 66 powers, Article 69(e) provides that, in cases where we grant review of appellant's petitions under Article 69(d), we "may take action only with respect to matters of law." UCMJ art. 69(e).

511 F.3d 881, 891 (9th Cir. 2007) ("[C]ourts have jurisdiction to determine jurisdiction . . . ."). As explained below, we now hold that we lack jurisdiction to reach the merits of appellant's appeal because there has been no qualifying TJAG "action" under Article 69 in this case, which is a mandatory condition precedent to our jurisdiction.

II. LAW AND DISCUSSION

A. Legal Principles and Standard of Review

Our court, like our sister courts of criminal appeals, are Article I "courts of limited jurisdiction, defined entirely by statute." *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015). Thus, without an express statutory grant of jurisdiction, we "cannot proceed at all," because jurisdiction is the prerequisite to our "power to declare the law . . . ." *Roberts v. United States*, 77 M.J. 615, 616 (Army Ct. Crim. App. 2018) (cleaned up). As a court of **[*8]** limited jurisdiction, we "must exercise [our] jurisdiction in strict compliance with [our] authorizing statutes." *Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013). If we determine that we lack jurisdiction, our "only function remaining . . . is that of announcing the fact and dismissing the cause." *Roberts*, 77 M.J. at 616 (cleaned up).

We review questions related to our own jurisdiction de novo. *United States v. Hennis*, 75 M.J. 796, 804 (Army Ct. Crim. App. 2016); *see also, e.g., United States v. Hale*, 78 M.J. 268, 270 (C.A.A.F. 2019).

B. Discussion

Lieutenant Colonel JR's November 2021 memorandum denying appellant's requested relief under Article 69 was not a qualifying TJAG action for the purposes of vesting this court with appellate jurisdiction. We reach this conclusion because neither the 2019 updated version of Article 69 nor any other source of law vested TJAG with the authority to delegate his power to take a qualifying "action" under Article 69 in appellant's case.

Multiple canons of statutory interpretation independently and collectively lead us to this result. First, as always, "we begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). Where the text of a statute is "unambiguous," the "judicial inquiry is complete." *Id.* at 461-62 (cleaned up). The plain language of Article 69 includes no authority for TJAG to delegate the power to take action under Article 69 to attorneys in OTJAG-CLD or anyone else. **[*9]** Rather, the statute says plainly that "the *Judge Advocate General* may set aside the findings or sentence" or provide other relief.[8] UCMJ art. 69(c)(1)(A) (emphasis added).

To be sure, Article 69 does not expressly *prohibit* TJAG from delegating his authority to take a qualifying action under that rule. We further acknowledge both that TJAG sits atop a world-wide military justice enterprise and must be able to delegate duties generally to complete the mission, and that there are other instances in the UCMJ where "TJAG" is commanded to do something but routinely delegates that action. *See, e.g.*, UCMJ art. 70(b) ("Appellate Government counsel shall represent the United States before [the CCAs and the CAAF] when directed to do so *by the Judge Advocate General*.") (emphasis added). Nevertheless, we are aware of no other instance in the Code in which a similar *sub silentio*/inherent delegation authority not present in the operable statute directly relates to this Court's statutory jurisdiction. By way of comparison, general court-martial convening authorities also have serious and

[8] At oral argument the government seized on the word "may" in Article 69 as authority for TJAG to delegate as he did in this case. While we agree that the term "may" provides TJAG with broad discretion, we believe the better reading of "may" in this context is that TJAG "may" provide relief under Article 69, or he "may" not—rather than that he "may" either take a qualifying action under the statute himself or delegate the power to take such an action to someone else.

wide-ranging responsibilities, but may not delegate their Article 25 responsibilities under the Code. *See, e.g., United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) ("A convening authority's power to **[*10]** appoint a court-martial . . . may not be delegated."); *see also United States v. Newcomb*, 5 M.J. 4, 6-7 (C.M.A. 1978) ("[W]e find that whenever Congress conferred a power upon a particular authority in the court-martial system and intended that authority to give others the right to exercise the power, *it expressly provided for such designation*.") (emphasis added). We are unwilling to "read in" a delegation power to Article 69 when it is otherwise not there.

Rule for Courts-Martial [R.C.M.] 1201 is another possible front of authority for TJAG's ability to delegate under Article 69. But that rule also includes no express delegation authority, saying only that TJAG "shall provide procedures for considering" cases submitted under Article 69. R.C.M. 1201(h)(5). Particularly in light of the plain language of Article 69, the most natural reading of this phrase is that TJAG "shall provide procedures for [personally] considering" such cases. *Id.* And, at any rate, an R.C.M. cannot override a statute. *See In re Vance*, 78 M.J. 631, 634 (Army Ct. Crim. App. 2018) ("We concluded that to the extent that R.C.M. 1107 was in conflict with Article 60, we must give effect to the statute over the rule.") (cleaned up).

