IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES, Appellee v. Chief Warrant Officer (CW2) **ANDRE X. TATE,** United States Army, Applicant[1]	**BRIEF ON BEHALF OF APPELLEE - SPECIFIED AND GRANTED ISSUES** Docket No. ARMY 20200590 Tried at Fort Bragg, North Carolina, on 27 August and 19–22 October 2020, before a general court-martial convened by Commander, 82d Airborne Division, Colonel J. Harper Cook, military judge, presiding.

TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Specified Issue

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)?

Assignment of Error

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT AS TO CHARGES I AND IV?

[1] The government refers to CW2 Tate as applicant for the specified issue.

Panel No. 4

Statement of the Case

On 22 October 2020, a military judge sitting as a general court-martial convicted applicant, contrary to his pleas, of one specification of violating a lawful regulation, one specification of domestic violence, and one specification of conduct unbecoming an officer, in violation of Articles 92, 128(b), and 133, Uniform Code of Military Justice [UCMJ], 10 U.S.C. §§ 892, 928b, 933 (2018).[2] (R. at 669). The military judge sentenced applicant to a reprimand and confinement for six months.[3] (R. at 726). The convening authority approved applicant's sentence and reprimand him on 25 January 2021. (Action). The military judge entered judgment on 28 January 2021. (Judgment).

Applicant acknowledged his post-trial and appellate rights on 17 October 2020. (App. Ex. XXVI). The military judge announced the sentence on 22 October 2020. (R. at 669). On 16 June 2021, an attorney "designated by the Judge Advocate General," Rule for Courts-Martial [R.C.M.] 1201(a), completed "appellate review in accordance with [R.C.M.] 1201(a)." (Certification of Completion of Appellate Review dated 16 June 2021). This attorney documented that "[t]he findings of guilty and sentence adjudged on 22 October 2020 . . . have

[2] Applicant was acquitted of Charge II, wrongful possession of a Schedule III controlled substance. (Charge Sheet; R. at 669).

[3] The six months' confinement was only attributed to Charge III, the domestic violence conviction. (Charge Sheet; R. at 726).

been determined to be correct in law and fact." (Certification of Completion of Appellate Review dated 16 June 2021).

On 2 July 2021, applicant timely filed his Article 69, UCMJ application for relief from his general court-martial conviction. (Dep't of Army, Form 3499, Application for Relief from Court-Martial Findings and/or Sentence Under the Provisions of Title 10, United States Code, Section 869 (Jan. 2019) [DA Form 3499]). On 18 November 2021, in a document titled Action, Pursuant to Article 69, Uniform of Military Justice, the Criminal Law Division denied relief after review of applicant's matters. On the same day in a memorandum addressed to applicant, the Criminal Law Division notified applicant "the Judge Advocate General, decided not to set aside the findings or sentence, in whole or in part, on the grounds stipulated in Article 69(c), UCMJ, or take other actions in [appellant's] case." (Office of The Judge Advocate General, Criminal Law Division Letter to Applicant dated 18 November 2021). On 11 January 2022, applicant submitted his application to this court requesting a review of TJAGs action taken on 18 November 2021.

Specified Issue

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)?

Standard of Review

"'The courts of criminal appeals are courts of limited jurisdiction, defined entirely by statute.' The scope of that jurisdiction is a legal question [this court] reviews de novo." *United States v. Brubaker-Escobar*, 81 M.J. 471, 473–74 (C.A.A.F. 2021) (internal citations omitted) (quoting *United States v. Arness*, 74 M.J. 441, 442 (C.A.A.F. 2015)).

Law

A. Court of Criminal Appeals Jurisdiction.

Article 66, UCMJ, provides that "a Court of Criminal Appeals shall have jurisdiction of a timely appeal from the judgment of a court-martial . . . as follows: . . . 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." Article 66(b)(1)(A), UCMJ. Automatic review by a Court of Criminal Appeals (CCA) occurs in the event of "a sentence of . . . dismissal of a commissioned officer . . . or . . . dishonorable discharge or bad conduct discharge . . . or confinement for 2 years or more." Article 66(b)(3), UCMJ. A CCA may also have jurisdiction in the event of appeal by the accused where: "the Government previously filed an appeal under [Article 62]"; "the Judge Advocate General has

sent to the [CCA] for review of the sentence under section 856(d)"; or, "the accused filed an application for review with the [CCA] under section 869(d)(1)(B) and the application has been granted by the Court." Article 66(b)(1)(A)–(D), UCMJ. Further, "[a] [CCA] shall have jurisdiction over all cases that the Judge Advocate General orders sent to the Court for review under section 856(d)." Article 66(b)(2), UCMJ.

