IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES AND COURT OF MILITARY APPEALS CASES

COURTS OF CRIMINAL APPEALS CASES

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

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellant's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction under Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of sexual assault and abusive sexual contact in violation of Article 120, UCMJ, 10 U.S.C. §§ 920 (2012). The Members sentenced Appellant to five years of confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

After the parties filed their briefs, the lower court ordered a hearing under *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1968), and after redocketing, set aside the Findings and Sentence. *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *53 (N-M. Ct. Crim. App. Mar. 7, 2018).

The Judge Advocate General filed a Certificate for Review, on behalf of the United States, at this Court. (Certificate for Review, Crim.App. No. 201500039, June 18, 2018). This Court reversed the judgment of the lower court and remanded for further review under Article 66(c), UCMJ. *United States v. Cooper*, 78 M.J. 283, 287 (C.A.A.F. 2019).

On remand, the lower court again set aside the Findings and Sentence. *United States v. Cooper*, 80 M.J. 664, 678 (N-M. Ct. Crim. App. 2020).

On February 8, 2021, Appellant/Cross-Appellee[1] filed a Petition for Grant of Review at this Court, currently pending decision. On February 8, 2021, the Judge Advocate General certified an issue to this Court for review.

Statement of Facts

A. The United States charged Appellant with sexual assault.

The United States charged Appellant with several crimes including sexual assault and abusive sexual contact by bodily harm of the Victim. (J.A. 321–23.)

[1] The United States will refer to Appellant/Cross-Appellee as "Appellant."

B. At arraignment, Appellant acknowledged his right to individual military counsel, but informed the Military Judge he wanted Detailed Defense Counsel to represent him.

At Appellant's Arraignment on August 20, 2014, the Military Judge asked whether any "individual military counsel [had] been requested in this case." (J.A. 331.) Appellant's Detailed Defense Counsel, Lieutenant (LT) JB, replied, "No, sir." (J.A. 331.) Appellant asked no questions and did not challenge this assertion. (J.A. 331.)

The Military Judge explained to Appellant his rights to counsel, including the "right to be represented by individual military counsel, provided that the counsel . . . is reasonably available." (J.A. 332–33.) Appellant confirmed that he understood his rights, elected to be represented by LT JB, and affirmed that he did not wish to be represented by any other counsel. (J.A. 333.)

C. Appellant elected to be represented by both LT JB as Detailed Defense Counsel and Lieutenant Commander (LCDR) NG as Assistant Defense Counsel.

Before the next session of court, Lieutenant Commander (LCDR) NG, LT JB's supervisor, detailed himself as Appellant's Assistant Defense Counsel. (J.A. 334–35, 604.) On September 15, 2014, he entered his appearance on the Record and informed the Military Judge that no other counsel had been requested. (J.A. 334–35.) Appellant did not challenge LCDR NG's assertion. (J.A. 335.)

D. The Members convicted Appellant of sexually assaulting the Victim and sentenced him to five years of confinement and a dishonorable discharge.

The Members returned mixed findings, convicting Appellant of abusive sexual contact and sexual assault of the Victim and acquitting him of other offenses. (J.A. 577.) The Members sentenced him to forfeit all pay and allowances, reduction to pay grade E-1, five years of confinement, and a dishonorable discharge. (J.A. 578.)

E. On appeal, Appellant complained that LT JB was ineffective in failing to forward three requests for individual military counsel. The lower court ordered a *DuBay* hearing to resolve the ineffective assistance claim.

In Appellant's first brief to the lower court, Appellant complained that he received ineffective assistance of counsel in part because LT JB failed to forward his three requests for individual military counsel, including one for Captain (CPT) TN of the California Army National Guard. (Appellant Br. at 24, Sept. 17, 2015.)

The Court of Criminal Appeals ordered a factfinding hearing to resolve the ineffective assistance of counsel claim. (J.A. 92–93.)

F. Appellant testified at the *DuBay* hearing that after the Article 32 hearing, he informed LT JB of a succession of three counsel he desired to have as individual military counsel, including CPT TN. Appellant explained that, believing all his requests had been denied, he elected to be represented by his Detailed Defense Counsel at trial.

In late April 2014, after preferral of charges, LT JB was detailed as Appellant's Defense Counsel. (J.A. 592, 597.) LT JB advised Appellant of his

right to individual military counsel, but Appellant did not request individual military counsel at that time. (J.A. 593–94, 597.) LT JB was the sole counsel representing Appellant at his Article 32 hearing in May 2014. (J.A. 595.)

Appellant testified at the *DuBay* hearing that after the Article 32 hearing, he told LT JB that he wanted to request individual military counsel. (J.A. 582–83.) Appellant ultimately informed LT JB he wanted three different individual military counsel, after learning in succession of each requested counsel's purported unavailability. (J.A. 583–90.)

