IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/Cross-Appellant	)	REPLY 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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COURTS OF CRIMINAL APPEALS CASES

UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. §§ 801–946 (2012)

REGULATIONS, RULES, OTHER SOURCES

Pursuant to Rule 19(b)(3) of this Court's Rules of Practice and Procedure, the United States replies to Appellant/Cross-Appellee's[1] Answer. (Appellant/Cross-Appellee's Answer, Apr. 28, 2021.)

A. In its first review, this Court remanded to the lower court for it to resolve the ineffectiveness claim. No holding or action of this Court precluded the lower court from applying *Strickland* to the claim directly—including applying *Strickland* in relation to Appellant's waiver of the right to individual military counsel.

1. Appellant misapprehends this Court's action as requiring the lower court to disregard Appellant's waiver of individual military counsel under *Chin* before considering the ineffectiveness claim.

In *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), this Court explained the Service Court's "should be approved" power: "the broad language with which we have described the [Courts of Criminal Appeals'] powers has been cabined in practice" to correcting those errors for which "doctrines applicable to issues of law—such as waiver—would have precluded [Court of Criminal Appeals] action in the absence of the 'should be approved' language of Article 66(c), UCMJ." *Id.* at 146–47.

Appellant incorrectly compares the posture of his case on remand to this language in *Nerad*, arguing that absent the "should be approved" power, the lower

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

court was precluded from considering the ineffective assistance of counsel claim. (Appellant's Ans. at 14–16.)

This misapprehends both this Court's remand and the law.

In its first review of this case, the Judge Advocate General certified four issues, including (1) "Did [Appellant] waive the right to [individual military counsel]?" and (2) "Should the failure of the detailed defense counsel to submit a request for [individual military counsel] be reviewed under the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for ineffective assistance of counsel (IAC)?" *United States v. Cooper*, 78 M.J. 283, 283 (C.A.A.F. 2019). This Court held that Appellant waived the right to individual military counsel, thus rendering the remaining certified issues moot. *Id.*

Appellant implies, by his analogy to situations like those described in *Nerad*, that this Court's finding of waiver would have precluded the lower court, absent *Chin*, from reviewing the ineffective assistance of counsel claim. (*See* Appellant's Ans. at 14.) But this would only be correct if this Court had found that Appellant's colloquy with the Military Judge also waived the right to argue ineffective assistance of counsel in failing to route his individual military counsel requests.

Nothing in this Court's Opinion supports that, and that view would have been a break from this Court's precedent. *See United States v. Gooch*, 69 M.J. 353, 355 n.2 (C.A.A.F. 2011) ("[A]n appellant cannot waive a claim of ineffective

assistance of counsel where waiver is based on the very advice he asserts was ineffective.")

Simply put, the lower court did not need to disregard Appellant's waiver in order to address his claim of ineffective assistance. (*Contra* Appellant's Br. at 14.)

Appellant also incorrectly claims that: (1) by finding the remaining certified issues moot, this Court precluded the lower court from analyzing ineffective assistance "as an error of law"; and, (2) that the United States' position that the lower court erred applying *Chin* as a prerequisite to considering the ineffectiveness claim "conflicts with this Court's holding." (Appellant's Ans. at 16.)

To the contrary, this Court found the remaining certified issues moot because the lower court never resolved the ineffective assistance of counsel claim in the first direct review, thus remand was required. *Cooper*, 78 M.J. at 286 (finding lower court's holdings "rendered several of the remaining issues, including the ineffective assistance of counsel claim, moot" (citing *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *3 n.3 (N-M. Ct. Crim. App. Mar. 7, 2018)).[2] The second certified issue did not ask this Court to apply

[2] At oral argument, Judge Ryan noted that if the Court decided Appellant waived his right to individual military counsel, that holding would leave open the issue of ineffective assistance of counsel and the lower court may need to conduct additional fact-finding to resolve the claim. Oral Argument at 44:47, *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.

Strickland itself to the ineffectiveness claim—indeed, it could not have, since the lower court had not yet answered the *Strickland* question.

Therefore, because this Court's holding on waiver did not preclude the lower court from applying *Strickland* to the ineffective assistance claim, the lower court was not faced with a situation where it could only reach the issue by disregarding the waiver under *Chin*. The lower court erred applying *Chin* as a prerequisite for considering ineffective assistance of counsel under *Strickland*.

2. The lower court's misapplication of *Chin* infected its *Strickland* analysis. Thus, this Court must reverse the lower court's *Strickland* analysis: in disregarding waiver under *Chin*, the lower court incorrectly applied *Strickland*—which depends on the waiver itself.