B. Article 69, UCMJ.

The Military Justice Act of 2016 (MJA 2016) significantly overhauled Article 69, UCMJ. National Defense Authorization Act for Fiscal Year 2017 (NDAA 2017), Pub. L. 114-328, § 5333, 130 Stat. 2935 (2016). With regard to a CCA's authority to conduct a review, Article 69 previously stated:

> [a] [CCA] may review, under [Article 66]—(1) any court-martial case which (A) is subject to action by the Judge Advocate General under this section, and (B) is sent to the Court of Criminal Appeals by order of the judge advocate general; and, (2) any action taken by the Judge Advocate General in such case."

Article 69(d), UCMJ, 10 U.S.C. § 869 (2016).

With regard to an application for review by an applicant, Article 69 now further provides that subject to certain limitations, an applicant may petition "the Judge Advocate General [to] 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)." Article 69(a), UCMJ. The Court of Appeals for the Armed Forces

(CAAF) has addressed Article 66 and the new Article 69 in the context of a writ, stating:

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

United States v. Brown, 81 M.J. 1, 4 (C.A.A.F. 2021) (quoting Article 69(b), UCMJ).

In the event of a "case reviewed under section 864 or section 865(d) of this title (article 64 or 65(d)), the Judge Advocate General (TJAG) *may* set aside the findings or sentence, in whole or in part, on the grounds of newly discovered evidence, fraud on the court, lack of jurisdiction over the accused or the offense, error prejudicial to the substantial rights of the accused, or the appropriateness of the sentence." Article 69(c)(1)(A), UCMJ (emphasis added). Following a review and action by TJAG as prescribed under Article 69(c), UCMJ, there are two pathways to CCA jurisdiction under Article 69(d)(1), UCMJ, one requiring mandatory review by the CCA and one within the discretion of the court. First, "[a] [CCA] may review the action taken by [TJAG] under subsection (c)—in a case sent to the [CCA] by order of [TJAG]." Article 69(d)(1)(A), UCMJ. Or, second, "[a] [CCA] may review the action taken by [TJAG] under subsection (c) . .

. in a case sent to the [CCA] by the accused in an application for review." Article 69(d)(1)(B), UCMJ.

In the event an applicant submits a case to a CCA in an application for review, a CCA "may grant an application under paragraph (1)(B) only if—(A) the application demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error." Article 69(d)(2)(A), UCMJ.

Argument

In this case, on 18 November 2021, TJAG did not grant relief during his Article 69 review and chose to deny the relief requested. Specifically, applicant provided a petition that supported his request to set aside the findings and sentence. (DA Form 3499, block 11).

A plain language reading of Article 69(d)(1)(B), UCMJ, indicates that this court has jurisdiction to review applicant's case further under Article 69, UCMJ, if it chooses to grant his application for review.

A. This court may only exercise jurisdiction under Article 69(d)(1)(B), UCMJ, after TJAG has reviewed and taken action on applicant's case.

This court may only exercise jurisdiction over applicant's case under Article 69(d)(1)(B), UCMJ, where applicant "demonstrates a substantial basis for concluding that the action on review under subsection (c) constituted prejudicial error." Article 69(d)(2)(A), UCMJ. In order to "demonstrate a substantial basis

for concluding that the action on review under subsection (c) constituted prejudicial error," TJAG must first review the case then take an action under subsection (c). Article 69(d)(2)(A), UCMJ.

