IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	REPLY ON BEHALF OF APPELLANT
Appellant	)	
	)	Crim.App. Dkt. No. 201600015
v.	)	
	)	USCA Dkt. No. 17-0537/MC
James A. HALE, III,	)	
Staff Sergeant (E-6)	)	
U.S. Marine Corps	)	
Appellee	)	

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

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Argument

A. <u>Appellee ignores *Mickens*' explicit caution against expanding the application of *Cuyler*</u>.

Appellee argues that the Supreme Court's application of *Cuyler v. Sullivan,* 446 U.S. 335 (1980), in *Mickens v. Taylor,* 535 U.S. 162 (2002), suggests that *Cuyler* applies whenever "defense counsel actively represents conflicting interest during a trial." (Appellee Br. at 10.)

But *Mickens* rejected this suggestion, noting that despite that the case had been presented to them on the assumption that *Cuyler* applied in cases of successive representation, *Cuyler* did not "clearly establish, or indeed even support such an expansive application." *Id*. at 175-76 ("Whether [*Cuyler*] should be extended to [cases of successive representation] remains . . . an open question."). Indeed, the Court cautioned that not all attorney conflicts face the same "difficulty of proving . . . prejudice" that conflicts involving "*multiple concurrent representations*" do. *Id*. at 175 (emphasis added).

B. <u>Appellee effectively concedes the Court of Criminal Appeals erred in finding a conflict of interest in Capt KC's "slated" rotation to a trial billet; the only remaining allegation of conflict had no impact on Appellee's Sixth Amendment rights</u>.

Appellee relies on the lower court's findings of "numerous adverse effects on performance" "all caused by the conflicts." (Appellee Br. at 16.) However, with the lower court's clearly erroneous finding that LtCol CT was Capt KC's

prospective Reviewing Officer, Appellee's remaining allegation of conflict depends solely on the relationship between Capt KC's husband and LtCol CT.

Making no attempt to defend or explain the lower court's error, Appellee persists in arguing that Capt KC still might someday become LtCol CT's subordinate, noting correctly that "[a]ssignments in the military are fluid. . . ." (Appellee Br. at 16-17.) But despite Appellee's claim that the Record is "full of conflicts," (Appellee Br. at 17), only one such relationship has any support in the Record: the relationship between Capt KC's husband, Capt CC, and LtCol CT. But nothing supports a finding of prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984), much less any adverse effect on Capt KC's performance.

Capt KC made repeated allegations of prosecutorial misconduct. (J.A. 220, 237-46, 312-15, 348-49, 350-51, 370-80, 389-90, 477-99, 500-02.) Even if Capt KC's husband discussed the possibility of requesting a new reviewing officer if Capt KC filed prosecutorial misconduct motions against LtCol CT, (J.A. 408), the Record amply demonstrates that Capt KC's performance was effective under *Strickland,* and suffered no "adverse effect" under the incorrect *Cuyler* standard.

C. Regardless of what test this Court decides governs conflicts of interest outside of multiple concurrent representation, Capt KC testified she was unaffected by LtCol CT. That is all the Sixth Amendment requires.

Capt KC testified: (1) she was not offended by LtCol CT's comments; (2) she laughed at them; (3) she felt annoyed but not threatened; and, (4) LtCol CT's

conduct had no effect on her trial work. (J.A. 395-96, 399.) Capt KC was resolute that she would not let the behavior of LtCol CT affect her trial performance. (J.A. 392.) She testified that she "represented [Appellee] to the best of [he]r ability." (J.A. 399.)

As this Court recognized in *Babbitt* while applying *Strickland* to an allegation of personal conflict: "Although another defense counsel might have defended the case differently, 'appellate courts do not lightly vacate a conviction' in the absence of a serious incompetency which 'falls measurably below the performance . . . of fallible lawyers.'" *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988) (internal citations omitted). Capt KC clearly affirmed that she conducted Appellee's defense without regard to LtCol CT's actions.

D. Appellee's claim that consideration of "reasonable alternative strategies" is limited to concurrent representation conflicts flies in the face of Appellee's demand to expand the applicability of *Cuyler*.