But to the extent the plain language of Article 69 and/or R.C.M. 1201 gives rise to any ambiguity about TJAG's delegation authority, that ambiguity is cleared **[*11]** away by looking at how Congress drafted both Article 65 and the pre-2019 version of Article 69. As explained *supra*, both of these statutes grant (or granted) TJAG with clear delegation authority that is absent in the 2019 version of Article 69. If TJAG possesses some inherent authority to delegate his Article 69 power in the way that he did in this case, it raises the question of why Congress would feel the need to spell out TJAG's delegation authority in both Article 65 and the prior version of Article 69. The most natural reading of these statutes together is that TJAG *has* delegation authority in the Article 65 context, and *had* it under the pre-2019 Article 69, but *does not have* that power under the 2019 version of Article 69. *See, e.g., Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16, 126 S. Ct. 941, 163 L. Ed. 2d 797 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read as if they were one law.") (cleaned up); *see also United States v. Mooney*, 77 M.J. 252, 257 (C.A.A.F. 2018) (discussing the cannon of statutory construction *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others)); *Halverson v. Slater*, 129 F.3d 180, 185, 327 U.S. App. D.C. 97 (D.C. Cir. 1997) (applying *expressio unius* canon and finding that a statute that expressly authorized delegation to Coast Guard officials logically **[*12]** meant that Congress "intended to exclude" other delegation authorities).

Finally, it is far from an absurd result to hold that Article 69 requires personal TJAG action before jurisdiction in this court may vest. *See, e.g., United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021) (courts may refuse to "apply the literal text of a statute when doing so would produce an absurd result"). Rather, in light of the overall post-2019 statutory scheme for reviewing sub-jurisdictional cases, it would be odd if Article 69 *allowed* TJAG to delegate as he did here. Under this new scheme, Article 65 mandates an initial review of all sub-jurisdictional general and special courts-martial. UCMJ art. 65(d)(2). TJAG may delegate this review to, *inter alia*, "an attorney within" OTJAG. UCMJ art. 65(d)(1). Thus, under the black letter of Article 65, he could have delegated the initial Article 65 review in this case to LTC JR. Then, after appellant petitioned for a second review under Article 69, if TJAG has the power to delegate as he did here, there would be nothing precluding him from delegating the action to . . . LTC JR again. This scenario points up the likelihood that the lack of delegation language in Article 69 was purposeful by Congress. Ultimately, whether the missing delegation language was purposeful or **[*13]** an

oversight, our analysis leads to the same conclusion. *See Arness*, 74 M.J. at 447 (C.A.A.F. 2015) (Baker, J., concurring in the result) ("[W]here Article I courts are concerned, the tie goes to the narrow view of jurisdiction.").[9]

In summary, because there was no TJAG action under Article 69, we lack jurisdiction to hear appellant's appeal.

IV. CONCLUSION

For the reasons set forth herein, we DISMISS this appeal for a lack of jurisdiction. We further hold that our initial grant of appellate review in this case was *void ab initio*.

Senior Judge WALKER and Judge PARKER concur.

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[9] 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 by TJAG. Because our answer to this question would have no effect on our holding here that we lack jurisdiction, anything we say on the subject would be in the nature of an "advisory opinion." *See, e.g.*, *United States v. Hamilton*, 78 M.J. 335, 342 (C.A.A.F. 2019) (declining to provide an "advisory opinion" on an issue "not necessary to the resolution" of the case).

United States v. Zier

United States Air Force Court of Criminal Appeals

April 18, 2023, Decided

No. ACM 21014

Reporter
2023 CCA LEXIS 178 *; 2023 WL 2989830

UNITED STATES, Appellee v. Jeremy M. ZIER, Senior Master Sergeant (E-8), U.S. Air Force, Applicant

Notice: NOT FOR PUBLICATION

Prior History: Application for Grant of Review Pursuant to Article 69(d)(1)(B), UCMJ **[*1]** . Military Judge: Sterling C. Pendleton. Sentence: Sentence adjudged on 14 August 2020 by SpCM convened at Joint Base San Antonio-Randolph, Texas. Sentence entered by military judge on 2 September 2020: reduction to E-7.

Counsel: For Appellant: Robert A. Feldmeier, Esquire.

