

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

UNITED STATES,
Appellee,

v.

DOUGLAS M. FOLTS,
Technical Sergeant (E-6),
United States Air Force,
Appellant.

Crim. App. Dkt. No. ACM 40322
USCA Dkt. No. 25-0043/AF

BRIEF ON BEHALF OF APPELLANT

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<i>Appellee,</i>)	APPELLANT
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v.)	
)	Crim. App. Dkt. No. 40322
Technical Sergeant (E-6))	
DOUGLAS M. FOLTS,)	USCA. Dkt. No. 25-0043/AF
United States Air Force,)	
<i>Appellant.</i>)	April 23, 2025

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

Technical Sergeant (TSgt) Douglas M. Folts, the Appellant, respectfully files this Brief in accordance with this Court’s Order of March 24, 2025. TSgt Folts submits the current version of Article 66, Uniform Code of Military Justice (UCMJ), applies to his appeal. 10 U.S.C. § 866 (as amended by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 544(d), 136 Stat. 2395, 2582 (Dec. 23, 2022) (FY23 NDAA)).¹ Thus, the Air Force Court of Criminal Appeals (AFCCA) had and this Court has jurisdiction.

¹ The version of this statute relevant to the granted issue became effective when Congress enacted it on December 22, 2023. *Johnson v. United States*, 529 U.S. 694, 702 (2000) (stating the “general rule that when a statute has no effective date, absent a clear direction by Congress to the contrary, it takes effect on the date of its enactment”) (cleaned up)).

Issue Presented

Whether the Air Force Court of Criminal Appeals lacked jurisdiction to review Appellant's case.

Statement of Statutory Jurisdiction

The AFCCA reviewed this case pursuant to Article 66(b)(1)(A), UCMJ, 10 U.S.C. § 866(b)(1)(A) (2018) (as amended by the FY23 NDAA). This Court has jurisdiction pursuant to Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2018).²

Relevant Authorities

Article 57(c), UCMJ, 10 U.S.C. § 857(c) (2018).³ Effective date of sentences

(c) APPELLATE REVIEW.—

(1) COMPLETION OF APPELLATE REVIEW.—Appellate review is complete under this section when—

(A) a review under section 865 of this title (article 65) is completed; or

(B) a review under section 866 of this title (article 66) is completed by a Court of Criminal Appeals and—

(i) the time for the accused to file a petition for review by the Court of Appeals for the Armed Forces has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court;

² The relevant text of this statute has not changed to date from the version reproduced in Appendix 2 of the 2019 Manual for Courts-Martial (MCM).

³ The relevant text of this statute has not changed to date from the version reproduced in Appendix 2 of the 2019 MCM.

(ii) such a petition is rejected by the Court of Appeals for the Armed Forces; or

(iii) review is completed in accordance with the judgment of the Court of Appeals for the Armed Forces and—

(I) a petition for a writ of certiorari is not filed within the time limits prescribed by the Supreme Court;

(II) such a petition is rejected by the Supreme Court;
or

(III) review is otherwise completed in accordance with the judgment of the Supreme Court.

(2) COMPLETION AS FINAL JUDGMENT OF LEGALITY OF PROCEEDINGS.—The completion of appellate review shall constitute a final judgment as to the legality of the proceedings.

Article 60c, UCMJ, 10 U.S.C. § 860c (2018).⁴ Entry of judgment

(a) ENTRY OF JUDGMENT OF GENERAL OR SPECIAL COURT-MARTIAL.—

(1) In accordance with rules prescribed by the President, in a general or special court-martial, the military judge shall enter into the record of trial the judgment of the court. . . .

⁴ The relevant text of this statute has not changed to date from the version reproduced in Appendix 2 of the 2019 MCM.

Article 65, UCMJ, 10 U.S.C. § 865 (2018).⁵ Transmittal and review of records

* * *

(c) NOTICE OF RIGHT TO APPEAL.—

(1) IN GENERAL.—The Judge Advocate General shall provide notice to the accused of the right to file an appeal under section 866(b)(1) of this title (article 66(b)(1)) by means of depositing in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in the official service record of the accused.

(2) INAPPLICABILITY UPON WAIVER OF APPEAL.—Paragraph (1) shall not apply if the accused waives the right to appeal under section 861 of this title (article 61).

(d) REVIEW BY JUDGE ADVOCATE GENERAL. — . . .

(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)).

Article 66(b), UCMJ, 10 U.S.C. § 866(b) (2018). Courts of Criminal Appeals

(b) REVIEW. —

(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction over a timely appeal from the judgment of a court-martial, entered into the record under section 860c of this title (article 60c), as follows:

⁵ The relevant text of this statute has not changed to date from the version reproduced in Appendix 2 of the 2019 MCM.

(A) On appeal by the accused in a case in which the sentence extends to confinement for more than six months and the case is not subject to automatic review under paragraph (3).

* * *

(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.