Appellee asks this Court to endorse the lower court's excising his counsel's representation from the requirements of *Strickland*, and to endorse the expansion of the *Cuyler* presumption to that same sort of relationship. But Appellee then demands that the *Mickens* requirement that "reasonable alternative defense strategies" be considered should not similarly be expanded to his case. (Answer at 17.) The United States finds no legal basis underlying Appellee's distinction.

If this Court expands *Cuyler* to the non-concurrent multiple representation situation in this case, then it should likewise direct the lower courts—where the *Cuyler* presumption is raised—to first look identify if "reasonable alternative strategies" existed. That is, courts should look objectively to whether other strategies existed before applying the presumption.

More tellingly, Appellee's concession that the analysis discussed in *Mickens v. Taylor,* 240 F.3d 348 (4th Cir. 2001), and *United States v. Tatum,* 943 F.2d 3270 (4th Cir. 1991), is "deeply rooted in, and limited to, conflicts involving conflicting duty of loyalty to multiple clients," underlines the United States' argument that *Cuyler* is indeed a presumption properly limited to the multiple concurrent representation context. (Answer at 17.) And, Appellee's concession highlights the correctness of the Supreme Court's firm language in *Mickens* itself. The United States agrees: the narrow *Cuyler* exception to the *Strickland* requirement for defendants to positively identify prejudice is deeply rooted and limited to the multiple concurrent representation context.

In any case, if this Court expands *Cuyler,* which it should not, then it must also expand the test for determining causality and alternative strategies. The lower court failed to do so here, and even under *Cuyler,* must be reversed.

E. The lower court's use of Article 66(c) to alternatively resolve a conflict issue displaces binding law and is intertwined with the *Strickland/Cuyler* issue. The clearly erroneous ruling sets aside a violent rape conviction and twenty-six year sentence, creates a parallel test for conflicts that requires less than the Supreme Court requires, and results in a manifest injustice.[1]

The Judge Advocate General certified "What is the correct test" for the conflict alleged in *Hale.* By displacing binding law from the Supreme Court governing ineffective assistance in these circumstances, the lower court purported as an "alternative holding" to use Article 66(c) to resolve conflicts of interest in the Navy and Marine Corps. But even if this Court disagrees with that plain language reading of the certified issue and believes the Article 66 issue should have been separately certified, precedent supports that this Court may rule on the issue.

"Although the Judge Advocate General has not certified for this Court's review [a] holding . . . this Court may rule on [an] issue [despite] . . . law-of-the-case . . . once the case has been properly granted for review." *United States v. Kelly*, 45 M.J. 259 (C.A.A.F. 1996). Although this Court is not precluded from examining the legal ruling of a subordinate court in cases where the Judge Advocate General has not certified the issue, the Court has expressed "reluctan[ce]

[1] Appellee's claim that other portions of the United States' Brief beyond the *Nerad* issue were not included in the Certified Issue is of no moment. The Judge Advocate General asked for the "correct test"—which, under any plain language reading, includes this Court's analysis of whether *Strickland* or *Cuyler* applies, and how. This Section answers why the lower court's Article 66 "alternative holding" likewise requires this Court's action, and is included in the Certified Issue.

to exercise that power and, as a rule, reserve it for those cases where the lower court's decision is 'clearly erroneous and would work a manifest injustice' if the parties were bound by it." *United States v. Simmons*, 59 M.J. 485, 488 (C.A.A.F. 2004); *United States v. Doss*, 57 M.J. 182, 185 (C.A.A.F. 2002). That is the case here for four reasons.

First, the lower court's "alternative disposition" purporting to use Article 66 to set aside Findings and Sentence "[e]ven if . . . *Cuyler*'s presumption of prejudice did not apply . . . or . . . the appellant could not adequately prove prejudice" is a clearly erroneous use of Article 66 to set aside a court-martial conviction without regard to relevant legal tests, thus for "no [legal] reason at all" and without application of a "legal standard." *United States v. Nerad,* 69 M.J. 138, 146-47 (C.A.A.F. 2010). The legal standard for non-concurrent multiple representations is *Strickland.* Or, if this Court endorses the lower court's restriction of *Strickland*'s applicability, then *Cuyler* becomes the new test.