Appellant's second request was to have CPT TN as his individual military counsel, which was made sometime between late July and early August 2014. (J.A. 585–88, 619.) Appellant testified LT JB told him CPT TN would not be "back from Guantanamo Bay in time" and that they would be unable to get a continuance. (J.A. 587.) Appellant never withdrew his request for CPT TN as individual military counsel but "was under the impression it was denied." (J.A. 588.)

Appellant explained why, during his colloquy with the Military Judge, he did not ask to be represented by other military counsel. (J.A. 590–92.) He testified that he believed his requests "had all been denied" and had no other reason at that point to ask for representation other than LT JB and LCDR NG. (J.A. 591.)

The *DuBay* Judge found that after the Article 32 hearing and before trial, Appellant requested CPT TN as individual military counsel, but LT JB failed to forward the request. (J.A. 620–23.) The *DuBay* Judge further found that, if LT JB had submitted an individual military counsel request, CPT TN's National Guard Commander would have found CPT TN "reasonably available," and that CPT TN and Appellant had an ongoing attorney-client relationship at the time of Appellant's request. (J.A. 623–27.)

G. The lower court held Appellant was deprived of the statutory right to individual military counsel.

The lower court held Appellant was denied his statutory right to representation by individual military counsel and authorized a rehearing. *Cooper*, 2018 CCA LEXIS 114, at *6–45.

The court further held the convictions were legally and factually sufficient and found there was no error in the Article 32, UCMJ, hearing or the referral of charges. *Id*. at *45–53. The court declined to consider six of Appellant's other Assignments of Error that their opinion rendered moot, including the claim of ineffective assistance of counsel for LT JB's failure to forward his requests for individual military counsel. *Id.* at *2, *3 n.3.

H. On appeal, this Court held Appellant waived the right to individual military counsel and remanded to the lower court for further review under Article 66(c).

After certification by the Judge Advocate General, this Court held Appellant waived the right to individual military counsel, reversed the judgment of the lower court, and remanded for further review under Article 66(c), UCMJ. *Cooper*, 78 M.J. at 286–87.[2]

I. On remand, the lower court used its authority under Article 66 and *Chin* to disregard Appellant's waiver of individual military counsel, held that LT JB was ineffective, and again set aside the findings and sentence.

The lower court said it was using its authority under Article 66 and *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016), to disregard Appellant's waiver of the right to individual military counsel. *Cooper*, 80 M.J. at 668–71.

The lower court then: (1) found ineffective assistance in the failure to forward the request for individual military counsel; (2) declined to apply Article 59 and the Supreme Court's *Strickland* test for prejudice; and (3) instead applied a presumption of prejudice; and in the alternative, found Article 59 prejudice. *Id.* at 672–77. The lower court set aside the Findings and Sentence and remanded for a new trial. *Id.* at 678.

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[2] The United States asked this Court to resolve the claim on waiver grounds and noted that "any claim that Appellant's waiver was not knowing or intelligent based on erroneous advice from [LT JB] is more appropriately handled as an ineffective assistance of counsel claim." (Brief on Behalf of Appellee, at 32, July 19, 2019.)

Argument

THE LOWER COURT ABUSED ITS DISCRETION BY (A) APPLYING *UNITED STATES V. CHIN*, 75 M.J. 220 (C.A.A.F. 2016), AS A PREREQUISITE FOR CONSIDERING THE INEFFECTIVE ASSISTANCE CLAIM; AND (B) DISREGARDING APPELLANT'S WAIVER TO "HIGHLIGHT THE IMPORTANCE OF THE RIGHT TO INDIVIDUAL MILITARY COUNSEL" RATHER THAN BASED ON THE ENTIRE RECORD, INCLUDING THE KNOWING, VOLUNTARY, AND R.C.M. 905 WAIVERS OF INDIVIDUAL MILITARY COUNSEL. INSTEAD, THE LOWER COURT SHOULD HAVE APPLIED *STRICKLAND* IN RELATION TO THE WAIVER AND ASSESSED FOR PREJUDICE UNDER ARTICLE 59(a).

A. Standard of review.

This Court reviews a Court of Criminal Appeals' exercise of its discretionary authority under Article 66(c), UCMJ, for abuse of discretion. *See United States v. Nerad*, 69 M.J. 138, 146–47 (C.A.A.F. 2010) (disapproval of findings); *United States v. Schweitzer*, 68 M.J. 133, 139 (C.A.A.F. 2009) (excessive post-trial processing relief); *United States v. Hutchison*, 57 M.J. 231, 234 (C.A.A.F. 2002) (sentence appropriateness).

