IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/Cross-Appellant v. **Paul E. COOPER,** Yeoman Second Class (E-5) U.S. Navy Appellant/Cross-Appellee	**ANSWER ON BEHALF OF APPELLANT/CROSS-APPELLEE** Crim. App. Dkt. No. 201500039 USCA Dkt. No. 21-0150/NA

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

MICHAEL W. WESTER
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite 100
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-5188, fax (202) 685-7426
Bar no. 37277

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UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

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Issue Presented

DID THE LOWER COURT ERR APPLYING *UNITED STATES V. CHIN*, 75 M.J. 220 (C.A.A.F. 2016), (A) AS A PREREQUISITE TO CONSIDERING INEFFECTIVE ASSISTANCE OF COUNSEL, AND (B) TO DISREGARD THE KNOWING, VOLUNTARY, AND R.C.M. 905 WAIVERS, OF INDIVIDUAL MILITARY COUNSEL?

Statement of Statutory Jurisdiction

This Court has jurisdiction to hear this case under Article 67(a)(2), Uniform Code of Military Justice (UCMJ).

Statement of the Case

Appellant agrees with Appellee's recitation of the Statement of the Case.

Statement of Facts

In 2018, the Navy-Marine Corps Court of Criminal Appeals (CCA) reversed after concluding Appellant had been deprived of his statutory right to individual military counsel (IMC).[1] The CCA determined that Appellant requested IMC but his detailed defense counsel incorrectly led him to believe the IMC was unavailable.[2] The CCA found Appellant had not waived his right to IMC since "he relied on an erroneous representation" of the IMC's supposed

[1] *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *45 (N-M. Ct. Crim. App. Mar. 7, 2018).
[2] *Id*. at *27.

unavailability when he later told the military judge during the standard colloquy that he wanted detailed military defense counsel to represent him.[3] The CCA explicitly noted it did not evaluate the error under the rubric of ineffective assistance of counsel—it viewed the issue as one of denial of counsel.[4]

Following this decision, the Judge Advocate General of the Navy (TJAG) certified four issues to this Court, including: whether Appellant waived the right to IMC; whether counsel's failure to route the IMC request should be reviewed under *Strickland v. Washington*[5] as ineffective assistance of counsel; if *Strickland* does not apply, whether Appellant was deprived of his statutory right to IMC; and was Appellant prejudiced.[6]

On review of the certified issue, this Court concluded that Appellant "knowingly and intelligently waived his right to IMC" and found that this decision rendered the remaining certified issues "moot."[7] This Court found dispositive that Appellant did not renew his request for IMC during the in-court colloquy on this matter with the military judge and instead stated he wanted to be represented by detailed defense counsel.[8] This Court acknowledged that its

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[3] *Id*. at *35, *37.
[4] *Id*. at *37 ("First, we disagree with framing deprivation of IMC as ineffective assistance of counsel or applying the *Strickland* test.").
[5] 466 U.S. 668 (1984).
[6] *United States v. Cooper*, 78 M.J. 283, 283 (C.A.A.F. 2019).
[7] *Id*.
[8] *Id*. at 287.

decision left "unanswered other issues the CCA determined were mooted by its decision that [Appellant] was denied his statutory right to IMC."[9] It decided to "leave those issues for the CCA to resolve on remand" and returned the case "for further review under Article 66(c), UCMJ."[10]

On remand, the CCA took up one of the issues Appellant had raised in his first appeal but which the CCA did not reach: whether detailed defense counsel was ineffective for failing to submit Appellant's IMC request.[11] The CCA noted that this Court had not decided this issue.[12] It explained that once this Court had concluded Appellant waived IMC, the underlying ineffective assistance of counsel issues became moot for purposes of Article 67, UCMJ.[13] However, the CCA recognized that this decision did not bar it from addressing the issue using its Article 66(c) authority.[14] Indeed, this Court remanded the case "for further review under Article 66(c), UCMJ."[15]

In addressing this issue, the CCA applied *United States v. Chin*.[16] In *Chin*, this Court held that a CCA is required to "assess the entire record to