Whether this court has jurisdiction is predicated upon the plain language meaning of the term "action taken by [TJAG] under subsection (c)." Article 69(d)(1), UCMJ; *United States v. Tucker*, 76 M.J. 257, 258 (C.A.A.F. 2017) ("As a first step in statutory construction, we are obligated to engage in plain language analysis of the relevant statute."). A plain reading of Article 69(d)(1), UCMJ, contemplates TJAG first reviewing the application then denying the relief requested, granting partial relief, or granting total relief for one of the enumerated, tangible actions set forth under Article 69(c), UCMJ. Put simply, Article 69(c) does not require TJAG to take a favorable action—i.e. setting aside the findings or sentence in whole or part—during the review as a condition precedent for an appellant to apply to this court for relief. In this case, TJAG reviewed and took action on 18 November 2021; therefore, the requirements of Article 69(d)(1), UCMJ, have been met.

B. The history of Article 69, UCMJ, and other cases support the government's interpretation.

This plain reading is further supported by the history of Article 69, UCMJ, with the most recent change specifically adding a pathway for an applicant to apply to a CCA to consider his application. The proposed amendment to Article 69,

UCMJ, as outlined in the Military Justice Review Group was designed to "provide the accused with an opportunity to apply for review by a court of criminal appeal." Report of Military Justice Group, Part I: UCMJ Recommendations, Subchapter IX, Article 69 – Review in the Office of the Judge Advocate General [10 U.S.C. § 869] (22 Dec. 2015). This interpretation is further supported by two similar sister-service cases wherein the CCA reviewed applicant's timely submitted application after TJAG approved the findings and sentence as adjudged.[4] *United States v. Farnum*, NMCCA No. 202000120, 2021 CCA LEXIS 597, at *1–2 (N.M. Ct. Crim. App. 11 Nov 2021) (order); *Csady*, 2021 CCA LEXIS 516, at *1. Although the respective TJAGs took no favorable action in both cases, the CCA reviewed the action taken by each TJAG and determined that the applications did not demonstrate a substantial basis for concluding that the action under review constituted prejudicial error. *Farnum*, 2021 CCA LEXIS 597, at *1–2*; Csady*, 2021 CCA LEXIS 516, at *1. As such the court has jurisdiction to address the specified issue.

[4] The government is unaware of any other CCA opinions addressing this issue.

Assignment of Error

WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT AS TO CHARGES I AND IV?[5]

Additional Facts

Appellant married Chief Warrant Officer Two (CW2) [redacted] in May of 2016. (R. at 241). During the court-martial, CW2 [redacted] testified that she was aware appellant was a member of the Outcast Motorcycle Club (OMC) prior to their marriage because appellant talked about it and wore OMC attire. (R. at 241, 244–45). This attire included a "1 percent diamond tag thing that he wore." (R. at 252; Pros. Ex. 4). Appellant would also go to the OMC clubhouse in Georgia. (R. at 242; Pros. Ex. 3).

At trial, the government admitted photographs of appellant wearing OMC attire. (Pros. Ex. 3). Appellant's motorcycle club attire included a face covering depicting OMC insignia and the denotation "1%." (Pros. Ex. 3; Pros. Ex. 5).

[redacted], an expert in the field of outlaw motorcycle gangs, testified as a government witness. (R. at 449–86). Specifically, [redacted] was identified as an "expert in gang identification and outlaw motorcycle groups" in Georgia, South Carolina, and North Carolina. (R. at 477). [redacted] testified that the OMC is a gang listed in the

[5] Charge I is violation of a general regulation, in violation of Article 92, UCMJ, and Charge IV is conduct unbecoming an officer, in violation of Article 133, UCMJ.

National Crime Information Center (NCIC). (R. at 458, 483). The NCIC classifies organizations as gangs when they have "[i]ncidents and then ongoing incidents or criminal acts." (R. at 459). The OMC has operated in Georgia, South Carolina, and North Carolina since at least 2015. (R. at 477). According to [redacted], the 1% symbol is a self-proclaimed way to identify their gang as being at the top of the hierarchy. (R. at 460). In his expert opinion, "A lot of it is . . . imbedded [sic] in criminal activity." (R. at 460). Given "[t]he extensive criminal activity that comes with all of these clubs, it is easy to show that they wear it, they live it, they act it out." (R. at 460).

Standard of Review

Questions of legal sufficiency are reviewed de novo. *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002).