Article 66, UCMJ, 10 U.S.C. § 866.⁶ Courts of Criminal Appeals

(b) REVIEW. —

(1) APPEALS BY ACCUSED.—A Court of Criminal Appeals shall have jurisdiction over—

(A) timely appeal from the judgment of a court-martial, entered into the record under section 860c(a) of this title (article 60c(a)), that includes a finding of guilty;

* * *

(c) TIMELINESS.—An appeal under subsection (b)(1) is timely if—

(1) in the case of an appeal under subparagraph (A) of such subsection, it is filed before the later of—

(A) the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under section 865(c), or

(B) the date set by the Court of Criminal Appeals by rule or order;

...

⁶ This is the version of the statute as amended by the FY23 NDAA.

Article 69, UCMJ, 10 U.S.C. § 869 (2018).⁷ Review by Judge Advocate General

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

(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 (article 64 or 65), as the case may be. . . .

(c) SCOPE.—

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

(d) COURT OF CRIMINAL APPEALS.—

(1) A Court of Criminal Appeals may review the action taken by the Judge Advocate General under subsection (c)—

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

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

⁷ The relevant text of this statute has not changed to date from the version reproduced in Appendix 2 of the 2019 MCM.

Article 69, UCMJ, 10 U.S.C. § 869.⁸ Review by Judge Advocate General

* * *

(b) TIMING.—

(1) To qualify for consideration, an application under subsection (a) must be submitted to the Judge Advocate General not later than—

* * *

(B) for a general or special court-martial, one year after the end of the 90-day period beginning on the date the accused is provided notice of appellate rights under 865(c) of this title (article 865c)), unless the accused submitted a waiver or withdrawal of appellate review under section 861 of this title (article 61) before being provided notice of appellate rights, in which case the application must be submitted to the Judge Advocate General not later than one year after the entry of judgment under section 860c of this title (article 60c).

Article 76, UCMJ, 10 U.S.C. § 876 (2018).⁹ Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. . . .

⁸ This is the version of the statute as amended by the FY23 NDAA.

⁹ The relevant text of this statute has not changed to date from the version reproduced in the in Appendix 2 of the 2019 MCM.

James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Public Law No. 117-263, § 544(d), 136 Stat. 2395, 2582 (Dec. 23, 2022) (FY23 NDAA)

(d) APPLICABILITY—

[The amendments to Article 66 and Article 69] shall not apply to—

(1) any matter that was submitted before the date of enactment of this Act to a Court of Criminal Appeals established under section 866 of title 10, United States Code (article 66 of the Uniform Code of Military Justice); or

(2) any matter that was submitted before the date of enactment of this Act to a Judge Advocate General under section 869 of such title (article 69 of the Uniform Code of Military Justice).

Statement of the Case and Statement of Facts

On February 26, 2022, contrary to TSgt Folts’s pleas, a panel of officer and enlisted members sitting as a general court-martial at Eielson Air Force Base, Alaska, convicted him of one charge and one specification of sexual abuse of a child by communicating indecent language in violation of Article 120b, UCMJ, 10 U.S.C. § 920b (2018). JA at 21, 97. The language at issue consisted solely of three memes TSgt Folts sent to his teenage stepdaughter in March 2020. JA at 6. The members acquitted TSgt Folts of two specifications of sexual abuse of a child in violation of Article 120b, UCMJ (touching the stepdaughter and communicating certain language to her). JA at 21, 97.

On February 27, 2022, the military judge sentenced TSgt Folts to forfeit \$3000.00 per month for six months and to be confined for sixteen days. JA at 98.

The convening authority took no action on the findings and approved the sentence in its entirety. JA at 20. The military judge signed the Entry of Judgment (EOJ) on March 9, 2022. JA at 22.

On July 6, 2022, review under Article 65(d), UCMJ, 10 U.S.C. § 865(d), was completed. JA at 25; *see also* JA at 22 (showing a clearer copy of the Article 65(d), UCMJ, review). Although he had one year from that date to do so, TSgt Folts did not submit any matters pursuant to Article 69, UCMJ, 10 U.S.C. § 869 (2018).

Congress amended the appellate process set out in Articles 66 and 69, UCMJ, through the FY23 NDAA, which was signed into law and became effective¹⁰ on December 23, 2022. FY23 NDAA. This amendment expanded the lower courts' jurisdiction over direct appeal cases, permitting the Courts of Criminal Appeals (CCAs) to consider servicemembers' direct appeals in every case involving a conviction at general or special court-martial, regardless of the sentences adjudged. *Id.* at § 544(b).