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[9] *Id*.
[10] *Id*.
[11] *United States v. Cooper*, 80 M.J. 664, 666 (N-M. Ct. Crim. App. 2020).
[12] *Id*. at 671.
[13] *Id*. ("Under its Article 67 statutory authority, once CAAF found a waiver on IMC, the underlying IAC issue was moot, but not necessarily resolved.").
[14] *Id*.
[15] *Cooper*, 78 M.J. at 287.
[16] *Cooper*, 80 M.J. at 666 (citing 75 M.J. 220 (C.A.A.F. 2016)).

determine whether to leave an accused's waiver intact, or to correct the error" using its Article 66(c) powers.[17] In applying *Chin*, the CCA made clear that it was not disturbing this Court's conclusion as a matter of law that Appellant waived his right to IMC.[18]

In deciding to look past Appellant's waiver as it related to the ineffective assistance of counsel issue, the CCA quoted the Army CCA, which explained that the "should be approved" power under Article 66(c) is used well when addressing an issue that "disadvantaged the accused" or "may have the actual effect of *undermining* good order and discipline."[19]

The CCA agreed with this logic, explaining:

> We agree that, to the extent that *Chin* does have any limitations, CCAs would appear to be on the most solid ground when overlooking waiver to address issues needing correction that originate from something uniquely military in nature and that, if left uncorrected, may undermine good order and discipline or the perceived fairness of a court-martial.[20]

In applying this rationale to Appellant's case, the CCA explained that the statutory right of IMC "is uniquely military in origin" and that an accused relies

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[17] 75 M.J. at 223.
[18] *Cooper*, 80 M.J. at 671 ("As a matter of law, CAAF has spoken on Appellant's waiver. It is a waiver. We have no authority to conclude otherwise, and we do not do so here.").
[19] *Id*. at 670 (quoting *United States v. Conley*, 78 M.J. 747, 752 (A. Ct. Crim. App. 2019)) (emphasis in original).
[20] *Id*.

on his military defense counsel to accurately advise him of the IMC right.[21]

The CCA first analyzed the issue of counsel's failure to route the IMC request under the first prong of *Strickland*.[22] It noted the findings of the *DuBay* judge and found them not clearly erroneous.[23] This included the findings that detailed defense counsel failed to forward IMC requests to the convening authority as required by regulation and that the requested IMC was reasonably available.[24]

Regarding prejudice under *Strickland*'s second prong, the lower court cited Court of Military Appeals precedent finding that a presumption of prejudice attaches in cases involving an improper denial of an IMC.[25] Alternatively, the CCA held that it would find "Appellant suffered material prejudice in both the preparatory stages of his court-martial and at trial when his IMC request was never drafted and forwarded . . . for approval."[26] The CCA

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[21] *Id*. at 670-71.
[22] *Id*. at 672.
[23] *Id*. at 672-73.
[24] *Id*.
[25] *Id*. at 675-76 (citing *United States v. Beatty*, 25 M.J. 311, 316 (C.M.A. 1987) (declining to test for prejudice the military judge's improper refusal to allow the accused to request IMC on additional charges at a rehearing); *United States v. Hartfield*, 17 C.M.A. 269, 270 (C.M.A. 1967) (finding presumption of prejudice where legal officer acting on behalf of convening authority took it upon himself to deny IMC request)).
[26] *Id*. at 677.

noted the evidence in the case was "not overwhelming,"[27] and earlier noted that Appellant alleged numerous trial deficiencies in counsel's performance.[28] The CCA then set aside the findings and authorized a rehearing.[29]

On January 5, 2021, the Deputy Director of the Appellate Government Division submitted a memorandum to TJAG asking him to certify, *inter alia*, the issue certified in this appeal as well as the following issues similar to the ones TJAG certified in the prior appeal to this Court: "Did the lower court err in its *Strickland* analysis by not testing for prejudice where Article 59 requires it and the error is not structural" and "Did the lower court err in finding prejudice, in the alternative, where Appellee demonstrated no specific Article 59 prejudice and was represented by a team of competent military counsel throughout trial?"[30]

This time, TJAG declined to certify the latter two questions.

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[27] *Id*. at 676.

[28] *Id*. at 668 n.8 (noting that in separate assignments of error, Appellant alleged that counsel failed "to challenge the Government expert testimony or to rebut it with Defense expert testimony;" failed to file a motion to suppress a written statement; and failed "to question complaining witness about inaccuracies in her testimony").