For Appellee: Major Alex B. Coberly, USAF; Major Jay S. Peer, USAF; Mary Ellen Payne, Esquire.

Judges: Before POSCH, RICHARDSON, and CADOTTE, Appellate Military Judges. Senior Judge POSCH delivered the opinion of the court, in which Senior Judge RICHARDSON and Judge CADOTTE joined.

Opinion by: POSCH

Opinion

POSCH, Senior Judge:

This case is before the court on application for grant of review of the action taken by The Judge Advocate General (TJAG) pursuant to Article 69(d)(1)(B), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 869(d)(1)(B).[1] TJAG denied Applicant's three petitions seeking relief from the findings and sentence of his special court-martial. While the application was pending, we specified three issues[2] for counsel for both parties to answer based on the apparent scrivener's errors in Article 69(c)(1)(A) and (c)(2), UCMJ, 10 U.S.C. §§ 869(c)(1)(A), (c)(2). We asked whether TJAG had the authority to review Applicant's case and, in turn, whether this court has the authority to review the action taken by TJAG. To the extent these questions relate **[*2]** to jurisdiction, and not scope of authority of TJAG and this court to review his case, we answer both questions in the affirmative.

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[1] Unless otherwise noted, references in this opinion to the UCMJ and Rules for Courts-Martial (R.C.M.) are to the *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*).

[2] The specified issues read as follows:

> I. WHETHER THE REFERENCES TO ARTICLE 65(b), UCMJ, WHERE IT APPEARS IN ARTICLE 69, UCMJ, AS AMENDED BY SECTION 5333 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, NEGATE (A) THE AUTHORITY OF THE JUDGE ADVOCATE GENERAL TO REVIEW APPLICATIONS FOR RELIEF UNDER ARTICLE 69(c), UCMJ; OR (B) THE AUTHORITY OF THIS COURT UNDER ARTICLE 69(d), UCMJ, TO REVIEW THE ACTION OF THE JUDGE ADVOCATE GENERAL.
>
> II. WHETHER THE APPLICATION FOR RELIEF TO THE JUDGE ADVOCATE GENERAL WAS PROPERLY THE SUBJECT OF REVIEW BY THE JUDGE ADVOCATE GENERAL UNDER ARTICLE 69, UCMJ, AS AMENDED BY SECTION 5333 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017, OR BY ANY OTHER LAW.
>
> III. IF THE APPLICATION FOR GRANT OF REVIEW IS NOT PROPERLY BEFORE THIS COURT, WHAT RELIEF, IF ANY, DOES THIS COURT HAVE AUTHORITY TO ORDER?

Having settled the issue of jurisdiction in Applicant's favor, we grant review.

I. Background

A special court-martial composed of officer members convicted Applicant of dereliction of duty for failing to maintain professional relationships with subordinate Airmen, and committing abusive sexual contact by touching directly the genitalia and inner thigh of another person, in violation of Articles 92 and 120, UCMJ, 10 U.S.C. §§ 892, 920, *Manual for* **[*3]** *Courts-Martial, United States* (2012 ed.).[3] The sentence adjudged by members on 14 August 2020 and entered by the military judge on 2 September 2020 consisted of reduction to the grade of E-7. The convening authority denied Appellant's request for deferment of the reduction in grade.

On 21 January 2021, an attorney designated by TJAG reviewed Applicant's case under Article 65, UCMJ, 10 U.S.C. § 865. As a result of that review, the same notation was affixed to both the entry of judgment and Volume I of the record of trial, and states as follows:

> Article 65(d)[, UCMJ, 10 U.S.C. § 865(d)], Review pursuant to the authority of R.C.M. [Rule for Courts-Martial] 1202(d)[4]:
>
> I conclude: (1) the court had jurisdiction over the accused and the offense; (2) each charge and specification stated an offense; (3) the sentence was within the limits prescribed as a matter of law; and (4) [w]hen applicable, a response to each allegation of error was made in writing by the accused.[5]

Because it was not evident from the record that Applicant was notified of the results of the 21 January 2021 review of his case, on 5 October 2022, we ordered the Government to show good cause why we should not return the record because it **[*4]** appeared incomplete after entry of judgment. On 17 October 2022, the Government responded to that order, conceding, *inter alia*, that there was reason to believe that the designated reviewing attorney did not serve Applicant "by first-class certified mail" with the results of the Article 65, UCMJ, review as required by R.C.M. 1201(g) (stating "[p]roof of service shall be attached to the record of trial").