The scope and meaning of Article 66(c), UCMJ, is a matter of statutory interpretation, a question of law this Court reviews de novo. *Chin*, 75 M.J. at 222.

B. Courts of Criminal Appeals have broad authority under Article 66(c), but that authority is not unfettered.

A Court of Criminal Appeals "may affirm only such findings of guilty, and

the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. § 866(c). Article 66(c) grants Courts of Criminal Appeals an "awesome, plenary, *de novo* power of review," *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990), and a complete Article 66(c) review is a "substantial right" of an accused, *United States v. Jenkins*, 60 M.J. 27, 30 (C.A.A.F. 2004).

Summarizing Article 66(c)'s "three-pronged constraint on the [Court of Criminal Appeals'] authority to affirm," *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F. 2002), this Court has stated Courts of Criminal Appeals "may affirm only such findings and sentence that it: (1) finds correct in law; (2) finds correct in fact; and (3) determines, on the basis of the entire record, should be approved." *Nerad*, 69 M.J. at 141 (citing *Tardif*, 57 M.J. at 224).

Despite this broad mandate, the authority of Courts of Criminal Appeals is not unfettered. Article 59(a) states that a Court of Criminal Appeals may not hold a finding or sentence incorrect "on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Art. 59(a), 10 U.S.C. § 859(a). The first prong of Article 66(c)—correct in law—"pertains to errors of law and, as such, it also implicates Article 59(a)." *Tardif*, 57 M.J. at 224.

Additionally, in *Nerad*, this Court examined the scope of Article 66(c)'s

third prong as applied to its first prong; that is, whether the "should be approved" mandate permits a Court of Criminal Appeals to disapprove a legally correct finding. *Id.* This Court held that, while a Court of Criminal Appeals may disapprove a finding that is correct in law and fact, that power has a clear limit: "It must be exercised in the context of legal—not equitable—standards, subject to appellate review." *Id.* at 140; *see also id.* at 146 ("[T]he statutory phrase 'should be approved' does not involve a grant of unfettered discretion but instead sets forth a legal standard subject to appellate review.").

C. This Court in *Chin* held that Article 66(c)'s "should be approved" mandate allows a Court of Criminal Appeals, after assessment of the entire record, to determine whether to leave an appellant's waiver intact or to correct the underlying error.

The *Chin* court noted that this Court is generally bound by waivers. 75 M.J. at 222. But the Courts of Criminal Appeals' requirement to conduct a plenary review of "the entire record" for errors of law and fact, plus their statutory "should be approved" power, *Chin* said, requires a more rigorous and broad review by the lower court, while also granting that court an additional power. *Id.*

The *Chin* court looked at the impact of an accused's "waive all waivable motions" pretrial agreement provision on a Court of Criminal Appeals' exercise of its "should be approved" power. *Id.* at 222–23. The court held that while such a provision precludes an accused from raising the waived issue at the lower court or this Court, an accused "has no authority to waive a [Court Of Criminal Appeal's]

statutory mandate [absent total waiver of appellate review]." *Id.* at 223–24. Thus, despite a "waive all waivable motions" pretrial agreement provision, a Court of Criminal Appeals may proceed to fulfill its "affirmative obligation to ensure that the findings and sentence . . . are correct in law and fact . . . and should be approved." *Id.* at 223 (citations omitted).

The *Chin* court concluded the Courts of Criminal Appeals are required "to *assess the entire record* to determine whether to leave an accused's waiver intact, or to correct the error." *Id.* (emphasis added). But a "waive all waivable motions" provision or unconditional guilty plea "continues to serve as a factor for a [Court of Criminal Appeals] to weigh in determining whether to nonetheless disapprove a finding or sentence." *Id.*

Nor can Courts of Criminal Appeals disapprove a finding based on pure equity. *Id.* ("Article 66, UCMJ, is neither limitless nor standardless . . . ." (citing *Nerad*, 69 M.J. at 145–46)). In *Chin,* this Court approvingly noted that the lower court "disapproved specifications based on a *legal standard* . . . this Court gave them." *Id.* at 224 (citations omitted) (emphasis added).

D. The lower court abused its discretion by applying *Chin* as a prerequisite to considering ineffective assistance of counsel.

1. Article 66(c) requires Courts of Criminal Appeals to first determine if the findings and sentence are "correct in law and fact." If, despite a waiver, the findings and sentence merit relief for prejudicial legal error, *Chin* is inapposite. But if the findings and sentence merit no relief only due to the valid waiver, *Chin* applies.

Appellate courts evaluate statutory construction by beginning with the language of the statute. *United States v. McDonald*, 78 M.J. 376, 379 (C.A.A.F. 2019) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)). Unless ambiguous, the plain language of a statute will control unless it leads to an absurd result. *United States v. King*, 71 M.J. 50, 52 (C.A.A.F. 2012).