Unlike some other appellants, TSgt Folts did not receive a "Notice of Right to Submit Direct Appeal to the Air Force Court of Criminal Appeals." *See* Article 65(c)(1), UCMJ (requiring TJAG to notify an appellant of his or her right to appeal under Article 66(b)(1), UCMJ). Nevertheless, he submitted a notice of direct appeal to the AFCCA on February 22, 2023, sixty-one days after the effective date of the

¹⁰ *Johnson*, 529 U.S. at 702.

new version of Article 66, UCMJ, and before the deadline for him to file an Article 69, UCMJ, appeal had that statute remained unamended. JA at 26. The AFCCA docketed TSgt Folts's case on February 24, 2023, as a direct appeal pursuant to Article 66(b)(1)(A), UCMJ, and the FY23 NDAA. JA at 28.

At the AFCCA, TSgt Folts argued his purely speech-based conviction violated the First Amendment and the evidence was insufficient (because the language did not meet the definition of "indecent" and he did not have the requisite mens rea). *See* JA at 60-95 (TSgt Folts's AFCCA Reply Brief). He also challenged whether 18 U.S.C. § 922 constitutionally applied to him. JA at 2.

The Government did not file a motion to dismiss for lack of jurisdiction at the AFCCA. Instead, the Government argued in its Answer that the AFCCA lacked jurisdiction because Article 65(d), UCMJ, review was complete before the effective date of the amendment to Article 66, UCMJ, in the FY23 NDAA. JA at 30. In its unpublished opinion, the AFCCA did not address the jurisdictional question¹¹ but did analyze the merits of the assigned errors, and affirmed the findings and the sentence. JA at 1-15.

On September 24, 2024, TSgt Folts timely moved for reconsideration on two issues, which the AFCCA denied. Order, Appellant's Motion for Reconsideration

¹¹ The AFCCA had previously analyzed the issue and found jurisdiction was proper. JA at 101-08.

(Oct. 4, 2024). Thereafter, TSgt Folts timely filed his Petition for Grant of Review and Supplement to the Petition asking this Court to grant review on the issues litigated at the AFCCA. Supplement to the Petition for Grant of Review. The Government did not reply to the substantive issues TSgt Folts raised, but asked this Court to grant review on the issue whether the AFCCA had jurisdiction to hear the appeal. United States' Answer to Supplement to Petition for Grant of Review.

This Court granted review on the firearms and jurisdiction issues, but stated no briefs would be filed. Order (Mar. 5, 2025). The Court later ordered briefing on the jurisdiction issue. Order (Mar. 24, 2025). Oral argument is scheduled for May 20, 2025. Order (Apr. 2, 2025).

Summary of Argument

Congress intended to expand the jurisdiction of the CCAs to adjudicate appeals of servicemembers' convictions under Article 66, UCMJ, when it passed the FY23 NDAA. Concurrently, Congress limited the power of the Judge Advocates General to conduct substantive reviews of most convictions by special and general courts-martial under Article 69, UCMJ. In the amended Article 66, UCMJ, Congress deliberately enumerated two specific conditions that would disqualify a convicted servicemember from the benefit of the amended law: if the appellant had previously submitted matters under either Article 66, UCMJ, or Article 69, UCMJ. No other limitations exist. Because TSgt Folts was convicted at a general court-martial, had

not submitted any matters under either Article 66 or Article 69, UCMJ, and submitted a timely Notice of Direct Appeal, the AFCCA had jurisdiction to review his case. Despite its erroneous analysis on the merits of TSgt Folts's appeal, the AFCCA did properly exercise jurisdiction.

Argument

A. Standard of Review.

This Court reviews jurisdiction *de novo*. *United States v. English*, 79 M.J. 116, 121 (C.A.A.F. 2019). “The burden to establish jurisdiction rests with the party invoking the court's jurisdiction.” *United States v. LaBella*, 75 M.J. 52, 53 (C.A.A.F. 2015) (quoting *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)).

B. The Applicable Statute: FY23 NDAA.

Article I tribunals, such as the CCAs, “owe their existence to Congress’ authority to enact legislation pursuant to Article I, § 8 of the Constitution.” *United States v. Denedo*, 556 U.S. 904, 912 (2009) (citing *Clinton v. Goldsmith*, 526 U.S. 529, 533-34 (1999)). Congress has the authority to determine the scope of the CCAs’ jurisdiction and may limit and expand such jurisdiction by statute. *United States v. Kelly*, 77 M.J. 404, 406 (C.A.A.F. 2018).

Effective December 23, 2022, Congress did just that—expanded the CCAs’ jurisdiction to consider more direct appeals of general and special courts-martial, as long as the cases met several criteria:

1. The appellant must have a court-martial conviction documented by a judgment in the record;
2. The appellant must not have previously submitted matters to a CCA pursuant to Article 66, UCMJ;
3. The appellant must not have previously submitted matters to a Judge Advocate General pursuant to Article 69, UCMJ; and
4. The appellant must timely submit a notice of direct appeal.

FY23 NDAA, Pub. L. No. 117–263, § 544, 136 Stat. 2395, 2582–84. The statute contains no other disqualifying provisions.