Despite not having been notified in accordance with that rule, Applicant, with assistance of civilian defense counsel, nonetheless petitioned TJAG for relief pursuant to Article 69, UCMJ, 10 U.S.C. § 869, and R.C.M. 1201.[6] In the brief in support of his application filed with the court, Applicant provides a concise statement of that petition and what happened next:

> On 23 September 2021, Applicant filed an initial petition for relief with [TJAG] pursuant to R.C.M. 1201. On 6 December 2021, [Applicant] filed a supplemental petition with TJAG pursuant to R.C.M. 1201. On 19 April 2022, Applicant filed a second supplemental petition with TJAG, also pursuant to R.C.M. 1201. On 11 August 2022, TJAG issued an action which denied all relief to Applicant and found that his second supplemental petition was untimely.

On 29 September 2022, Applicant, again with assistance of civilian defense counsel, **[*5]** submitted his case to this court in an application for

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[3] Applicant was found not guilty of two specifications of abusive sexual contact under Article 120, UCMJ, 10 U.S.C. § 920.

[4] The citation to R.C.M. 1202(d) in the notation is incorrect. That rule pertains to detailing appellate counsel. We assume the judge advocate who conducted the review meant R.C.M. 1201(d), *Form and content for review of cases not eligible for appellate review at the Court of Criminal Appeals*.

[5] As to this fourth conclusion by the reviewing attorney, it does not provide the court any additional information as to whether the accused did in fact raise any allegations of error, and the record is silent on this.

[6] To qualify for review on application for relief to TJAG, an accused must submit such application not later than one year after the later of the date when the accused is notified of the decision under R.C.M. 1201(g), or the date in which the decision is deposited in the mail to the accused. *See* R.C.M. 1201(h)(2)(B).

review.[7] That application includes an accompanying brief that identifies five assignments of error, which we summarize here: (1) the evidence is legally insufficient to support a conviction for dereliction of duty because the Government presented no evidence as to the existence of any duty; (2) the military judge erred when he permitted the Government to prove he committed the abusive sexual contact offense with inadmissible propensity evidence; (3) the Under Secretary of the Air Force and then the Secretary of the Air Force engaged in apparent and actual unlawful command influence preventing Applicant from "receiv[ing] an impartial consideration of the merits of his other claims" during appellate review; (4) Applicant was subject to unlawful post-trial punishment in excess of the sentence; and (5) TJAG improperly found Applicant's second supplemental petition[8] to be untimely, despite the fact that he filed that petition before the R.C.M. 1201(g) review was mailed to him and despite the fact that the petition deals in part with allegations post-dating the original petition.

II. Discussion

A. Legislative History

For every court-martial that **[*6]** ends in a judgment of guilty, a convicted servicemember is entitled to a review of the findings of guilty and the sentence. Depending on the sentence, it is generally understood that appellate review may include evaluation of the record by TJAG. *See United States v. Brown*, 81 M.J. 1, 4 (C.A.A.F. 2021) (stating "[the accused] may yet seek review by TJAG pursuant to Article 69(b), UCMJ[, 10 U.S.C. § 869(b)]").

1. The Military Justice Act of 2016

In the Military Justice Act of 2016 (MJA), Congress included a provision that a Court of Criminal Appeals (CCA) "may review the action taken by [TJAG]" in a case submitted to the court "by the accused in an application for review." *See* National Defense Authorization Act for Fiscal Year 2017 (FY17 NDAA), Pub. L. No. 114-328, § 5333, 130 Stat. 2000, 2936 (2016) (amending Article 69, UCMJ, 10 U.S.C. § 869). However, in doing so, and as discussed in this opinion, Congress appeared to legislate that a CCA's expanded authority in two articles of the UCMJ—Articles 66(b)(1)(D) and 69(d)(1)(B), UCMJ[9]—would apply to cases that TJAG was not eligible to review as set forth in another article, Article 65(b), UCMJ.[10] Congress seemed to give with one hand what it took away with the other. To resolve this seeming contradiction, we begin with a discussion of the background of two amendments to the UCMJ when Congress enacted the MJA.

2. Articles 65 and 69, UCMJ

In the MJA, Congress amended Articles 65 and 69, UCMJ. *See* FY17 NDAA §§ 5329, 5333. As amended, Article 65, UCMJ, describes types of cases eligible for review by an attorney within the office of TJAG or designee, and the scope of review; Article 69, UCMJ **[*7]** , describes in subsection (c)(1) the kinds of relief TJAG may order when reviewing certain cases, and in

[7] The application was submitted before 23 December 2022, the effective date of the National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022). Section 544(b) of that Act amended Article 66, UCMJ, and gave a Court of Criminal Appeals jurisdiction over a timely appeal of, *inter alia*, a conviction by special court-martial. Section 544(d) of the Act specifies that our expanded jurisdiction will not apply to "any matter that was submitted before the date of the enactment of this Act to a Court of Criminal Appeals . . . ."