[29] *Id*. at 678.

[30] Appellant/Cross-Appellee has asked this Court to take judicial notice of the proposed certified questions. *See* Appellant's Mot. to Take Judicial Notice of Adjudicative Facts (Apr. 23, 2021).

Summary of Argument

Article 66(c) requires a CCA to review the entire record and "determine whether to leave an accused's waiver intact, or to correct the error."[31] As this Court has explained, Article 66(c)'s "should be approved" power permits a CCA to disapprove a finding "even if the error did not rise to the level of requiring disapproval of the finding or sentence as a matter of law."[32]

This Court's determination that Appellant waived his right to IMC mooted but did not resolve whether he received ineffective assistance of counsel when counsel failed to forward his IMC request.

Under its broad Article 66(c) mandate, the CCA correctly noted its duty under *Chin* to review the entire record despite the waiver. It correctly noted *Chin* allowed it to look past the waiver as it related to the ineffective assistance of counsel in determining whether the findings should be approved.

There is no support for the Government's claim that the CCA was first required to assess the error under Article 59(a), UCMJ. Whereas Article 59(a) imposes a restriction on an appellate court's ability to *reverse*, Article 66(c) is a broader grant of authority limiting a CCA's ability to *affirm*. Additionally, the

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[31] *Chin*, 75 M.J. at 223 ("A fortiori, the CCAs are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error.")

[32] *United States v. Nerad*, 69 M.J. 138, 146 (C.A.A.F. 2010).

Government's position conflicts with this Court's prior holding in this case.

This Court should not consider the Government's arguments about whether the CCA applied the proper legal standard in ultimately disapproving the findings because TJAG chose not to certify this issue and it is beyond the scope of the only certified issue. Regardless, the CCA correctly applied legal precedents from this Court in concluding Appellant received ineffective assistance of counsel.

Argument

THE LOWER COURT DID NOT ERR IN APPLYING *UNITED STATES V. CHIN* IN ADDRESSING THE ISSUE OF INEFFECTIVE ASSISTANCE OF COUNSEL. UNDER ARTICLE 66(C), THE CCA WAS REQUIRED TO ASSESS THE ENTIRE RECORD AND DETERMINE WHETHER TO LEAVE THE WAIVER INTACT.

A. This Court applies a unique, highly deferential abuse of discretion standard of review to a CCA's use of its "should be approved" power.

This Court will accept a CCA's exercise of its "should be approved" authority under Article 66(c) except when it "clearly acted without regard to a legal standard" or "disapprove[d] a finding based on purely equitable factors or because it simply disagree[d] that certain conduct . . . should be criminal."[33]

B. As this Court held in *United States v. Nerad*, a CCA may disapprove even legally correct findings through its "should be approved" power under Article 66(c) if it applies a legal standard and not equity.

In *United States v. Nerad*, this Court explained that a CCA has authority under the "should be approved" language of Article 66(c), UCMJ, to disapprove even legally correct findings.[34] This Court drew upon decades of precedent interpreting Article 66(c) as an "'awesome, plenary, *de novo* power'"

[33] *Nerad*, 69 M.J. at 147.
[34] *Id*. at 142 (acknowledging that the terms "[f]indings" and "sentence" in Article 66(c), UCMJ, are "grammatically coupled" and "joined equally" with the phrase "and determines . . . should be approved").

while clarifying that the power is not equitable.[35] For example, the Court cited *United States v. Claxton* for the proposition that "a CCA may disregard doctrines like waiver 'in the interest of justice' to reach legal errors that would otherwise be uncognizable."[36]

In *Nerad*, this Court rejected the notion that Article 66(c) gives a CCA "unfettered discretion to disapprove, for any reason or no reason at all, a finding that is correct in law."[37] But it also rejected the notion that "if a finding is correct in law and fact the CCA *must* approve it."[38] As it explained: "Article 66(c), UCMJ, empowers the CCAs to 'do justice,' with reference to *some legal standard*, but does not grant the CCAs the ability to 'grant mercy.'"[39]

This Court did not provide an exhaustive list of legal standards a CCA may use in deploying the power. Instead, it noted that CCAs have used the power in circumstances where "the error did not rise to the level of requiring disapproval of the finding or sentence as a matter of law" and where doctrines such as waiver "would have precluded CCA action" without the power.[40] On