C. The AFCCA Had Jurisdiction.

The fundamental—and only—question in this case is which version of Article 66, UCMJ, applies: the one before, or the one after, December 23, 2022. Under the prior version of the statute, TSgt Folts’s sentence was sub-jurisdictional, and he only had a potential right to CCA review by first submitting a petition to the Judge Advocate General pursuant to Article 69, UCMJ. Under the amended statute, his sentence was irrelevant and the AFCCA had jurisdiction to review his case if he timely submitted a notice of direct appeal. As discussed below, the amended statute applies in this case and thus the CCA had jurisdiction to hear this appeal.

1. The Plain Language of the Statute Dictates the Amended Version of Article 66, UCMJ, Applies to the Instant Case.

This Court should employ well-established rules of statutory construction in determining which version of the statute applies. The first such rule is that the plain language of the statute controls: “The first step in statutory interpretation is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.” *United States v. Valentin-Andino*, No. 24-0208, 2025 CAAF LEXIS 248, at *5-6 (C.A.A.F. Mar. 31, 2025) (citing *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002)); *see also United States v. Schmidt*, 82 M.J. 68, 73 (C.A.A.F. 2022) (“if a statute is clear and unambiguous—that is, susceptible to only one interpretation—we use its plain meaning and apply it as written.”); *United States v. Andrews*, 77 M.J. 393, 400 (C.A.A.F. 2018) (“Courts must give effect to the clear meaning of statutes as written and questions of statutory interpretation should begin and end with statutory text, giving each word its ordinary, contemporary, and common meaning” (cleaned up)).

Here, FY23 NDAA is clear and unambiguous in its application and amendments to Articles 66 and 69, UCMJ. To qualify for review under the new Article 66, UCMJ, there must be a court-martial conviction that has not already been appealed through Article 66 or 69, UCMJ, as of the effective date of the amendment,

December 23, 2022. Thereafter, an appellant wishing to seek a direct appeal must submit a “timely” notice of a direct appeal to the applicable service court.

TSgt Folts met the criteria (or more precisely, he did not meet the disqualifying criteria). He was convicted at a general court-martial and had not sought relief via Article 66 or Article 69, UCMJ. JA at 26. His notice of direct appeal was timely. Article 66(c)(1)(A)-(B), UCMJ, 10 U.S.C. § 866(c)(1)(A)-(B) (as amended by the FY23 NDAA). By filing sixty-one days after the effective date of the statute, TSgt Folts ensured that his appeal was filed “before the later of” either temporal requirement in Article 66(c)(1), UCMJ.

2. TSgt Folts’s Case was Not “Final” for Jurisdictional Purposes When the Law Changed.

Since Congress did not specifically exclude cases like TSgt Folts’s—he had not yet appealed under Article 69, UCMJ, nor was he otherwise undergoing Article 66, UCMJ, review—the question becomes whether his appeal was otherwise final. The answer is no. In short, his direct appeal provided by the UCMJ was and currently is in progress; until that process is complete, his conviction is not final. Article 76, UCMJ, 10 U.S.C. § 876 (2018).

a. By the plain language of the statute, the existence of an Article 65(d), UCMJ, review does not make TSgt Folts’s conviction “final” under Article 57, UCMJ.

Article 65(d), UCMJ, provides that cases not eligible for direct review will be reviewed by the Judge Advocate General. Article 57(c)(2), UCMJ, provides that

“completion of appellate review” constitutes “final judgment.” Article 57(c)(1), UCMJ, states the completion of appellate review occurs once a review under Article 65, UCMJ, is complete *or* review under Article 66, UCMJ, is complete and the time and opportunity to further appeal has expired. The operation of these two statutes does not mean that simply upon being reviewed under Article 65(d), UCMJ, TSgt Folts’s conviction became final and he could no longer appeal. There is no retroactive application of the law here. On the contrary, at least two reasons support why the existence of Article 65(d), UCMJ, review does not make TSgt Folts’s conviction final and why applying the amended version of Article 66, UCMJ, would not be a retroactive application of the law.

i. Article 57, UCMJ, pertains to the effective dates of sentences.

Article 57, UCMJ, is entitled, “Effective date of sentences.” While the statute does contain language regarding finality, it is only in the context of the *effective dates of sentences*, not the finality of a direct appeal: “Appellate review is complete *under this section* when— [review under Articles 65, 66, 67, and the Supreme Court, as applicable, conclude].” Article 57(c), UCMJ (emphasis added)). The plain language is clear and does not designate the finality of *an appeal*. This Court should not import additional language into the statute to broaden this statute’s scope from effective dates of sentences to finality of a direct appeal when Congress did not see fit to do so. *United States v. Kearns*, 73 M.J. 177, 181 (C.A.A.F. 2014) (“There is

no rule of statutory construction that allows for a court to append additional language as it sees fit. Courts should be extremely cautious not to add words to a statute that are not found in the statute.” (cleaned up)).

ii. A route to CCA review under Article 69, UCMJ, was still available before the law changed.