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *see also United States v. Pease*, 75 M.J. 180, 184 (C.A.A.F. 2016).

In a plain language reading, "it is neither ungrammatical nor unnatural to read 'and' to suggest a chronological sequence." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 61 (D.C. Cir. 2014). "Nouns joined by coordinating conjunctions are usually treated as a single, compounded unit, and a postmodifying prepositional phrase is most naturally read to modify that single unit." *ConocoPhillips Co. v.*

United States EPA, 612 F.3d 822, 839 (5th Cir. 2010).

Under Article 66(c), a Court of Criminal Appeals may only affirm as much of the findings and sentence "as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Art. 66(c), UCMJ, 10 U.S.C. § 866(c). Before a Court of Criminal Appeals may affirm:

> the court must be satisfied that the findings and sentence are (1) "correct in law," and (2) "correct in fact." Even if these 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."

Tardif, 57 M.J. at 224 (citation omitted); *see also Nerad*, 69 M.J. at 141 (using numbered approach to application of Article 66(c)).

This Court's consistent approach and the plain language of the statute support that Article 66(c)'s use of the conjunctive "and"—"finds correct in law and fact *and* determines . . . should be approved"—establishes a sequential test for a Court of Criminal Appeals' review. Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (emphasis added); *see also United States v. Conley*, 78 M.J. 747, 751 (A. Ct. Crim. App. 2019) (identifying "should be approved" as "third of three tests").

In application of this sequential statutory test, a Court of Criminal Appeals first applies principles of law to determine if the findings and sentence are "correct in law and fact"; only then can the Courts determine what findings and sentence "should be approved." *See Tardif*, 57 M.J. at 224; *see also Nerad*, 69 M.J. at 148–

49 (Baker, J., concurring) ("Courts of Criminal Appeals (CCAs) are courts of law. They can decide cases based on principles of law or issues of fact . . . applied in the context of Article 66, UCMJ.")

As *Chin* elaborated, a Court of Criminal Appeals may find that, because of a valid waiver, a finding or sentence is correct in law and fact—but the court can nonetheless, under its "should be approved" authority and based on the entire record, chose to disregard the waiver to correct the error. 75 M.J. at 223. However, the Court of Criminal Appeals, should it find that, despite a waiver, the findings and sentence merit relief for prejudicial legal error, *Chin* is inapposite. Thus, the only prerequisite for applying *Chin* is the court's determination that the findings and sentence merit no relief, only due to a valid waiver.

In sum, a Court of Criminal Appeals can exercise its "should be approved" power, including its power to disregard a valid waiver, only where, based on the entire record and applying Article 59(a), no prejudicial error of law or fact already necessitates disapproving the findings or sentence. *See Tardif*, 57 M.J. at 224; *Chin*, 75 M.J. at 223; *cf. Conley*, 78 M.J. at 751 ("We muddy the scrutiny of our reasoning when we decide a case based on our unique Article 66 authority under circumstances where we would have reached the same result as a matter of law.").

But where the lower court, pursuant to *Chin* and its Article 66 powers, explicitly reviews matters of law and applies incorrect or equitable principles, as

here, the Article 66 analysis is incomplete. *See Cooper*, 80 M.J. at 669–77.[3] No *Chin* analysis, or "should be approved" exercise, can be affirmed until a new "correct in law and fact" Article 66 analysis is performed.

2. Where an appellant alleges a waiver was influenced by the erroneous advice of his counsel, appellate courts apply *Strickland* and Article 59(a) to assess whether to provide relief, despite the waiver.

Appellate courts apply *Strickland*'s ineffective-assistance test to claims that counsel's erroneous advice influenced the appellant's waiver of a right at trial. *See, e.g.*, *Lee v. United States*, 137 S. Ct. 1958, 1964–69 (2017) (applying *Strickland* to claim that appellant would not have pled guilty had counsel not given erroneous deportation advice); *Lafler v. Cooper*, 566 U.S. 156, 162–64 (2012) (applying *Strickland* to claim that appellant would have accepted plea deal had counsel not erroneously advised him he could not be convicted); *Moore v. Bryant*, 348 F.3d 238, 241 (7th Cir. 2003) (applying *Strickland* to appellant's claim he

[3] *See, e.g.*, *Nerad*, 69 M.J. at 138 (remanding for new Article 66 review where lower court seemingly applied equitable principles); *Jenkins*, 60 M.J. at 30 (remanding for new Article 66 review where it was unclear from opinion that lower court conducted review of entire record); *United States v. Holt*, 58 M.J. 227, 232–33 (C.A.A.F. 2003) (remanding for new Article 66 review where lower court considered evidence excluded by court-martial and outside scope of lower court's mandate); *United States v. Waymire*, 9 C.M.A. 252, 254–55 (C.M.A. 1958) (remanding for new Article 66 review where lower court "side-stepped the legal issue" and instead applied equitable "compromise holding"); *c.f. United States v. Gonzalez*, 79 M.J. 466, 469 (C.A.A.F. 2020) (finding ultra vires action by lower court as to sentence required reversal of sentence and remand for new action on sentence).

would not have pled guilty had counsel not given erroneous sentencing advice); *Barrow v. Uchtman*, 398 F.3d 597, 608 (7th Cir. 2005) (applying *Strickland* to appellant's claim that his waiver of right to testify was based on counsel's erroneous advice).