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[35] *Id*. 144 (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)) (italics in original).
[36] *Id*. (quoting 32 M.J. 159, 162 (C.M.A. 1991)).
[37] *Id*. 142.
[38] *Id*. (emphasis added).
[39] *Id*. at 146 (emphasis added).
[40] *Id*. at 146-47 (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (recognizing a CCA's authority to determine the circumstances in which it would apply waiver or forfeiture to an abuse of prosecutorial discretion)).

this point, the Court again cited *Claxton*, where the Court of Military Appeals approved the authority of the Board of Review to order a sentence rehearing even where "waiver would have ordinarily precluded relief."[41]

As for the standard of review, this Court in *Nerad* held that "when a CCA acts to disapprove findings that are correct in law and fact, we accept the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion."[42] It clarified that a CCA abuses its discretion where it disapproves the finding "based on purely equitable factors or because it simply disagrees that certain conduct . . . should be criminal."[43]

C. In *United States v. Chin*, this Court again explained that a CCA may disregard that an issue was waived as a matter of law to provide relief under its "should be approved" power of Article 66(c).

In *United States v. Chin*, a CCA disregarded an appellant's waiver to address an underlying error even where the appellant signed a pretrial agreement agreeing to "waive all waivable motions."[44] At trial, the defense counsel stated that he "would have raised a multiplicity motion" absent the provision.[45] On appeal, the CCA disregarded waiver and dismissed various

[41] *Id*. at 147 (citing *Claxton*, 32 M.J. at 164).
[42] *Id*.
[43] *Id*.
[44] *Chin*, 75 M.J. at 221.
[45] *Id*.

specifications citing the doctrine of unreasonable multiplication of charges.[46]

On review of *Chin*, this Court distinguished its "more circumscribed statutory authority" under Article 67(c) from Article 66(c).[47] This Court explained that under Article 67(c), "an appellant may not raise on appeal, and . . . we cannot rectify, an error that was waived at trial."[48] However, this Court clarified that "this 'ordinary rule' does not apply to a CCA's wholly dissimilar statutory review" under Article 66(c), UCMJ. [49] Unlike Article 67(c), this Court explained, "Article 66(c), UCMJ, requires that the CCAs conduct a plenary review and that they 'affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved."[50]

This Court explained that even if an appellant pleads guilty, "[i]f an appellant elects to proceed with Article 66, UCMJ, review . . . then the CCA is commanded *by statute* to review the entire record and approve only that which "'should be approved.'"[51] This Court clarified that as part of this review, "the CCAs are required to assess the entire record to determine whether to leave an

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[46] *Id*. at 222.
[47] *Id*.
[48] *Id*.
[49] *Id*.
[50] *Id*. (alteration in original).
[51] *Id*. at 223 (emphasis in original).

accused's waiver intact, or to correct the error."[52]

In reviewing the CCA's decision, this Court noted that the "CCA provided a detailed explanation for disapproving and merging offenses despite Appellee's waiver," citing the doctrine of unreasonable multiplication of charges.[53] This Court did not disturb the CCA's decision after noting that it applied *Nerad* and "disapproved specifications based on a legal standard."[54]

D. On remand, the CCA correctly noted that this Court ordered it to decide the remaining issues, which included whether counsel was ineffective for failing to forward the IMC request. The CCA correctly applied *Chin* by noting it had to decide whether to look past the fact that Appellant waived IMC itself in addressing this issue under Article 66(c).

This Court's conclusion that Appellant knowingly and intelligently waived his right to IMC mooted—but did not decide—the remaining certified issues.[55] These issues included whether *Strickland* governed counsel's failure to forward an IMC request and whether Appellant was prejudiced.[56] The CCA correctly noted that whether counsel was ineffective in failing to forward the IMC request was a separate legal issue from whether Appellant waived his right

[52] *Id*.
[53] *Id*.
[54] *Id*. at 224 (citing *Nerad*, 69 M.J. at 147).
[55] *Cooper*, 78 M.J. at 283.
[56] *Id*.

to complain about it before this Court.[57] Thus, the issue was not *res judicata*.