Even if, *arguendo*, Article 57, UCMJ, pertained to the finality of a conviction as a whole, TSgt Folts’s conviction was not final under the plain language of that statute. Specifically, the statute provides a conviction is final at the conclusion of review under Article 65, UCMJ, *or* at the conclusion of the traditional substantive appeal beginning with CCA review and ending with potential review by the United States Supreme Court. Article 57(c)(1)(A), (B), UCMJ. Because a path to substantive CCA review still was available to TSgt Folts at the time the law changed, subparagraph (B) applies to him, not (A). The statute clearly states that *one or the other* of those conditions may constitute the end of appellate review, but it does not include the words, “whichever occurs earlier.” In cases such as TSgt Folts’s case, where the appellate path under subsection (B) *was* and still *is* in progress, the case is *not* final until the entirety of that process is complete.

Here, the appellate path under Article 57(c)(1)(B), UCMJ, still existed following Article 65(d), UCMJ, review because the previous version of the statutory scheme provided for additional review and potential CCA jurisdiction via Article 69, UCMJ. Article 69(a), (c)(1)(A), (d), UCMJ (2018); *United States v. Parino-*

Ramcharan, 84 M.J. 445, 451 (C.A.A.F. 2024) (“[W]e direct and hold that Article 69(c)(1)(A), UCMJ, should be read as if the references to ‘section 865(b)’ and ‘article . . . 65(b)’ are references to ‘section 865(d)’ and ‘article . . . 65(d).’”). Prior to the FY23 NDAA amendment, TSgt Folts had one year from his Article 65, UCMJ, review to submit a petition to the Judge Advocate General seeking *substantive* review of his conviction. Article 69(b), UCMJ (2018); *see* Article 69(c)(1)(A), UCMJ (2018) (dictating the scope of that review included “error prejudicial to the substantial rights of the accused”). The timeline of relevant events is as follows:

Trial ended	February 27, 2022
EOJ.....	March 9, 2022
Article 65(d), UCMJ review	July 6, 2022
Article 66, UCMJ changed	December 23, 2022
Notice of direct appeal filed	February 22, 2023
90-day post-enactment date ¹²	March 21, 2023
Article 69(b), UCMJ, (2018) 1-year limitation expired	July 5, 2023

¹² TSgt Folts did not receive the letter advising him he had 90 days to file a notice of direct appeal. However, the earliest that letter could be dated is December 23, 2022, the effective date of the statute. TSgt Folts exercised reasonable diligence in filing his appeal and did so within the timeline constraints specified in Article 66(c)(1), UCMJ (as amended by FY23 NDAA).

But for Congress amending Article 69, UCMJ, TSgt Folts would still have had approximately six months to utilize that route to CCA-substantive review at the time the law changed. The Judge Advocate General could have sent the case to the AFCCA or, if the Judge Advocate General denied relief, TSgt Folts could have petitioned the AFCCA for discretionary review of the Judge Advocate General's decision. Article 69(d)(1), UCMJ (2018). This Court has held, "Potential jurisdiction exists as long as some pathway to the lower court's statutory jurisdiction remains." *United States v. Brown*, 81 M.J. 1, 5 (C.A.A.F. 2021). TSgt Folts's conviction was not final where he still had a right to challenge that conviction via an Article 69, UCMJ, appeal and where exercising that right could have led to further review by the AFCCA, this Court, and the Supreme Court. Therefore, Article 65(d), UCMJ, review did not make his conviction "final" for Article 66, UCMJ, jurisdictional purposes, under Article 57, UCMJ, or any other statute.

b. Any "ambiguity" in the statute regarding "finality" is resolved by Congressional intent.

This Court has held, "Since the beginning of jurisprudence under the UCMJ, we have read the statutes governing our jurisdiction as an integrated whole, with the purpose of carrying out the intent of Congress in enacting them." *United States v. Lopez de Victoria*, 66 M.J. 67, 69 (C.A.A.F. 2008) (citing *United States v. Best*, 4 C.M.A. 581 16 C.M.R. 155 (C.M.A. 1954)). If this Court finds the statutory scheme ambiguous, it should interpret the statutes in the context of the FY23 NDAA's intent

to apply to pending cases and expand CCA substantive review of court-martial convictions, while simultaneously eliminating substantive review by the Judge Advocates General.

First, with regard to timing and pending cases, the “Legislative Text and Joint Explanatory Statement to Accompany H.R. 7776 Public Law 117-263,” the bill that contained the change to Article 66, UCMJ, states: “The agreement includes the Senate provision with an amendment that would limit the applicability of this provision to *matters submitted* on or after the date of enactment of this Act.” *Id.* at 1885 (emphasis added).¹³ Congress intended the statute to apply to matters submitted after December 23, 2022, and TSgt Folts met that criterion—he submitted his notice of direct appeal on February 22, 2023. That piece of congressional intent, which matches the plain language of the statute, was met here.