In *United States v. Gooch*, No. ACM 37303, 2009 CCA LEXIS 414 (A.F. Ct. Crim. App. Nov. 24, 2009), the Air Force Court of Criminal Appeals found the appellant waived a claim of ineffective assistance for his counsel's failure to request dismissal of a specification, as the appellant acquiesced to the decision on the record. *Id.* at *16–17. This Court noted "an appellant cannot waive a claim of ineffective assistance . . . where waiver is based on the very advice he asserts was ineffective." *United States v. Gooch*, 69 M.J. 353, 355 n.2 (C.A.A.F. 2011). The waiver did not bar the appellant's claim of ineffective assistance, and this Court applied a *Strickland* analysis to the underlying issue. *Id.* at 361–62.

As in *Gooch*, whether a trial defense counsel's actions contributed to a later waiver is part of a standard ineffective assistance analysis, notwithstanding the waiver itself. The analysis of whether ineffective assistance influenced an accused's valid waiver is a discrete *Strickland* analysis; this differs from the separate analysis of whether the lower court should disregard a valid waiver and consider the underlying waived issue on the merits. *See United States v. Bonior*, No. ACM 39755, 2020 CCA LEXIS 466, at *40 (A.F. Ct. Crim. App. Dec. 22,

2020) (finding appellant's counsel were not ineffective before considering whether to disregard the "waive all waivable motions" provision and provide relief); *cf. Conley*, 78 M.J. at 751.

But in both cases—a *Strickland* analysis in face of a valid waiver, and a merits analysis paired with a *Chin*-type "disregarded" valid waiver—the Article 66(c) power to affirm only what "should be approved" can only be exercised after a complete Article 66 analysis of whether the record is correct in law and fact, applying extant law. *See Tardif*, 57 M.J. at 224; *Chin*, 75 M.J. at 223; *see also Nerad*, 69 M.J. at 148 (remanding for new Article 66(c) review to clarify whether it applied legal or equitable principles when setting aside finding); *Jenkins*, 60 M.J. at 30 (remanding for new Article 66(c) review where this Court was in doubt appellant received full Article 66(c) review).

3. Because the lower court found ineffective assistance, it erred by failing to apply settled *Strickland* law to determine whether to grant relief. *Chin* was inapplicable, not a prerequisite to the *Strickland* test, and analysis of ineffective assistance on the waiver was required for a proper Article 66(c) analysis.

Although Appellant's August 2014 colloquy with the Military Judge was otherwise a knowing and intelligent waiver of the right to individual military counsel, *Cooper*, 78 M.J. at 287, LT JB's earlier failure to route Appellant's request for individual military counsel created the *fait accompli*. Because Appellant's waiver was infected by the premise that his requested individual

military counsel was unavailable, (J.A. 587), his waiver was "based on the very [performance] he asserts was ineffective." *See Gooch*, 69 M.J. at 355 n.2.[4]

Despite this link between LT JB's deficient performance and Appellant's waiver—and the settled application of *Strickland* to negate erroneously influenced waivers—the lower court applied *Chin,* and "annulled" the waiver, before considering the ineffectiveness claim. *See Cooper*, 80 M.J. at 660, 672 (exercising authority to disregard waiver before turning to ineffectiveness claim).

This erroneous exercise of the Article 66(c) review misapplied the sequential test that requires a Court of Criminal Appeals to review the entire record first and determine its correctness in law and fact *before* applying the "should be approved" power. *See supra* Section D.1.

The lower court abused its discretion applying *Chin* as a prerequisite to considering the ineffective assistance claim and erred in disregarding the waiver.

[4] The United States has consistently argued that, assuming waiver, Appellant's claim—and the waiver itself, and the waiver's effects on trial—should be analyzed for ineffective assistance. *See* (Brief on Behalf of Appellee, at 32, July 19, 2019); Oral Argument at 47:56, *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019) (No. 18-0282), https://www.armfor.uscourts.gov/newcaaf/calendar/201812.htm (noting if waiver was influenced by LT JB, "that is the whole reason why *Strickland* and IAC is the framework"). Appellant's counsel also argued that, when viewed as an ineffective assistance of counsel case, "there is no waiver, because IAC trumps waiver." Oral Argument at 21:35.