In addressing this issue on remand, the CCA correctly observed that this Court's waiver conclusion did not relieve it of its duty to determine whether to leave Appellant's waiver intact.[58] As this Court wrote in *Chin*, "Article 66(c), UCMJ, requires that the CCAs conduct a plenary review and that they 'affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [they] find[] correct in law and fact and determine[], on the basis of the entire record, should be approved.'"[59] As this Court explained, "the CCAs are required to assess the entire record to determine whether to leave an accused's waiver intact, or to correct the error."[60]

In short, the CCA was confronted with a situation like that in *Nerad* in which "doctrines applicable to issues of law – such as waiver – would have precluded CCA action in the absence of the 'should be approved' language of Article 66(c), UCMJ."[61] In this case, however, the CCA chose to disregard the waiver and consider the issue. This was a permissible application of *Chin*.

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[57] *Cooper*, 80 M.J. at 671 ("Under its Article 67 statutory authority, once CAAF found a waiver on IMC, the underlying IAC issue was moot, but not necessarily resolved.").
[58] *Id*.
[59] *Chin*, 75 M.J. at 222 (alteration in original) (citation omitted).
[60] *Id*. at 223.
[61] *Cooper*, 80 M.J. at 67.

E. The Government's claim that the CCA was first required to test the error under *Strickland* for Article 59(a) prejudice is unsupported—and conflicts with this Court's holding.

The Government all but concedes Appellant received ineffective assistance of counsel under the first *Strickland* prong.[62] But it claims a "sequential test" required the CCA to first evaluate error under Article 59(a) and claims review under Article 66(c) only follows if there is no Article 59(a) prejudice.[63] The case law and the statutory language do not support this view.

As this Court has stated, "Article 59(a) constrains the authority to reverse 'on the ground of an error of law.'"[64] By contrast, "Article 66(c) is a broader, three-pronged constraint on the court's authority to *affirm*."[65] While this shows that Article 66(c) is more encompassing than Article 59(a), it does not imply that Article 66(c) review may only occur if there is no Article 59(a) prejudice.

Additionally, the text of Article 66(c) shows that it is a general limitation on a CCA's ability to affirm findings and sentences rather than the second part of a sequential test. Article 66(c) states that a CCA "may affirm only such findings of guilty and the sentence or such part of amount of the sentence, as it

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[62] *See* Br. on Behalf of Appellee/Cross-Appellant (Mar. 22, 2021) at 17 (stating "LT JB's earlier failure to route Appellant's request for individual military counsel created the *fait accompli*" and "Appellant's waiver was infected" by counsel's error) (italics in original).
[63] *Id*. at 13.
[64] *Tardif*, 57 M.J. at 224.
[65] *Id*. (emphasis added).

finds correct in law and fact and determines, on the basis of the entire record, should be approved."[66] In *Tardif*, this Court explained the power as follows: "*Even if* the first two prongs are satisfied, the court may affirm only so much of the findings and sentence as it 'determines, on the basis of the entire record, should be approved.'"[67] By contrast, the Government's "sequential test" interpretation would turn "*even* if" into "*only* if."

Additionally, the Government's position conflicts with this Court's decision not to entertain the remaining certified issues in the prior appeal.[68] This Court held that once Appellant waived IMC, the remaining certified issues relating to ineffective assistance of counsel became "moot."[69] Of course, this Court is limited to addressing errors of law and does not have authority to look past waiver.[70] Yet by claiming the CCA should have analyzed this issue as an error of law, the Government's position conflicts with this Court's holding.

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[66] 10 U.S.C. § 866(c) (2012).
[67] *Tardif*, 57 M.J. at 224 (emphasis added).
[68] *Cooper*, 78 M.J. at 283.
[69] *Id*.
[70] *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) ("Courts of Criminal Appeals enjoy much broader appellate authority than civilian intermediate courts or our Court, which is empowered by Article 67, UCMJ, 10 U.S.C. § 867, to 'take action only with respect to matters of law.'").

F. The Government's claim that the CCA erred by failing to apply an "extant legal test" in deciding to look past Appellant's waiver confuses the law: the requirement to act with regard to a legal standard applies to a CCA's decision to disapprove findings, not to look past waiver.