Second, regarding the purpose of the amendment, congressional intent for jurisdiction to exist at the CCA here is obvious based on the shift in substantive review. Prior to the change in the law, appellants whose sentences were not severe enough to warrant direct review (more than six months’ confinement) or automatic review (two years confinement or a punitive discharge) could challenge their convictions by arguing error and asking the Judge Advocate General to set aside the

¹³ Available at <https://www.congress.gov/118/cprt/HPRT50665/CPRT-118HPRT50665.pdf>.

findings and/or sentences in their cases under Article 69, UCMJ. Now, the new statute gives the CCAs jurisdiction to review *all* convictions at special or general courts-martial without regard to sentence (as long as the request is timely), and simultaneously restricts Judge Advocate General review to cases ineligible for CCA review. Article 66, UCMJ (as amended by FY23 NDAA); Article 69, UCMJ (as amended by FY23 NDAA). And, even in those rare instances when a Judge Advocate General is involved, that official no longer reviews substantive legal issues and decides whether to grant relief; if a Judge Advocate General finds a waiver or withdrawal of an appeal was invalid, the *only* action permitted is to refer the case to a CCA. Article 69(c)(2), UCMJ (as amended by FY23 NDAA). This is a clear and unambiguous indication Congress intended the new statute to operate in a way in which *only courts*, beginning with CCAs, conduct meaningful reviews of court-martial convictions. This is a vast departure from the previous practice and clearly illustrates Congress's intent in enacting the FY23 NDAA provisions at issue.

This interpretation is also consistent with and supported by Congress's historically protective stance toward the rights of servicemembers, especially in a military justice context. For example, when Congress enacted the UCMJ in 1950, it included provisions such as Article 31(b), UCMJ, requiring rights advisements before questioning a military suspect; there was no such requirement under federal civilian law at the time. In fact, the Supreme Court cited this statute as authority

justifying its holding mandating police give similar warnings to civilian suspects. *Miranda v. Arizona*, 384 U.S. 436, 489 (1966). More recently, Congress amended 28 U.S.C. § 1259, allowing appellants to seek Supreme Court review of cases where this Court denied review, whereas previously, not every case that made its way to this Court could seek such additional review. National Defense Authorization Act for Fiscal Year 2024, Pub. L. 118-31, § 533(a)(1), 137 Stat. 136, 261 (Dec. 22, 2023).

The conclusion CCA had jurisdiction in this case is further supported by the significant fact that Congress suddenly shut off TSgt Folts’s existing recourse to remedy his wrongful conviction while providing him with no alternative. The new version of Article 69, UCMJ, does not permit a Judge Advocate General to review substantive issues; Congress shifted that responsibility to the CCA. On December 22, 2022, TSgt Folts still had six months to petition the Judge Advocate General of the Air Force for relief—a process that could lead to further review before the AFCCA, this Court, and the Supreme Court. 10 U.S.C. § 869(c)(1)(A), (c)(2), (d) (2018). The President’s act of signing the NDAA for FY 2023 into law on December 23, 2022, shifted TSgt Folts’s opportunity to seek relief from the Judge Advocate General to the CCA. The enactment of section 543 of the NDAA for FY 2023 did not suddenly divest TSgt Folts and servicemembers like him with a still-running Article 69, UCMJ, deadline of any ability to challenge their general or special court-martial conviction. Stripping such servicemembers of their existing right to seek

review would be antithetical to the obvious intent to *broaden* servicemembers' access to appellate review. The only rational reading of the statute affords the AFCCA review of this case.

c. The existence of Article 65(d)(2), UCMJ, is irrelevant to whether there is jurisdiction here.

Under current law, Article 65(d), UCMJ, review is not conducted unless an appellant waives the right to direct appeal, fails to timely file for direct appeal, or withdraws his or her direct appeal. Article 65(d)(3), UCMJ. And again, a Judge Advocate General's ability to substantively review a conviction is completely eliminated under the amended statute. Article 69, UCMJ (as amended by FY23 NDAA). Article 65(d)(2), UCMJ, providing for review of cases "not eligible" for direct or automatic appeal, still remains in the statute. But this subsection does not appear to apply to any case under the new statutory scheme. This is because under the amended Article 66, UCMJ, all servicemembers convicted by special or general court-martial are eligible to appeal, as long as they file a timely notice of appeal and previously did not avail themselves of the procedures under the former versions of Article 66 or Article 69, UCMJ. Article 66, UCMJ (as amended by FY23 NDAA).