[8] The petition at issue in this assignment of error sought relief from TJAG on grounds that "the Secretary of the Air Force is engaged in apparent and actual unlawful command influence while [Applicant's] conviction is pending Article 69, UCMJ[,] review."

[9] 10 U.S.C. §§ 866(b)(1)(D), 869(d)(1)(B).

[10] 10 U.S.C. § 865(b) (identifying cases eligible for automatic review and direct appeal review).

subsection (c)(2), the scope of review when an appeal is waived or withdrawn.

As relevant here, the legislative history reflects minor substantive differences in these amended articles as passed by the House of Representatives (House) and Senate. However, an apparent difference lies in the way each chamber enumerated and identified subsections of those articles in bills that worked their way through the legislative process.

The amended articles were complementary within the bills in each chamber, but each chamber's draft legislation enumerate subsections differently. Stated succinctly, the House made provisions for TJAG review in Article 65(b), and the Senate put those provisions in Article 65(d).[11] In November 2016, a conference report to accompany Senate Bill 2943 was submitted to each chamber for approval. H.R. REP. NO. 114-840 (2016). The report summarized the relevant provision of the Senate bill, noting:

> 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[, 10 U.S.C. § 866]. The Judge Advocates General would retain authority to certify cases **[*8]** for review by the appellate courts.

H.R. REP. NO. 114-840, at 1528. The report also stated, "The House amendment contained a similar provision (sec. 6813)." *Id.*

The conference report that accompanied Senate Bill 2943 passed the House. 162 CONG. REC. H7134 (daily ed. 2 Dec. 2016). The Senate agreed. 162 CONG. REC. S6873 (daily ed. 8 Dec. 2016). The President signed Senate Bill 2943 on 23 December 2016 and Articles 65 and 69, UCMJ, as amended, became law as implemented by the President effective on 1 January 2019 in Executive Order 13,825, § 3(a), 83 Fed. Reg. 9889 (8 Mar. 2018).[12]

As amended, counsel for both parties agree that there appear to be scrivener's errors in Article 69(c)(1)(A) and (c)(2), UCMJ, 10 U.S.C. §§ 869(c)(1)(A); (c)(2): the language in both subsections refers to a case reviewed under Article 65(b), UCMJ; however Congress could have meant Article 65(d), UCMJ, instead.

a. Article 65, UCMJ

As amended by the MJA, Article 65, UCMJ, subsections (b) and (d) read as follows:

> § 865. Art. 65. Transmittal and review of records
>
> . . . .
>
> (b) CASES FOR DIRECT APPEAL.—

[11] The FY17 NDAA was introduced in Congress as H.R. 4909. 162 CONG. REC. H1634 (daily ed. 12 Apr. 2016). The House passed the bill in May 2016. 162 CONG. REC. H2813 (daily ed. 18 May 2016). The bill made provisions for "Review by Judge Advocate General" (TJAG review) in subsection (b) of Article 65. H.R. 4909, 114th Cong. § 6809 (as engrossed in House, 18 May 2016). The bill also made conforming amendments to Article 69(c), UCMJ, to refer to a case reviewed by TJAG under section "865(b)" of title 10, United States Code (Article "65(b)"). *See id.* § 6813. The Senate passed similar legislation in Senate Bill 2943, but it differed from H.R. 4909 by placing provisions for TJAG review in subsection (d) of Article 65, *and not subsection (b)* as the House had done. See 162 CONG. REC. S4245 (daily ed. 15 Jun. 2016). The Senate's version of the legislation made conforming amendments to Article 69(c) to refer to TJAG review under section "865(d)" of title 10, United States Code (Article "65(d)"). *See id.* S4247.

[12] The specifications of which Applicant was convicted alleged offenses before 1 January 2019. Nonetheless, Articles 65 and 69, UCMJ, as amended by the MJA apply to his case. *See* FY17 NDAA, Pub. L. No. 114-328, § 5542(c)(1), 130 Stat. 2000, 2967 (2016), as amended by National Defense Authorization Act for Fiscal Year 2018 (FY18 NDAA), Pub. L. No. 115-91, § 531(n)(1), 131 Stat. 1283, 1387 (2017). The Acts clarify that the President shall prescribe whether, and to what extent, MJA amendments apply to a case in which a specification alleges the commission, before 1 January 2019, of an offense in violation of the UCMJ.