4. The lower court erred by applying *Chin* to the waiver and presuming prejudice. Before granting relief for ineffective assistance, Articles 66(c) and 59(a) require the Courts of Criminal Appeals to first both (a) analyze ineffective assistance in relation to the waiver and under the established *Strickland* legal principles, and (b) test for prejudice as required by Article 59(a), based on the entire record.

The lower court compounded the misapplication of Article 66(c) and *Chin* by purporting to provide relief under *Chin* by disregarding a valid waiver, but instead presuming prejudice, in contravention of settled *Strickland* precedent, Article 59(a), and Article 66(c). *See Cooper*, 80 M.J. at 674–77.

In *Garza v. Idaho*, 139 S. Ct. 738 (2019), the appellant—who filed an appeal waiver at trial—alleged his counsel was ineffective because he never filed a notice of appeal, despite the appellant's requests to do so. *Id.* at 742–43. Having previously held that a counsel's failure to file a notice of appeal is deficient performance and merits a presumption of prejudice under *Strickland*, the *Garza* court examined whether the presumption would apply where the appellant had signed an appeal waiver. *Id.* at 742 (citing *Roe v. Flores-Ortega*, 528 U.S. 470 (2000)). Reasoning that the counsel's deficient performance forfeited further appellate review, the Court held the presumption of prejudice applies. *Id.* at 747.

The dissent criticized this deviation from *Strickland*'s prejudice requirement. *Garza*, 139 S. Ct. at 752–53 (Thomas, J., dissenting). The dissent argued *Flores-Ortega* was inapposite because there "[t]he proximate cause of the defendant's

failure to appeal . . . was his counsel's failure to file one." *Id.* at 752. In contrast, it was "Garza's agreement to waive his appeal rights, not his attorney's actions, that caused the forfeiture of his appeal." *Id.* at 753 (Thomas, J., dissenting). As such, the dissent would have resolved the claim "on a straightforward application of *Strickland*," including showing specific prejudice from the deficient performance. *Id.*

Garza's holding and the dissent's criticism bear on two points relevant here. First, although *Garza* is dealing with ineffectiveness claims leading to the denial of an entire appellate proceeding—not present here—the *Garza* majority-dissent debate underscores that resolving claims of ineffective assistance involving a trial-level waiver requires analysis of the impact of that waiver on both prongs under *Strickland*. *Id.* at 746–47, 753–55 (analyzing, in both majority and dissent, impact of appeal waiver to *Strickland* prongs). Contrary to this precedent, the lower court erred when it removed Appellant's valid waiver from its consideration of the "entire record" before applying *Strickland* in a vacuum; properly analyzed, that waiver is part of the *Strickland* analysis. *See Cooper*, 80 M.J. at 674–77.

Second, unlike in *Garza*, the lower court cites no authority that applied a presumption of prejudice under *Strickland* to the denial of the statutory right to

individual military counsel. *See id.* at 675–76.[5] Where no authority supports applying a presumption of prejudice to satisfy *Strickland*, the *Garza* dissent is instructive—"a straightforward application of *Strickland*" is warranted. *Garza*, 139 S. Ct. at 753 (Thomas, J., dissenting).

Finally, this Court routinely holds that denial of the statutory right to counsel must be tested for prejudice under Article 59(a) and that appellate courts must assess prejudice by looking to trial proceedings. *See, e.g.*, *United States v. Hutchins*, 69 M.J. 282, 291–93 (C.A.A.F. 2011) (improper severance of attorney-client relationship testable for prejudice, finding no material prejudice after assessing performance of detailed defense counsel at trial); *United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009) (violation of statutory right to counsel testable for prejudice, assessing prejudice by looking to trial proceedings); *United States v. Rodriguez*, 60 M.J. 239, 254–55 (C.A.A.F. 2004) (improper severance of attorney-client relationship prior to a *DuBay* hearing tested for prejudice, no prejudice where substitute counsel represented cause "zealously").

The lower court's refusal to test for prejudice violates both *Strickland* and

[5] The lower court in fact rejected the only precedent it cited where a claim of denial of individual military counsel was evaluated under *Strickland* and tested for prejudice, reasoning that that claim was testable for prejudice because, in essence, the appellant's claim was weak. *Cooper*, 80 M.J. at 676 (citing *United States v. Johnson*, No. 201200379, 2013 CCA LEXIS 784, at *9–13 (N-M. Ct. Crim. App. Sept. 30, 2013)).

Article 59(a).