That Article 65(d)(2), UCMJ, remains after FY23 NDAA's enactment is likely a result of a drafting oversight. In any event, application of canons of statutory construction make its existence irrelevant, at least in the instant case. First, "a general statutory provision may not be used to nullify or to trump a specific provision,

irrespective of the priority of enactment.” *California ex rel. Sacramento Metro. Air Quality Mgmt. Dist. v. United States*, 215 F.3d 1005, 1013 (9th Cir. 2000). Article 66, UCMJ, is a specific provision and thus trumps the broad review power described in Article 65(d)(2), UCMJ. Thus, the more specific provision, Article 66(b), UCMJ, takes priority and, by its plain language, confers jurisdiction in this case. Second, under the legal maxim that when two provisions conflict, the later in time prevails, Article 66, UCMJ (as amended by FY23 NDAA) would control. *States v. Under Seal*, 709 F.3d 257, 262 n.2 (4th Cir. 2013) (referring to “*leges posteriores priores contrarias abrogant*—the rule that the more recent of two conflicting statutes shall prevail.”); *Southern Scrap Material Co. LLC v. ABC Ins. Co.*, 541 F.3d 584, 593 (5th Cir. 2008) (referring to “the longstanding principle that when two statutes irreconcilably conflict, the more recent statute controls”). Between Article 66, UCMJ, and Article 65(d)(2), UCMJ, Article 66, UCMJ, is the most recently enacted provision between the two, would control, and thus confer jurisdiction.

Finally, statutes are drafted by humans, who are, by definition, not perfect. Even as amended by the FY23, 24, and 25 NDAAs, mistakes remain in Subchapter IX, Post-Trial Procedure and Review of Courts-Martial, of Chapter 47 of Title 10, U.S. Code. For example, the current version of Article 65(d)(3)(a)(ii), UCMJ, references “subparagraph[s] (A), (B), [and] (C) of section 866(b)(1) of this title (article 66(b)(1)).” However, Article 66(b)(1), UCMJ, only has two subparagraphs:

(A) and (B). This is merely a scrivener’s error, which is understandable due to the complexity of these statutes and the drastic change to the appellate landscape through the FY23 NDAA. Similarly, Article 65(d)(2), UCMJ, likely should have been deleted; but nevertheless, such vestigial provisions do not bar jurisdiction in this case.

3. A CCA’s Review After Article 69, UCMJ, Proceedings is a Part of a Direct Appeal and Is Not “Collateral.”

The Government previously asserted an appellant’s direct appeal ends with the conclusion of Article 65(d), UCMJ, review and any potential future litigation under Article 69, UCMJ, is “collateral.” JA at 106. The AFCCA properly rejected this argument. JA 107. This Court, too, should find this argument unavailing.

The difference between direct and collateral review is grounded in the finality of the conviction. As discussed, TSgt Folts’s conviction was not final. Characterizing Article 69, UCMJ, review as “collateral” ignores the fact that review through the CCA is still possible. Articles 65, 66, and 69, UCMJ are all part of the direct appeal: “The UCMJ’s statutory provisions for post-trial and appellate review—including Article 69, UCMJ, review—operate together to create a “framework” that brings “finality” to a court-martial, which the court expressly

distinguished from coram nobis relief.” JA at 107 (citing *MacLean v. United States*, 67 Fed. Cl. 14, 21 (2005)).

In practice, the military justice system is more akin to a unitary system rather than what is commonly seen in civilian jurisdictions. *Compare* 28 U.S.C. § 2254 (governing collateral review of state convictions), *and* 28 U.S.C. § 2255 (detailing collateral review for federal civilian convictions), *with* Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 25 n.89 (2006) (detailing unitary appellate systems in several states and how the military justice system operates in a similar manner). What would be seen as collateral in civilian courts is comparable to servicemembers collaterally challenging convictions via petitions for extraordinary relief, i.e, writs of habeas corpus or coram nobis. *See MacLean*, 67 Fed. Cl. at 20-22 (identifying a writ of coram nobis as permissive while Articles 59-76, UCMJ, “directly” challenge a court-martial conviction). Article 69, UCMJ, though, is part of the direct appeal process of this unitary appeal system.

Before being amended by the NDAA for FY 2023, Article 69 provided the Judge Advocates General with authority to set aside findings because of, *inter alia*, “error prejudicial to the substantial rights of the accused.” That embraces the kind of errors assessed on direct review in both the military and civilian criminal justice systems. Moreover, those decisions were subject to the possibility of judicial review on direct appeal.

Federal civilian case law indicating Article 69, UCMJ, proceedings are “collateral” is erroneous for several reasons, including that such cases were based on an analysis of even earlier versions of Article 69, UCMJ, which did not provide for CCA review of a Judge Advocate General’s decision. JA 106-07 (citing *Curci v. United States*, 577 F.2d 815 (2d Cir. 1978); *McKinney v. White*, 291 F.3d 851, 855 (D.C. Cir. 2002)). This distinction is critical because upon the Military Justice Act of 2016’s effective date, Article 69(a), UCMJ, review by a Judge Advocate General became a procedural path for the convicted service member to continue direct appellate review, distinct from prior versions of the statute—and the one analyzed in *Curci* and *McKinney*. See *Curci*, 577 F.2d at 818 (analyzing the 1969 version of the statute, which did not have an independent path the convicted service member could initiate to what was then the Court of Military Review); *McKinney*, 291 F.3d at 855 (citing *Curci*).