(1) AUTOMATIC REVIEW.—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 2 years or more, the Judge Advocate General shall forward the record of trial to the Court of Criminal Appeals for review under **[*9]** section 866(b)(2) of this title (article 66(b)(2)).[13]

(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—(i) forward a copy of the record of trial to an appellate defense counsel who shall be detailed to review the case and, upon request of the accused, to represent the accused before the Court of Criminal Appeals; and (ii) upon written request of the accused, forward a copy of the record of trial to civilian counsel provided by the accused.

(B) INAPPLICABILITY.—Subparagraph (A) shall not apply if the accused—(i) waives the right to appeal under section 861 of this title (article 61); 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 direct appeal under **[*10]** 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 61); or (ii) the accused does not file a timely appeal in a case eligible for direct appeal under subparagraph (A), (B), or (C) of section 866(b)(1) of this title (article 66(b)(1)).

(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).

. . . .

FY17 NDAA, Pub. L. No. 114-328, § 5329, 130 Stat. 2000, 2930-31 (2016) (internal quotation marks omitted).

b. Article 69, UCMJ

[13] This sentence was further amended in subsequent legislation by striking "section 866(b)(2) of this title (article 66(b)(2))" and inserting "section 866(b)(3) of this title (article 66(b)(3))." *See* FY18 NDAA, Pub. L. No. 115-91, § 1081(c)(1)(J), 131 Stat. 1283, 1598 (2017).

As amended by the MJA, Article 69(c)(1)(A) and (c)(2), UCMJ, appears to contain scrivener's errors by reference to a case reviewed under Article 65(b), UCMJ, rather **[*11]** than Article 65(d), UCMJ. Subsection (c) of the statute reads in its entirety as follows:

> § 869. Art. 69. Review by Judge Advocate General . . . .
>
> (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[14] 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.
> (B) In setting aside findings or sentence, the Judge Advocate General may order a rehearing, except that a rehearing may not be ordered in violation of section 844 of this title (article 44).
> (C) If the Judge Advocate General sets aside findings and sentence and does not order a rehearing, the Judge Advocate General shall dismiss the charges.
> (D) If the Judge Advocate General sets aside findings and orders a rehearing and the convening authority determines that a rehearing would be impractical, the convening authority shall dismiss the charges.[15]
>
> (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 **[*12]** Judge Advocate General determines that the waiver or withdrawal of an appeal was invalid, the Judge Advocate General shall order appropriate corrective action under rules prescribed by the President.
> . . . .

FY17 NDAA, Pub. L. No. 114-328, § 5333, 130 Stat. 2000, 2935-36 (2016) (emphasis added) (internal quotation marks omitted).

3. The *Manual for Courts-Martial*

The Joint Service Committee on Military Justice (JSC) states in the Preface to the *Manual* that it "contains amendments to the Uniform Code of Military Justice (UCMJ) made by [the] Military Justice Act of 2016."[16] *Manual for Courts-Martial, United States* (2019 ed.) (*MCM*), Preface. However, Article 69(c), UCMJ, 10 U.S.C. § 869(c), is stated differently in the *Manual* than the language quoted above from Section 5333 of FY17 NDAA. As stated in the *Manual*, the provisions of Article 69, UCMJ, in subsection (c)(1)(A)—for the kinds of relief that may be ordered following TJAG review, and in subsection (c)(2)—for the scope of that review when a direct appeal to a Court of Criminal Appeals is waived or withdrawn, most closely tracks Senate Bill 2943, *supra*, but not the law.

In that regard, the *Manual* recites, incorrectly, 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, **[*13]** fraud on the court, lack of jurisdiction over the

[14] This sentence was further amended in subsequent legislation by inserting a comma after "in part." *See* FY18 NDAA, Pub. L. No. 115-91, § 1081(c)(1)(L), 131 Stat. 1283, 1598 (2017).

[15] This paragraph was further amended in subsequent legislation enacted on 27 December 2021, and will apply to offenses that occur two years after that date. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 539A, 539C, 135 Stat. 1541, 1698, 1699 (2021).

[16] The Preface further states that the *Manual* contains amendments made by the National Defense Authorization Acts for Fiscal Year 2018 and Fiscal Year 2019.

> 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.

MCM, App. 2, at A2-29 (emphasis added).