But to set aside Findings and Sentence without application of the correct test, or to disregard that test yet disapprove the Findings without any of the extant and reviewable legal standards governing use of Article 66—amounts to another iteration of the service court's action in *Nerad*. That is, the lower court here explicitly purports to apply the legal standard of *Holloway v. Arkansas,* 435 U.S. 475 (1978), and *Sullivan*—the "needed prophylaxis"—to a situation where that law

explicitly does not apply, and *Strickland* is the proper test. *See Mickens,* 535 U.S. at 176.

But the service courts of criminal appeals cannot replace binding law that, properly applied, would *not* merit relief, with an "even so, we grant relief" test. If that were the case, this Court would have no role under Article 67, UCMJ. The unhinged "even so" test would swallow binding law and no legal tests would remain for this Court to review. That is not what Congress intended. Nor would it make for a predictable system of laws subject to this Court's and the Supreme Court's review. It is, after all, "unreasonable" to not apply the law.

Second, the lower court's assertion that it is merely taking action where waiver or forfeiture otherwise would have precluded action clearly and erroneously conflates the requirement that the lower court must apply the correct law and conduct a full and correct analysis, with *Nerad*'s discussion of the lower court's undisputed ability to avoid application of prudential legal *doctrines* such as waiver and forfeiture. *Nerad,* 69 M.J. at 146-47. The former means that the lower courts must correctly apply the law, and indications that the court applied anything other than the correct law in conducting its Article 66 review should be reversed by this Court and returned for a full and correct Article 66 review.[2]

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[2] *See, e.g., United States v. Swift,* 76 M.J. 210 (C.A.A.F. 2017) (lower court affirmed charged conduct based on uncharged conduct, rendering the "underlying validity of the Article 66(c), UCMJ, review in question"); *Nerad,* 69 M.J. at 148

And the latter means that the lower court may ignore prudential "*doctrines*" to grant relief. But it does not mean that the lower court may abandon binding law or legal tests, or incorrectly apply those tests, to grant what is tantamount, in such a circumstance, to equitable relief. *Cf. United States v. Chin,* 75 M.J. 220, 223-24 (C.A.A.F. 2016) (approving lower court's application of the prudential doctrine of waiver to the established law governing unreasonable multiplication of charges). Again, declining to apply binding law and apply it correctly is not a "reasonable" legal standard—whatever is unclear in *Nerad,* at least that much is clear.

Third, where tests exist for determining ineffective assistance of counsel, a manifest injustice occurs where the lower court restricts the ambit of *Strickland,* misapplies *Cuyler,* and then turns to Article 66(c) to "in the alternative" set aside a conviction of rape by gunpoint, and a well-earned twenty-six year sentence to confinement. Witness attrition issues pertain even to rehearings, and rehearings sometimes become impossible. *Cf. United States v. Stellato,* 74 M.J. 473 (C.A.A.F. 2015).

Fourth and finally, a manifest injustice occurs where uniformity and adherence break down: one service's court of criminal appeals sets aside the legal

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(C.A.A.F. 2010) (reversing Article 66(c) review where lower court applied no legal reason to set aside findings and sentence, and where "labeling the [conviction] 'unreasonable] does not transform a quintessentially equitable determination into a legal one.'); *United States v. Jenkins,* 60 M.J. 27 (C.A.A.F. 2004) (lower court copied substantial portions of government's brief into its opinion, suggesting "absence of . . . a complete" Article 66(c) review and requiring reversal).

test governing conflicts of interest and instead applies a “needed prophylactic” bespoke test, while the other service courts follow relevant binding and higher law. Appellate courts

> are guided by the doctrine of stare decisis. Under this fundamental principle, adherence to precedent “is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”

United States v. Tualla, 52 M.J. 228, 231 (C.A.A.F. 2000) (quoting *Payne v. Tennessee,* 501 U.S. 808 (1991)); *see United States v. Quick*, 74 M.J. 332, 335-336 (C.A.A.F. 2015). All servicemembers and all Americans should be confident that their service court will neither affirm nor set aside hard-won convictions without predictable and correct application of binding law.

Conclusion

This Court should reverse the lower court and affirm the Findings and Sentence.

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I certify that the foregoing was delivered to the Court and a copy was served on opposing counsel on October 10, 2017.

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