In the context of the instant case, potential Article 69, UCMJ, proceedings—if they even were available after the change in the law¹⁴—would be part of TSgt Folts’s direct appeal, not a collateral proceeding.

¹⁴ The FY23 NDAA contains no indication the old version of Article 69, UCMJ, would apply to anyone other than an appellant who had submitted matters under that Article prior to the effective date of the statute based on subsection (d)(2) of § 544.

1. Application of the FY23 NDAA version of Article 66, UCMJ would not have a prohibited retroactive effect.

The Supreme Court noted, “A statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment.” *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). (internal quotes and citations omitted). Here, applying the amended version of Article 66, UCMJ, to TSgt Folts does not violate the principle of non-retroactivity nor create new legal consequences even though TSgt Folts’s case pre-dated the enactment of the statute.

The Supreme Court traced the history of the concept that retroactivity is disfavored, noting it is based on the following: “Elementary considerations of *fairness* dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.” *Id.* at 265 (emphasis added). Many constitutional rights are implicated, including Article I, Section 9’s *Ex Post Facto* Clause and the Fifth Amendment’s Due Process Clause. *Id.* at 266.

However, the Government is not entitled to protection from *ex post facto* laws, nor does it have due process rights. *Id.* And none of the unduly burdensome effects of concern to the Supreme Court will arise if this Court applies the new version of

Article 66, UCMJ. *See id.* at 258-59 (“Applying the entire Act to cases arising from preenactment conduct would have important consequences, including the possibility that trials completed before its enactment would need to be retried and the possibility that employers would be liable for punitive damages for conduct antedating the Act’s enactment.”). This is for two reasons.

First, the issue of retroactivity is predicated on the conviction being final. Because TSgt Folts’s case was not final, there is no issue of retroactive application. Second, and relatedly, “[a]s applied to [TSgt Folts], the FY23 NDAA is better understood as Congress expanding an existing path to appellate review, rather than reopening a completed case.” JA 106 (*see, e.g., Landgraf*, 511 U.S. at 266; *QUALCOMM Inc. v. FCC*, 181 F.3d 1370, 1380 n.8 (D.C. Cir. 1999)).

This makes sense in the overall context of “retrospective” application. TSgt Folts’s rights were expanded, but they were not resuscitated after being cut off. He was entitled to seek *substantive review* at the AFCCA through Article 69, UCMJ. He is *still* entitled to that review, but now through application of the amended Article 66, UCMJ. The legal consequences focus on a new vehicle to relief. But, as noted above, *failure* to apply the new version of Article 66, UCMJ, would mean TSgt Folts has *zero* ability to substantively appeal his conviction, whether under Article 66 or 69, UCMJ. After all, the amended Article 69, UCMJ, came into effect the same day the new Article 66, UCMJ, did. This new version provides no substantive appeal

relief. Article 69(c), UCMJ (as amended by FY23 NDAA). This absurd result of complete deprivation of substantive appellate rights buttresses the conclusion that application of the amended Article 66, UCMJ, is not retroactive application.

D. Conclusion: Jurisdiction Exists Under the Current and Applicable Article 66, UCMJ.

There is no debate about the procedural status of this case. TSgt Folts was convicted by a general court-martial and there is an EOJ in the record documenting the conviction. He did not take any action to bring his case within the purview of either of the two exceptions to the expanded jurisdiction of the CCA. He also exercised his right to appeal in a timely manner by filing sixty-one days after the statute was amended, well within the statutory timeliness deadline under Article 66(c)(1), UCMJ (as amended by FY23 NDAA). His case was not final, but rather was still pending at the time the AFCCA docketed his appeal. Therefore, the AFCCA had jurisdiction over TSgt Folts's case and properly considered the merits of his appeal.

All four Courts of Criminal Appeals have found jurisdiction in similar cases. JA at 101-141; *see also* JA at 138 (describing the NDAA provision at issue as “stating jurisdictional amendments to Article 66 apply to cases *submitted* to this court on or after 23 December 2022” (emphasis added)). The AFCCA correctly exercised jurisdiction in the instant case.

We respectfully ask the Court to hold the AFCCA had jurisdiction in this case.

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that an electronic copy of the foregoing was sent via electronic mail to the Court and served on the Air Force Government Trial and Appellate Operations Division on April 23, 2025.



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CERTIFICATE OF COMPLIANCE WITH RULES 24(b) AND 37

This Brief complies with the type-volume limitation of Rule 24(b) because it contains 7142 words. and complies with the typeface and type style requirements of Rule 37 because it has been prepared in Times New Roman font, using 14-point type with one-inch margins.



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