In summary, Article 69(c), UCMJ, as amended by the MJA, differs in three ways from the language of the article contained in the *Manual*:

> • Article 69(c)(1)(A), UCMJ, references actions TJAG may direct on appeal by reference to a case reviewed under Article 65(b), UCMJ, 10 U.S.C. § 865(b); however, the *Manual* references such actions with respect to a case reviewed under a different subsection, that is, one reviewed under Article "65(d)."
>
> • Article 69(c)(2), UCMJ, references the limited scope of review of a case under Article 65(b), UCMJ; however, the *Manual*, again, references such limited review with respect to a case reviewed under Article "65(d)."[17]
>
> • Additionally, the *Manual* includes within the scope of TJAG's authority **[*14]** 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.

[17] Applicant argues the provisions in Article 69(c)(2), UCMJ, "are not applicable to [his] application." The Government argues Congress could amend Article 69(c)(2), UCMJ, to "reference Article 65(d)(3)[, UCMJ]." We find that we need not reach either contention to decide the question of jurisdiction.

B. Responses to Specified Issues

On 22 December 2022, by order of the court, we specified three issues, *supra* n.2, for briefing. In response to our order, Applicant argues that "[t]he apparently erroneous references in Article 69(c)(1)(A)[, UCMJ,] to Article 65(b)[, UCMJ,] . . . does not affect the ability of the Judge Advocate General of the Air Force [TJAG] to review the application at issue here because that authority derives from Article 69(a), UCMJ[, 10 U.S.C. § 869(a)]." As to the matter of this court's authority to review TJAG's decision, Applicant cites the opinion of the United States Court of Appeals for the Armed Forces (CAAF) in *Brown*, in which the CAAF favorably acknowledged the authority of this court to review such decisions, stating:

> 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 [C]ourts of [C]riminal [A]ppeals 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."[18] Thus, it is no longer the case that only those cases that TJAG elects to **[*15]** refer to the [C]ourt of [C]riminal [A]ppeals under Article 69(d), UCMJ, may be heard by the lower court.

Brown, 81 M.J. at 4, n.5 (dictum) (noting "[t]he instant case was referred on January 12, 2018"). Applicant urges that we must follow the CAAF's guidance in *Brown*.

The Government agrees with Applicant that "the plain language of Article 69[, UCMJ,] seemingly contains a scrivener's error in its internal reference to Article 65(b)[, UCMJ]." Referring to the power of a court to sidestep "the literal text of a statute when doing so would produce an absurd result," the Government notes that courts have applied the "absurdity doctrine," but only "in very limited

[18] The opinion quotes Article 66(b)(1)(D), UCMJ.

circumstances." *See United States v. McPherson*, 81 M.J. 372, 380 (C.A.A.F. 2021).

While conceding that "consideration of the absurdity doctrine is warranted," the Government contends that application of that doctrine is "ultimately unavailing because amending the scrivener's error creates an absurd result." The Government argues that the references to Article "65(b)" where they appear in Article 69(c), though erroneous, "would require congressional revision" to correct. As a result, the Government contends that "the plain language of Article 69, UCMJ, leaves Applicant without an avenue for relief" from "either [TJAG] or this Court."

C. Jurisdiction

Jurisdiction is a legal question reviewed de novo. *United States v. Brubaker-Escobar*, 81 M.J. 471, 474 (C.A.A.F. 2021). At the same time, **[*16]** because our jurisdiction is defined by statute, an issue of statutory construction is a question of law 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)). Usually the plain language of the relevant statute will control unless the meaning is ambiguous. *See United States v. Ortiz*, 76 M.J. 189, 192 (C.A.A.F. 2017) ("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."), *aff'd*, 138 S. Ct. 2165, 201 L. Ed. 2d 601 (2018).

"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, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997)). The CAAF cautions that it "has no license . . . to construe statutes in a way that 'undercut[s] the clearly expressed intent of Congress.'" *Id.* at 396 (C.A.A.F. 2014) (alteration in original) (quoting *United States v. Bartlett*, 66 M.J. 426, 428 (C.A.A.F. 2008)).

The CAAF allows that "a court can refuse to apply the literal text of a statute," but only "in very limited circumstances." *McPherson*, 81 M.J. at 380. Ordinarily "when a legislature makes a substantive error concerning the actual effect of a new law, 'the remedy lies with the lawmaking authority, and not with the courts'" *Id.* at 378 (quoting **[*17]** *Crooks v. Harrelson*, 282 U.S. 55, 60, 51 S. Ct. 49, 75 L. Ed. 156, 1931-1 C.B. 469 (1930)). In such a case, "'a departure from the letter of the law' may be justified to avoid an absurd result if 'the absurdity . . . is so gross as to shock the general moral or common sense.'" *Id.* at 380 (quoting *Crooks*, 282 U.S. at 60).