This Court reviews claims of ineffective assistance of counsel de novo. *United States v. Harpole*, 77 M.J. 231, 236 (C.A.A.F. 2018). Appellant incorrectly argues that, because the lower court applied a legal standard—ineffective assistance of counsel—to disapprove the findings, it did not "abuse[] its discretion" under *Nerad*. (Appellant's Ans. at 22 (citing *Nerad*, 69 M.J. at 147)). But a Court of Criminal Appeals' action under its discretionary authority is not shielded from this Court's review of the legal issue simply because the lower court applied a legal standard. This Court reviews de novo the lower court's application of *Strickland*, regardless of whether the court applied *Strickland* directly or through

its ability under *Nerad* to disapprove a legally correct finding with respect to a legal standard. *See Harpole*, 77 M.J. at 236; *Nerad*, 69 M.J. at 147.

When the lower court applied *Chin* as a prerequisite to considering the ineffective assistance of counsel claim, it excised Appellant's waiver from the Record, treating the claim as if Appellant had objected to the denial of individual military counsel at trial and preserved the issue. *See United States v. Cooper*, 80 M.J. 664, 672–77 (N-M. Ct. Crim. App. 2020).

But Appellant did not object. Instead, after the Military Judge "carefully explained to [him] . . . the nature of the right to [individual military counsel]," Appellant told the Military Judge that he understood his rights and wanted to be represented by his Detailed Defense Counsel and twice "sat mute" when his Detailed Defense Counsel told the Military Judge that no request for individual military counsel had been made. *Cooper*, 78 M.J. at 287.

By waiving the right to individual military counsel and electing to be represented by his Detailed Defense Counsel, Appellant contributed to the denial of individual military counsel that he seeks to lay solely at the feet of his Detailed Defense Counsel.[3] *See id.* at 287 n.8 (noting Appellant "had the power to change

[3] While the United States disagrees with the *DuBay* Judge's Findings of Fact with regard to Detailed Defense Counsel's performance, (J.A. 620–23), the United States accepts them for the purposes of this appeal and agrees that, based on the *DuBay* Judge's Findings, Detailed Defense Counsel's failure to route Appellant's

the condition by telling the [M]ilitary [J]udge that he wanted CPT [TN] as his [individual military counsel].").

But in its *Strickland* prejudice analysis, the lower court failed to consider that Appellant unequivocally, directly, and "without the filter of his defense counsel," waived the right to individual military counsel. *Id.* at 287. This error was the product of the lower court's mistaken belief that it must apply *Chin* and disregard Appellant's waiver as a prerequisite to considering the ineffectiveness claim—rather than considering the ineffectiveness claim as a matter of law and addressing the prejudicial effect of Appellant's waiver, as induced by Detailed Defense Counsel's deficient performance, within the second prong of its *Strickland* analysis. (*See* Appellee/Cross-Appellant's Br. at 19–21, Mar. 22, 2021 (discussing *Garza v. Idaho*, 139 S. Ct. 738 (2019), and need to analyze *Strickland* prejudice prong in relation to trial waiver).)

Nor did the lower court "faithful[ly] appl[y] this Court's ineffective assistance of counsel precedents" when it determined a presumption of prejudice was appropriate, as Appellant claims. (Appellant's Ans. at 22.) In fact, none of the cases on which the lower court relied in applying a presumption of prejudice were ineffective assistance of counsel cases. *See United States v. Beatty*, 25 M.J.

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request for individual military counsel constituted deficient performance. (*See* Appellant's Ans. at 15 ("Government all but concedes Appellant received ineffective assistance of counsel under the first *Strickland* prong").)

311, 315 (C.M.A. 1987) (denial of individual military counsel by military judge); *United States v. Hartfield*, 17 C.M.A. 269, 270 (C.M.A. 1967) (denial of individual military counsel by convening authority's staff legal officer); *United States v. Allred*, 50 M.J. 795, 799–800 (N-M. Ct. Crim. App. 1999) (denial of individual military counsel by military judge). The lower court rejected the only case in which it had applied *Strickland* to a claim of ineffective assistance of counsel for failure of trial defense counsel to route a request for individual military counsel—a case in which it had not presumed prejudice. *See Cooper*, 80 M.J. at 676 (citing *United States v. Johnson*, No. 201200379, 2013 CCA LEXIS 784 (N-M. Ct. Crim. App. Sept. 30, 2013)).

Thus, the lower court's failure to evaluate prejudice under *Strickland* is unsupported by the precedent it cites and contrary to this Court's precedent—and Congress' mandate—that even the denial of the statutory right to counsel must be tested for prejudice under Article 59(a), and appellate courts must assess prejudice by looking to the record of trial proceedings.[4] (*See* Appellee/Cross-Appellant's Br. at 21–22 (compiling cases).)