Law

A. Legal sufficiency.

The standard for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." *United States v. Turner*, 25 MJ 324 (C.M.A. 1987) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F. 2002). In resolving questions of legal sufficiency, the court is "bound to draw every reasonable

inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). During its legal sufficiency review, the court considers all available facts within the record and is "not limited to the appellant's narrow view of the record." *United States v. Cauley*, 45 M.J. 353, 356 (C.A.A.F. 1996).

B. Article 92, UCMJ.

An individual violates Article 92 when he "violates or fails to obey any lawful general . . . regulation." Article 92(a)(1), UCMJ. Army Regulation [AR] 600-20 states that "participation in criminal gangs . . . by Army personnel is inconsistent with the responsibilities of military service." Army Reg. 600-20, Personnel—General: Army Command Policy, para. 4-12(g) (6 November 2014) [AR 600-20]. "Soldiers are prohibited from participation in gangs or their activities." AR 600-20, para. 4-12(g)(3). "Criminal gangs and activities are ones that advocate the planning or commission of one or more criminal offenses, by persons who share a group identity, and may share a common name, slogan . . . clothing style or color." AR 600-20, para. 4-12(g)(1). "Penalties for violations of these prohibitions include the full range of statutory and regulatory sanctions [under the UCMJ]." AR 600-20, para. 4-12(g)(3). "[E]xamples of active participation . . . specific to criminal gangs [includes]: (a) knowingly wearing gang colors or clothing." AR 600-20, para. 4-12(g)(3)(a).

C. Article 133, UCMJ.

Article 133, UCMJ, criminalizes "conduct unbecoming an officer and a gentleman." The nature of the offense is "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. *Manual for Courts-Martial* (2019 ed.) [*MCM*, 2019], ¶ 90.c(2). "There are certain moral attributes common to the ideal officer . . . a lack of which is indicated by acts of . . . lawlessness . . . or cruelty." *MCM*, 2019, ¶ 90.c(2). "This article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising." *MCM*, 2019, ¶ 90.c(2). "This article includes acts made punishable by any other article, provided these acts amount to conduct unbecoming of an officer." *MCM*, 2019, ¶ 90.c(2).

Violations of Article 133 can be expansive in that "[the Court of Appeals for the Armed Forces] has previously held an officer's conduct need not violate other provisions of the UCMJ or even be otherwise criminal to violate Article 133." *United States v. Meakin*, 78 M.J. 396, 403 (C.A.A.F. 2019). "'The gravamen of the offense is that the officer's conduct disgraces him personally or brings dishonor to the military profession such as to affect his fitness to command the obedience of his subordinates so as to successfully complete the military mission.'" *Meakin*, 78 M.J. at 403 (quoting *United States v. Lofton*, 69 M.J. 386, 388 (C.A.A.F. 2011)).

The expansive nature of Article 133 is highlighted in that "the conduct of an officer may be unbecoming even when it is private." *Id*. at 403 (quoting *United States v. Moore*, 38 M.J. 490, 493 (C.A.A.F. 1994)). Furthermore, "even conduct that has no bearing on military discipline might establish the basis for an Article 133, UCMJ, charge." *Id*. at 404.

Argument

A. Charge I and its Specification is legally sufficient.

The record is rife with evidence, to include photographs, of appellant's active participation and membership in the criminal biker gang known as the OMC. (R. at 241–45; Pros. Ex. 3–5).

1. [redacted], an expert in gang identification and outlaw motorcycle groups, testified that the OMC is a known criminal gang.

[redacted], an expert in "gang identification and outlaw motorcycle groups" provided a wealth of evidence that confirmed the OMC is a known criminal gang. (R. at 444–86). First, [redacted] testified that the OMC has been operating in North Carolina, South Carolina, and Georgia since at least 2015, and the gang has clubhouses in Fayetteville, North Carolina and Georgia. (R. at 477–78). Second, the OMC operating in North Carolina has a reputation for committing violent acts. (R. at 475). Finally, the OMC was validated as a gang in the NCIC and by the Department of Justice. (R. at 449, 458, 479). This evidence clearly shows that the OMC is a criminal gang under AR 600-20, para. 4-12(g).