D. Analysis

Because Applicant's sentence precludes a right of direct appeal to this court, the question whether the court can exercise jurisdiction to grant the application and review the action taken by TJAG turns on whether Congress intended to vest jurisdiction in TJAG and this court to permit review of his case. We hold that Congress did, and without reliance on the absurdity doctrine. It follows that TJAG had the authority to review Applicant's petitions and we have jurisdiction to grant the application. Given these conclusions, it is unnecessary for us to decide the third issue we specified for briefing. Before proceeding with the analysis that underlies our holding, two points require mention.

First, while the JSC reference to Article 65(d), UCMJ, in Appendix 2 at A2-29 of the *Manual*, seems logically correct, even so Section 5333 of the FY17 NDAA, which refers to Article "65(b)," would have precedence over the altered recitation of Pub. L. No. 114-328, § 5333, 130 Stat. 2000, 2935 (2016), in the *Manual*. A federal statute may be surpassed only by the Constitution in the hierarchy of sources of military **[*18]** law; and, in

that regard, the UCMJ is of higher precedence than the *Manual*. *See, e.g., United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997) (observing that "a lower source on the hierarchy may grant additional or greater rights than a higher source, [but] those additional rights may not conflict with a higher source").

Second, whether TJAG and this court have jurisdiction, on the one hand, and the scope of our respective authority when exercising that jurisdiction, on the other, are related questions. However, they are sufficiently different that we need not decide them together. *See Fauntleroy v. Lum*, 210 U.S. 230, 234-35, 28 S. Ct. 641, 52 L. Ed. 1039 (1908) (observing "it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain"). Today, we decide the former and leave questions about the scope of our authority in conducting our review of TJAG's action for another day.

1. TJAG Review under Article 69, UCMJ

We agree with Applicant that TJAG's review authority is derived most directly from the text of Article 69(a), UCMJ. That subsection and the title of the article that precede it state,

> §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, **[*19]** 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).

Our conclusion serves the purpose of Article 69, UCMJ, which is to provide authority and direction to TJAG in the conduct of review of a court-martial conviction and sentence. In that regard, the words of the title, held to their ordinary meaning, manifest the clearest intent that Congress vested jurisdiction in TJAG to review a case. *See, e.g., Almendarez-Torres v. United States*, 523 U.S. 224, 234, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (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)).

In subsection (a), *supra*, moreover, Congress used the phrase "subject to" to refer to provisions in three other subsections. That phrase qualifies TJAG review of a case by reference to, *inter alia*, subsections (b) and (c). The former relates to timing of an application submitted to TJAG and the latter plainly relates to the "[s]cope" of TJAG review, as may be distinct from jurisdiction. Lastly, the legislative history reflects intent in both the House and Senate to define TJAG's "scope" of review under Article 69(c), UCMJ. Importantly, the bills passed in both chambers vest jurisdiction in TJAG to review the findings **[*20]** and sentence in a case, like Applicant's, in which the judgment of the court martial includes confinement of six months or less and no punitive discharge. For these reasons, we conclude that TJAG had jurisdiction to review Applicant's petitions.

2. CCA Review under Article 66, UCMJ

On the question whether this court has jurisdiction under Article 66, UCMJ, to review the action taken by TJAG, we find that we do. Article 66(b)(1)(D) expressly confers such authority upon timely appeal and submission of an application for review:

> §866. Art. 66. Courts of Criminal Appeals
>
> . . . .
>
> (b) REVIEW.—
>
> (1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c),[19] as follows:

[19] Article 60c, UCMJ, 10 U.S.C. § 860c, requires an entry of judgment to record the Statement of Trial Results as may be

. . . .

(D) In 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.

Our jurisdiction in that regard is succinctly stated in Article 69(d)(1)(B), UCMJ, referenced above, which allows that "[a] Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c) . . . in a case submitted to the Court of Criminal Appeals by the accused in an application for review." As discussed **[*21]** above, both the House and Senate defined TJAG's "scope" of review under Article 69(c), UCMJ, as distinct from TJAG's jurisdiction, and this court's. It follows that we may review TJAG's action.

III. CONCLUSION

The court has jurisdiction to grant the application. Having met the criteria listed in Article 69(d)(2), UCMJ, 10 U.S.C. § 869(d)(2), the application is **GRANTED**. A scheduling order will be issued by the court under separate order, and a decision issued in due course.

End of Document

modified or supplemented by the convening authority or military judge.