The Government claims the CCA failed to apply an "extant legal test" and applied "non-legal" considerations in deciding to consider the issue despite Appellant's waiver.[71] This argument confuses the standard.

There is no requirement that a CCA apply a legal test to the mere act of *considering* a waived issue. As this Court explained in *Chin*, unless an appellant withdraws from appellate review, a CCA is always required "to review the entire record and approve only that which 'should be approved.'"[72] Inherent in this review is the decision "whether to leave an accused's waiver intact, or to correct the error."[73] The fact that an appellant waived the issue "continues to serve as a factor for a CCA to weigh in determining whether to nonetheless disapprove a finding or sentence."[74] Even so, *Chin* imposed no separate requirement that a CCA provide a legal rationale for merely deciding to consider the waived issue.

This is supported by the line of cases preceding *Chin*. For example, in *Claxton*, the Court of Military Appeals referred to the fact that "the Court of

[71] Br. on Behalf of Appellee/Cross-Appellant at 22, 24-25.
[72] *Chin*, 75 M.J. at 223 (quoting Art. 66(c), UCMJ).
[73] *Id*.
[74] *Id*.

Military Review chose not to apply the waiver doctrine, relying on its plenary review authority granted by Article 66(c), UCMJ."[75] Similarly, in *Nerad*, this Court interpreted *United States v. Quiroz* as holding that a CCA, "having identified an unreasonable multiplication of charges – an abuse of prosecutorial discretion – possessed the authority under Article 66(c), UCMJ, 'to determine the circumstances, if any, under which it would apply waiver or forfeiture.'"[76] Thus, these cases indicate that through Article 66(c), Congress intended to give a CCA plenary authority to determine whether to apply waiver.

The decision to *disapprove* findings is a separate matter. In *Nerad*, this Court referred to the need for a CCA to use a legal standard when discussing limits on a CCA's ability to disapprove a finding "in the event of error even if the error did not rise to the level of requiring disapproval of the finding or sentence as a matter of law[.]"[77]As this Court explained, the need to apply a legal standard in this context ensures that a CCA did not "disapprove a finding based on pure equity."[78]

As further support of this, in *Quiroz*, this Court explained that "[t]he CCA *disapproved specifications* based on a legal standard" citing an

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[75] 32 M.J. at 162.
[76] *Nerad*, 69 M.J. at 147 (citing *Quiroz*, 55 M.J. at 338).
[77] *Id*. at 146.
[78] *Id*. at 147.

unreasonable multiplication of charges.[79] Likewise, in *Nerad*, this Court explained that it would accept the CCA's action unless in "*disapproving the findings* the CCA clearly acted without regard to a legal standard" or engaged in equity.[80] Similarly, in *Chin*, this Court upheld the CCA's decision after noting that the "CCA *disapproved* specifications based on a legal standard[.]"[81]

1. Even if a CCA had to apply a legal standard in looking past waiver, it did so here by explaining that it was applying legal concepts grounded in this Court's jurisprudence.

In discussing why it disregarded Appellant's waiver, the CCA began by explaining that the right to IMC is "uniquely military in origin" and that if an error relating to this right were left uncorrected, it "may undermine good order and discipline or the perceived fairness of a court-martial."[82] These are ingrained legal concepts in military law.

First, the need to maintain good order and discipline is listed under the "Nature and purpose of military law" in the Preamble of the Manual for Courts-Martial.[83] This Court has recognized the "critically important role that the military justice system performs for the armed forces," citing its ability "to

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[79] *Quiroz*, 55 M.J. at 339 (emphasis added).
[80] *Nerad*, 69 M.J. at 147.
[81] *Chin*, 75 M.J. at 224.
[82] *Cooper*, 80 M.J. at 670-71.
[83] MANUAL FOR COURTS-MARTIAL, UNITED STATES (2012), Preamble, Para. 3, Part I.

contribute to the military's overall discipline and mission effectiveness."[84] The Air Force CCA has included this concept in devising its own test for sentence appropriateness due to post-trial delay under Article 66(c).[85] One of the factors it used considered "the dual goals of justice and good order and discipline."[86]