2. Appellant knowingly wore gang colors and clothing.

The prosecution exhibits, CW2 [redacted]s testimony, and [redacted]s testimony confirmed that appellant wore gang colors and clothing—which violates AR 600-20, para. 4-12(g). (R. at. 252, 459–60, Pros. Ex. 3–5). Appellant's own wife referenced the "1 percent diamond tag thing that he wore" during her testimony. (R. at 252). Furthermore, [redacted] identified the "1%" symbol depicted on appellant's OMC attire as indicative of being an "outlaw biker." (R. at 459–60). In order to wear the attire of a "one percenter" as appellant did, [redacted] testified that "their club has to be an outlaw club." (R. at 461). [redacted] further testified that all "[outlaw motorcycle gangs wear] the 1 percent diamond." (R. at 462). With regard to how a member of an outlaw motorcycle gang earns the right to wear the "one percenter" insignia, [redacted] testified "[t]here can be many reasons on how you earn it that's inside the club. It could be through criminal act. It could be an act against a rival. It could be something business oriented for the club." (R. at 462).

3. Chief Warrant Officer [redacted] testimony confirmed appellant's active participation in the Outcast Motorcycle Club.

Chief Warrant Officer Two [redacted] testified that she knew appellant was a member of the OMC prior to their marriage in May of 2016 because appellant talked about it and wore OMC attire. (R. at 241, 244–45). She further testified that appellant went to the OMC clubhouse when he came to visit her in North Carolina. (R. 242). After their marriage, appellant would also go to events at the

OMC clubhouse in Georgia. (R. at 242–43). Appellant would leave their home "wearing his [OMC] gear, and on his motorcycle." (R. at 245). Chief Warrant Officer Two [redacted] even identified photographs from 2019 of appellant wearing his OMC attire and "one percenter insignia." (R. at 248–52; Pros. Ex. 3–5).

The evidence in the record is clear and overwhelming. The OMC is a motorcycle gang of which appellant had been an active participant in both North Carolina and Georgia since on or about 1 January 2016. In addition to CW2 [redacted] confirming appellant's active participation in the motorcycle gang, appellant also regularly donned the club's attire and "one percenter" insignia, baldy signaling his membership and support of a criminal organization. (Pros. Ex. 3–5). Appellant's active participation and membership in the OMC violated the prohibition on "[s]oldiers . . . participat[ing] in gangs or their activities." AR 600-20, para. 4-12(g)(3). Accordingly, appellant's conviction under Article 92 for violation of lawful general regulation is legally sufficient.

Appellant's contention that the government offered no "competent" evidence that the OMC is a criminal gang is belied by the evidence. (Appellant's Br. 7).[6] Appellant conveniently overlooks the evidence in the record which delineates the criteria for the classification of a criminal gang in the NCIC—

[6] Of note, appellant did not contest his membership in the Outcast Motorcycle Club. (Appellant's Br. 7–9).

evidence of "ongoing three or more, common interest, criminal acts or delinquent acts." (R. at 453). The OMC met this criteria, hence it had been validated as a criminal gang by the Department of Justice and registered as a criminal gang in the NCIC. (R. at 458, 479).

While appellant claims this evidence is not "competent," (Appellant's Br. 7), his objection at trial was limited to "improper opinion testimony." (R. at 452). As indicated by the military judge, [redacted]s testimony pertaining to the NCIC classification of the OMC was admitted commensurate with his pretrial ruling because it demonstrated to the fact-finder "that this isn't just the expertise of [redacted] calling something a gang. But that in the specialized field of classifying gangs, there is some rigor to it." (R. at 452); *see* Mil. R. Evid. 702(a) ("A witness who is qualified as an expert . . . may testify in the form of an opinion or otherwise if . . . the expert's . . . specialized will help the trier of fact to understand the evidence or determine a fact in issue"). Consequently, appellant's contention that this evidence was incompetent falls flat.

Independent of his explanation of the federal classification of the OMC, [redacted] testified that the OMC in North Carolina had a reputation for committing violent acts. (R. at 475). Appellant's "one percenter" attire further underpins the evidence in support of the OMC as a criminal gang because the "1%" symbol depicted on appellant's OMC attire is indicative of being an "outlaw biker." (R. at 459–60;

Pros. Ex. 3). Put simply, in order to wear the attire of a "one percenter" as appellant did, "their club has to be an outlaw club." (R. at 461). Appellant's blatant wear of the OMC vestments—combined with [redacted] expert testimony—(R. 444–86), firmly supports the legal sufficiency of the charged offense.