[4] Appellant claims that because the lower court noted he also raised claims of ineffectiveness for his Detailed Defense Counsel's performance at trial, "it found Appellant was materially prejudice both before and during trial." (Appellant's Ans. at 25.) This is illogical and an improper reading of the lower court's Opinion. The lower court never applied *Strickland* to the claims of ineffectiveness at trial, let alone found them substantiated. *See Cooper*, 80 M.J. at 667 (noting it did not

Because the lower court failed to consider Appellant's waiver of the right to individual military counsel in its *Strickland* analysis and instead treated the statutory and regulatory error as structural by applying a presumption of prejudice to his unequivocal waiver, the *Chin* error infected the *Strickland* analysis, and this Court must reverse the lower court's application of *Strickland* to resolve the Certified Issue. (*Contra* Appellant's Ans. at 21–22.)

B. Courts of Criminal Appeals are courts of law, not equity. Appellant's view of Article 66(c) is contrary to the statutory scheme and conflates the Courts of Criminal Appeals' "should be approved" power with the statutory mandate to determine if findings and sentence are correct in law and fact by applying the correct law.

In *United States v. Tardif*, 57 M.J. 219 (C.A.A.F. 2002), the court examined a Court of Criminal Appeal's authority to review sentence appropriateness under Article 66(c). *Id.* at 223–24. The lower court found the post-trial delay unreasonable, but found it had no authority to provide relief since the appellant could not show the delay prejudiced substantial rights. *Id.* at 221.

Finding that "Articles 59(a) and 66(c) 'bracket' the authority of a Court of Criminal Appeals," the *Tardif* court held that the discretionary "should be approved" authority under Article 66(c) requires a Court of Criminal Appeals "to

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reach assignments of error unnecessary for resolution of case). Nor can the Opinion be read to state that the lower court found Appellant was prejudiced at trial by his Detailed Defense Counsels' performance, only that the purported prejudice to the preparatory stages of Appellant's court-martial from the denial of individual military counsel invariably affected the trial. *See id.* at 677.

determine what findings and sentence 'should be approved'" even absent specific prejudice under Article 59(a). *Id.* at 224. The *Tardif* court thus remanded the case to the lower court to "exercise its broad authority under Article 66(c) to determine whether relief [was] warranted." *Id.*

Tardif supports the United States' position that Article 66(c) is a three-pronged, sequential test, despite Appellant's arguments otherwise. (*Contra* Appellant's Ans. at 15–16.) A Court of Criminal Appeals' review is "bracket[ed]" by Articles 59(a) and 66(c): it begins with the first prong of Article 66(c)—"correct in law," requiring application both of correct legal principles and Article 59(a)'s requirement to show substantial prejudice—and ends with application of the discretionary "should be approved" power. *Tardif*, 57 M.J. at 224.

The exercise of Article 66(c)'s "should be approved" power necessarily follows application of "correct in law and fact" and Article 59(a). A Court of Criminal Appeals cannot know what cases can receive no relief due to application of precedent, including waiver, until a correct and complete legal analysis has been performed under the "correct in law and fact" clause and Article 59(a)'s requirement to assess for prejudice. Nor can the Service Courts assess which findings and sentence "should be approved" without first determining if the findings and sentence are correct in law and fact. *See id.* (noting "even if the[] first

two prongs are satisfied," Court of Criminal Appeals can provide relief "on the basis of the entire record" and without showing of Article 59(a) prejudice).

That is, Article 66(c)'s "should be approved" power is not a "general limitation" on a Court of Criminal Appeals' ability to affirm. (*Contra* Appellant's Ans. at 15.) Instead, it is the final step, coming after an analysis of whether the findings and sentence are correct in law and fact. Otherwise, the lower court would be ignoring the "correct in law and fact" statutory mandate, and absent a correct legal analysis, would mete out equitable justice.

Further, Appellant's view of a Court of Criminal Appeal's "should be approved" authority as a "general limitation" applicable regardless of what the law had to say about the findings and sentence would allow a Court of Criminal Appeals to, when desired, supplant its statutory mandate with its discretionary authority. *See* Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). Without the sequential approach, a Court of Criminal Appeals could, under cover of *Chin*, set aside the findings and sentence based on a validly waived legal error, even if the resolution of a preserved error would reach the same result. *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016); *cf. also Nerad*, 69 M.J. at 147 ("We have expressly declined to agree that a [Court of Criminal Appeals] may disapprove a finding based on pure equity."). But that would ignore Congress' requirement that

the lower court make a correct analysis of whether the findings and sentence were correct in the first place.