The lower court thus abused its discretion when it disregarded Appellant's waiver under *Chin*, analyzed *Strickland* without reference to the waiver, and applied a presumption of prejudice in contravention of Article 59(a).

E. The lower court abused its discretion under *Chin,* Article 59(a), and Article 66(c), when instead of assessing the entire Record, it disregarded Appellant's waiver based on a desire to "highlight the importance of the right to [individual military counsel]."

1. A Court of Criminal Appeals must apply extant legal tests in the exercise of Article 66(c) powers; it cannot act equitably or on the basis of non-legal tests.

In *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001), this Court approved the framework the Court of Criminal Appeals created for addressing unreasonable multiplication of charges, "conclud[ing] that this approach is well within the discretion of the court below to determine how it will exercise its Article 66(c) powers." *Id.* at 339.

This Court emphasized the framework rested on "a determination of law under a classic legal test"—reasonableness. *Id.* Like sentence appropriateness, reasonableness "is a concept that the Courts of Criminal Appeals are fully capable of applying under . . . Article 66." *Id.* (citing *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), *United States v. Suzuki*, 20 M.J. 248 (C.M.A. 1985)); *see also, e.g.*, *United States v. Brown*, 62 M.J. 602, 606–07 (N-M. Ct. Crim. App. 2005) (creating factors to determine whether to grant relief under Article 66(c) for post-trial delay).

2. Article 66(c) and *Chin* require that a Court of Criminal Appeals' decision to disregard a waiver and provide relief be based on an individualized assessment of an appellant's record.

In guiding Courts of Criminal Appeals in the exercise of their discretionary authority to disregard an appellant's waiver, the *Chin* court pointed to: (1) the factors surrounding the appellant's waiver, *Chin*, 75 M.J. at 223; and (2) the "facts and circumstances reflected in the record," *Tardif*, 57 M.J. at 224 (examining "should be approved" discretion in context of relief from excessive post-trial processing); *see also* Art. 66(c), 10 U.S.C. § 866(c) (2012) (requiring determination "on the basis of the entire record").

This guidance demonstrates that exercise of the unique Article 66(c) authority is an individualized assessment—much like in the context of sentence appropriateness, unreasonable multiplication of charges, and post-trial delay. *See Quiroz*, 55 M.J. at 338 (setting five case-specific factors for evaluating unreasonable multiplication of charges); *Sales*, 22 M.J. at 307–08 (noting service court must assure sentence adjudged is "appropriate for the offenses of which the accused has been convicted"); *Brown*, 62 M.J. at 606–07 (creating case-specific factors to determine whether to grant relief under Article 66(c) for post-trial delay); *see also United States v. Begani*, 79 M.J. 767, 786 n.7 (N-M. Ct. Crim. App. 2020) (Gaston, J., concurring) ("[T]he application of waiver is and must always be a case-by-case determination." (citing *Chin*, 75 M.J. at 223)).

3. The lower court abused its discretion when it used a non-legal standard, relying instead on considerations outside the record for exercising its authority under *Chin*, in contravention of this Court's holding in *Vazquez*.

Unlike the legal frameworks in *Quiroz* and *Brown*, the lower court here created a framework for disregarding waiver relying not on an individualized assessment of Appellant's Record, but instead on non-legal considerations outside the Record. *Cooper*, 80 M.J. 668–71. The lower court found, in applying *Chin*:

> [Courts of Criminal Appeals] 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, left uncorrected, *may undermine good order and discipline* or the *perceived fairness of a court-martial*.

Id. at 670[6] (emphasis added).

This "uniquely military" standard looks to considerations outside the Record: (1) how the failure to correct the error would impact good order and discipline, writ large; and, (2) how an outside observer—not a party to the court-martial, but a hypothetical "member of the public"—might perceive the fairness of a court-martial. This standard looks beyond the limits of Article 66(c) and *Chin,*

[6] Although the lower court adapted this framework from the Army Court of Criminal Appeals in *Conley*, *see Cooper*, 80 M.J. at 670, the *Conley* court itself did not apply a "uniquely military circumstances" test, instead making its determination based on factors surrounding the waiver and "after reviewing the entire record," *Conley*, 78 M.J. 752–53. The *Conley* court also noted, "[w]hen determining whether to notice error, we must first review the entire record." *Id.* at 750.

and is not a case-specific, record-specific assessment. *See Chin*, 75 M.J. at 223.

Nor is this "uniquely military" standard a legal test for applying Article 66 powers. *See Nerad*, 69 M.J. at 147. While a Court of Criminal Appeals may be well equipped to recognize an error's unique military origins, that is not the same as looking to an appellant's entire record, assessing that record for legal and factual correctness, and then conducting an individualized assessment of the record to determine whether to disregard waiver. *Cf. Quiroz*, 55 M.J. at 338; *Brown*, 62 M.J. at 606–07.