As for the perception of fairness within military justice, this Court has applied this legal concept in a variety of settings. For example, the test for challenging a panel member for implied bias involves "the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel."[87] Additionally, "the fairness of the entire system" is a factor in considering relief for post-trial delay.[88] Finally, the public's perception of fairness plays an integral role in assessing unlawful command influence.[89]

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[84] *United States v. Sneed*, 43 M.J. 101, 104 (C.A.A.F. 1995).
[85] *United States v. Gay*, 74 M.J. 736, 745 (A.F. Ct. Crim. App. 2015), *aff'd on other grounds*, 75 M.J. 264 (C.A.A.F. 2016).
[86] *Id*. at 745.
[87] *United States v. Peters*, 74 M.J. 31, 34 (C.A.A.F. 2015); *see also United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995) (explaining in reference to implied bias challenges that the "focus of this rule is on the perception or appearance of fairness of the military justice system").
[88] *United States v. Moreno*, 63 M.J. 129, 147 (C.A.A.F. 2006) (citing *Barker v. Wingo*, 407 U.S. 514, 532 (1972)).
[89] *United States v. Bergdahl*, 80 M.J. 230, 233 (C.A.A.F. 2020) ("An appearance of unlawful command influence arises in a case when an 'intolerable strain' is placed on the public's perception of the military justice system because an 'objective, disinterested observer, fully informed of all the facts of the circumstances, would harbor a significant doubt about the fairness of the proceeding.'") (citations omitted).

G. Whether the CCA applied correct legal standards in disapproving the findings is an issue the Government waived by TJAG's decision not to certify it. It is also beyond the scope of the narrow certified issue.

The Government also challenges the legal standards the CCA used in disapproving the findings. It contends the CCA erred by applying a "presumption of prejudice under *Strickland* to the denial of the statutory right to individual military counsel."[90] It claims "a straightforward application of *Strickland*" was the proper standard.[91]

This Court should not consider these arguments. The Director of the Appellate Government Division asked TJAG to certify these issues, but TJAG declined to do so. And they are not within the scope of the narrow certified issue. Thus, these issues should be deemed waived.[92]

Aside from waiver, these issues are also not necessary to resolve the only certified issue, which asks whether the CCA properly applied *Chin* in looking past waiver. Whether the CCA applied the proper standards in *disapproving* the

[90] Br. on Behalf of Appellee/Cross-Appellant at 20-21.
[91] *Id*. at 21 (citing *Garza v. Idaho*, 139 S. Ct. 738, 753 (2019) (Thomas, J., dissenting)).
[92] *United States v. Clifton*, 71 M.J. 489, 493 n.1 (C.A.A.F. 2013) (Erdmann, J., concurring) ("Therefore, the Government's failure to certify the allegedly erroneous decision of the CCA concluding that the error was not waived, was itself a waiver which 'leaves no error [of the CCA] for [this Court] to correct on appeal,'" regardless of whether the issue was waived at trial.") (alteration in original) (citation omitted).

findings is a separate issue.[93]

Recently, in *United States v. Simpson*, it was the Government who asked this Court not to consider an argument raised by the appellant "because it [fell] outside of the scope of the granted issue."[94] This Court agreed and declined to consider the argument.[95] The rules should not apply differently in this appeal.

1. Regardless, in disapproving the findings, the CCA adhered to *Nerad* by acting with regard to a legal standard through a faithful application of this Court's ineffective assistance of counsel precedents.

As this Court explained in *Nerad*, this Court will accept the CCA's action in disapproving legally correct findings unless "the CCA clearly acted without regard to a legal standard or otherwise abused its discretion."[96] An abuse of discretion occurs where the CCA "simply disagrees that certain conduct – clearly proscribed by an unambiguous statute – should be criminal."[97]

Here, the CCA acted with regard to the legal standard of ineffective assistance of counsel in disapproving the findings. The CCA applied the first *Strickland* prong and observed that counsel had a legal duty to forward IMC

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[93] *United States v. Phillips*, 64 M.J. 410 n.* (C.A.A.F. 2007) (declining to consider issue after concluding it was "not within the scope of the granted issues").
[94] No. 20-0268, 2021 CAAF LEXIS 235, at *11 (C.A.A.F. 2021).
[95] *Id*.
[96] *Nerad*, 69 M.J. at 147.
[97] *Id*.

requests yet failed to do so here.[98] This Court also found that the *DuBay* judge's finding that the IMC was reasonably available was supported by evidence.[99]

Regarding *Strickland's* second prong, this Court applied a presumption of prejudice after citing two Court of Military Appeals precedents.