B. Charge IV and its Specification is legally sufficient.

Appellant's active participation OMC clearly "compromises [his] standing as a commissioned officer." *MCM*, 2019, ¶ 90.c(2); *United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009) ("An officer's conduct that . . . brings dishonor to the military professions affects his fitness to command the obedience of his subordinates so as to successfully complete the military mission . . . is the gravamen of the offense proscribed in Article 133.") By appellant's own admission, he joined the OMC in May of 2015. (R. at 516). The OMC is classified as a criminal gang, has self-proclaimed status as an "outlaw" organization, and has a reputation for violent acts. (R. at 444–86). Still, appellant broadcasted his membership by making frequent visits to the Outcast Motorcycle Club's clubhouse and by wearing its affiliated gang vestments. (Pros. Ex. 3–5; R. at 242). As such, appellant's actions are clearly "conduct unbecoming an officer and a gentleman." Article 133, UCMJ.

Appellant, a commissioned officer in the United States Army, flaunted his status as a "one percenter" or "outlaw," (Pros. Ex. 3–4), by virtue of his

membership in the OMC. This status is in direct contrast to the "moral attributes common to the ideal officer . . . a lack of which is indicated by acts of . . . lawlessness." *MCM*, 2019, ¶ 90.c(2). Appellant does not contest his membership, participation, and endorsement of the Outcast Motorcycle Club, and argues only that the government failed to provide evidence of the club's criminality. (Appellant's Br. 7–9). To the contrary, [redacted], an expert in "gang identification and outlaw motorcycle groups," (R. at 449), testified that the OMC has a reputation for committing violent acts. (R. at 475).

Appellant claimed—as a prospect—that he only picked up trash, cleaned the clubhouse, and he was not required to commit any crime to become a member of the OMC or to earn any patches. (R. at 516–18). He further claimed the 1% symbol is simply a "piece of jewelry." (R. at 519). However, appellant's self-serving claims were contradicted by the government's expert witness in gangs, [redacted], who testified that the 1% symbol is associated with criminal acts and the OMC is a known criminal gang. (R. at 459–60). [redacted] testimony is corroborated by the OMC's classification as a gang in the NCIC and by the Department of Justice. (R. at 458, 479). Thus, this court should reject appellant's testimony in favor of [redacted]s. *See United States v. Nicola*, 78 M.J. 223, 227 (C.A.A.F. 2019) ("[B]ut one risk of testifying, recognized long ago, is that the tier of fact may disbelieve the accused's testimony and then use the accused's statement as

substantive evidence of guilty 'in connection with all the other circumstances of the case.'") (quoting *Wilson v. United States*, 162 U.S. 613, 620–21 (1896)).

As such, the evidence is legally sufficient because when viewed in a light most favorable to the government, the evidence established the elements of the offense. *See United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011) ("The Supreme Court stated that in reviewing for legal sufficiency of the evidence, 'the relevant question' an appellate court must answer is 'whether, after viewing the evidence in the light most favorable to the prosecution,' which preserves 'the factfinders role as weigher of evidence.'") (quoting *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)).

CONCLUSION

WHEREFORE, the government respectfully requests this Honorable Court affirm the findings and the sentence.

PAMELA L. JONES
MAJ, JA
Branch Chief, Government
Appellate Division

CRAIG J. SCHAPIRA
LTC, JA
Deputy Chief, Government
Appellate Division

CHRISTOPHER B. BURGESS
COL, JA
Chief, Government Appellate
Division

APPENDIX

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.

Core Terms

judge advocate, sentence, find guilty, court-martial

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]

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[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)***.

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

The Application for Review is **DENIED**.

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CERTIFICATE OF SERVICE U.S. v. TATE (20200590)

I certify that a copy of the foregoing was sent via electronic submission to Mr. Robert A. Feldmeier, civilian appellate defense counsel, at [redacted] and the Defense Appellate Division, at [redacted] on this 15th day of March, 2022.

[redacted]

DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
[redacted]