This Court in *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), rejected past precedent that discussed ideas like "military due process" or the notion that servicemembers enjoy rights "beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]." *Id.* at 19.

But here, the lower court expanded rights to individual military counsel beyond the Constitution, Congress' statutes, and the President's and Departmental rules, while voiding an otherwise valid waiver and granting relief for ineffective assistance based on "uniquely military" circumstances, perceived fairness, and good order and discipline factors. *See Cooper*, 80 M.J. at 670.

This approach is not an extant legal test, as *Nerad* stresses the lower courts must apply, but rather, an arbitrary application of Article 66(c) powers. As the

lower court dissent noted: "Why would a military accused need less protection from this Court for a universal criminal justice matter, as opposed to a uniquely military matter?" *Cooper*, 80 M.J. at 678 (Crisfield, C.J.E., dissenting).

The lower court abused its discretion by adopting an arbitrary, non-legal standard, and looking to considerations outside an appellant's record, to exercise its Article 66(c) powers and grant relief.

4. Even if a "uniquely military" standard is appropriate, the lower court abused its discretion when it relied on its desire to highlight the importance of a certain right—rather than an individualized assessment of the Record—to disregard Appellant's waiver.

In *Hutchison*, the lower court determined "it was appropriate to take into account [the appellant's] civilian sentence" in its Article 66(c) sentence appropriateness review, and thus disapproved the punitive discharge and reduction in grade. 57 M.J. at 233. Despite evidence of the appellant's civilian sentence in the record—making it properly reviewable by the lower court under Article 66(c)—this Court found the lower court abused its discretion. *Id.* at 234. The lower court "discussed a wide variety of subjects in a manner that raises the possibility that the court acted because it viewed the state court proceedings as inappropriate and sought to lessen the punishment from those proceedings" rather than limiting its review to "whether the military sentence is inappropriate." *Id.* at 234. The *Hutchison* court remanded the appellant's case to the lower court for a de

novo sentence appropriateness review. *Id.*

Like *Hutchison*, the lower court here explicitly justified its exercise of Article 66(c) authority not on Congress' statutes, established precedent, or the limits discussed in *Chin*—the nature of the waiver and facts and circumstances of the record—but on its desire to "highlight the importance of the right to an [individual military counsel]." *Cooper*, 80 M.J. at 671.

The lower court's wide-ranging discussion of (1) the importance of the right to individual military counsel, (2) an accused's potential trepidation about expressing his actual desires when questioned by the military judge in open court, and (3) the need for all trial defense counsel to scrupulously honor requests for individual military counsel, *id.* at 670–71, show the court did not limit its application of Article 66(c) discretion to an individualized assessment of Appellant's Record and whether it was "correct in law and fact." *Cf. Hutchison*, 57 M.J. at 234.

Even though the lower court resolved the ineffective assistance of counsel claim without assessing the performance of Appellant's detailed counsel at trial, it must nonetheless exercise its Article 66(c) discretionary authority "on the basis of the entire record." *See Cooper*, 80 M.J. at 674–77 (declining to apply Article 59 and *Strickland* test for prejudice, instead applying presumption of prejudice, and, alternatively, finding Article 59 prejudice from solely pre-trial events); *Chin*, 75

M.J. at 222 ("[A] [Court of Criminal Appeals] may not rely on only selected portions of a record or allegations of error alone.").

The lower court should have considered factors surrounding Appellant's waiver when determining whether to disregard it—that he knowingly and voluntarily waived the right in a direct colloquy with the Military Judge and mandatorily waived the right under R.C.M. 905.[7] *See Cooper*, 78 M.J. at 287 ("If [Appellant] had wanted other counsel he should have said so.").

The decision to disregard a waiver must be an assessment of an individual case—not a means for a Court of Criminal Appeals to highlight a specific issue writ large. Because the lower court failed to conduct an individualized assessment of the Record before disregarding Appellant's waiver, it abused its discretion.

Conclusion

The United States respectfully requests that this Court vacate the lower court's decision and remand for further review under Article 66(c), UCMJ.

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[7] Appellant's failure to file a motion regarding the denial of his request for individual military counsel prior to entry of pleas resulted in mandatory waiver under R.C.M. 905(b)(6), which must also be considered as part of "the entire record." (*See* Brief of Appellee at 24–26, July 19, 2018.) But the United States acknowledges that this Court has already held the lower court may disregard, under *Chin*, a knowing and voluntary waiver.

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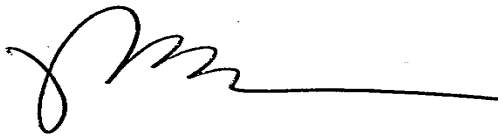

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