First, it cited *Hartfield*, where the Court of Military Appeals wrote that "the right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[100] The Court found the appellant was prejudiced despite his "failure to renew the request at trial" because "it appears his inaction there was on the premise that the convening authority had denied his request, when, in fact, such was not the case."[101]

The Court also cited *United States v. Beatty*.[102] There, the military judge declined to allow the appellant to request individual military counsel on additional charges being tried at a rehearing.[103] The Court of Military Appeals reversed, explaining that "deprivation of a statutory right to counsel cannot be

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[98] *Cooper*, 80 M.J. at 673 (citing Dep't of the Navy, Commander Naval Legal Service Command Instr. 5800.1G, Naval Legal Service Command (NLSC) Manual, para. 1006.a (Feb. 25, 2013)).
[99] *Id*. at 673-74.
[100] *Id*. at 675 (citing 17 C.M.A. at 270).
[101] *Hartfield*, 17 C.M.A. at 270.
[102] *Cooper*, 80 M.J. at 675 (citing 25 M.J. at 311)
[103] *Beatty*, 25 M.J. at 313.

analyzed in terms of specific prejudice but, instead, mandates automatic reversal."[104]

In its brief, the Government cites three cases in which this Court tested various violations of the statutory right to counsel for prejudice.[105] But these cases are distinguishable since none involved the situation present here: a *total* denial of a requested IMC throughout all proceedings of a contested court-martial.[106]

Even if a presumption of prejudice were the incorrect standard, the CCA held in the alternative that Appellant suffered material prejudice in the pretrial and trial stages of his court-martial.[107] The CCA noted the evidence was "not

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[104] *Id*. at 316.
[105] Br. on Behalf of Appellee/Cross-Appellant at 21.
[106] *Cf. United States v. Hutchins*, 69 M.J. 282, 291-93 (C.A.A.F. 2011) (finding no prejudice where assistant military defense counsel improperly left defense team but was replaced by other military defense counsel before trial and appellant was represented by experienced civilian counsel and other military counsel throughout all proceedings); *United States v. Wiechmann*, 67 M.J. 456, 462-64 (C.A.A.F. 2009) (finding no prejudice in guilty plea case where convening authority wrongfully disallowed civilian defense counsel to participate in Article 32, UCMJ, investigation and pretrial discussions but where counsel "represented Appellant fully as lead defense counsel throughout the trial and post-trial proceedings"); *United States v. Rodriguez*, 60 M.J. 239, 254-55 (C.A.A.F. 2004) (finding no prejudice where the appellant was represented at *DuBay* hearing by different counsel and did not consent to release of previous counsel but also "did not fulfill his duty to advise counsel of his whereabouts" and issue at hearing dealt with "matters of law" and not "matters within Appellant's personal knowledge").
[107] *Cooper*, 80 M.J. at 677.

overwhelming, but appeared to be the kind of 'he said-she said' sexual assault cases where the difference between conviction and acquittal often lies in the margin."[108] The CCA also observed that the Government waited five months before making counsel available, which "spurred [Appellant's] formation of an attorney-client relationship with" his requested IMC.[109] It noted that detailed defense counsel "frustrated the continuation of that same relationship."[110] The CCA earlier noted that Appellant separately alleged this counsel was ineffective at trial.[111] Thus, it found Appellant was materially prejudiced both before and during trial.[112]

In short, the CCA adhered to *Nerad* by disapproving the findings "with reference to some legal standard" without granting equity.[113]

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[108] *Id*. at 676.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 668 n.9.
[112] *Id*. at 677.
[113] *Nerad*, 69 M.J. at 146.

Conclusion

The Appellant/Cross-Appellee respectfully requests this Court answer the certified question in the negative and affirm the lower court's decision.

MICHAEL W. WESTER
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite 100
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-5188, fax (202) 685-7426

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MICHAEL W. WESTER
Lieutenant, JAGC, U.S. Navy
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
Bldg. 58, Suite 100
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-5188, fax (202) 685-7426
Bar no. 37277