In other words, where extant legal precedent such as *Strickland* provides a basis for relief under the "correct in law and fact" clause despite a waiver, *Chin* is inapplicable. Otherwise the language in *Nerad*—that precedent-based waiver may be ignored where "doctrines applicable to issues of law . . . would have precluded . . . action in the absence of the 'should be approved' language"—would make little sense, as the lower court could simply set aside findings and sentence regardless of whether the findings and sentence were correct. *Nerad*, 69 M.J. at 146–47.

Indeed, this Court long ago rejected the idea that a Court of Criminal Appeals could shirk its duty to determine the legal issues before it. *See United States v. Waymire*, 9 C.M.A. 252, 255 (C.M.A. 1958). In *Waymire*, the court held that the lower court failed to fulfill its statutory duties when it "side-stepped the legal issue argued by counsel" and provided a compromise holding in the interest of "substantial justice." *Id.* This Court should make clear now that a Court of Criminal Appeals cannot apply *Chin* to disregard a waiver until the court first determines that no precedent addressing the preserved or forfeited error—like

Strickland—already requires setting aside the findings or sentence.[5] *See Chin*, 75 M.J. at 223.

C. Article 66(c) constrains the Courts of Criminal Appeals' exercise of discretionary authority by requiring it to be based "on the entire record." The lower court erred applying *Chin* based on factors outside the Record. Appellant fails to show the lower court's opinion does not run afoul of *Vazquez*'s rejection of "military due process."

In *United States v. Vasquez*, 72 M.J. 13 (C.A.A.F. 2013), the military judge granted the appellee's[6] mid-trial challenge for cause against a panel member, causing the panel to fall below quorum at a point in which five of the six Government witnesses had already testified. *Id.* at 15–16. Despite the appellee neither objecting to the R.C.M. 805(d)(1) procedures through which the newly appointed members received the already-presented evidence nor raising the issue on appeal, the Air Force Court of Criminal Appeals held the application of R.C.M. 805(d)(1) violated the appellee's "right to military due process . . . , resulting in a fundamentally unfair trial." *Id.* at 14 (internal quotation omitted).

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[5] The lower court rejected Appellant's Supplemental Assignment of Error regarding a preserved objection to the Members' receipt of evidence during deliberations without reopening of argument. (J.A. 163, 186; *see also* Appellant's Supp. Pet., Mar. 11, 2021.) In the interest of ensuring the resolution of preserved errors before resorting to *Chin*, the United States does not oppose the lower court's consideration of this Supplemental Assignment of Error on remand, but maintains its position that the filing was untimely. (*See* Appellant's Supp. Pet. at 35 (asking Court, should it answer Certified Issue affirmatively, to remand for consideration of issue); J.A. 212–20 (urging denial based on untimely filing.)

[6] The case was certified on behalf of the United States by the Judge Advocate General of the Air Force. *Vasquez*, 72 M.J. at 14.

This Court reversed, rejecting the lower court reliance on "military due process," an "amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]. They do not." *Id.* at 19. Because the Code specifically authorized the procedures in the appellee's case, the lower court erred finding "military due process" rights outside those in the Code, and erred finding the procedures violated those un-enumerated "military due process" rights. *Id.* at 20.

Here, the lower court found it could disregard waiver under *Chin* "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." *Cooper*, 80 M.J. at 670–71. But this extra-legal test merely revives the "military due process" firmly rejected in *Vasquez*.

A Court of Criminal Appeals exercises its "should be approved" power based on "the entire record." Art. 66(c), UCMJ, 10 U.S.C. § 866(c) (2012). The lower court's "unique military circumstances" standard, applied to "highlight the importance of the right to an [individual military counsel]," *Cooper*, 80 M.J. at 671, creates a right to relief outside the "correct law and fact" application of *Strickland* that already permitted an avenue of relief for the error, and outside the individualized circumstances in Appellant's Record.

Appellant's argument that the lower court's standard was proper because it relied on "ingrained legal concepts in military law" is misplaced. (Appellant's Ans. at 19.) The Air Force Court of Criminal Appeals' consideration of "the dual goals of justice and good order and discipline" as part of its post-trial delay analysis, *United States v. Gay*, 74 M.J. 736, 744 (A.F. Ct. Crim. App. 2015), is not comparable to the lower court's reference to "uniquely military" circumstances that "may undermine good order and discipline" if left uncorrected, *Cooper*, 80 M.J. at 670.

Whereas the Air Force Court's use of the term, in context with its other factors, is case-specific, *see Gay*, 74 M.J. at 744, the lower court here invokes "good order and discipline," not in relation to a specific appellant, but to whether the waived issue, globally, effects good order and discipline and the "perceived fairness of a court-martial," *Cooper*, 80 M.J. at 670. The lower court further emphasized its decision to disregard Appellant's waiver rested on factors surrounding the right to individual military counsel generally, seemingly disregarding waiver to provide a cautionary tale for practitioners rather than because of anything in Appellant's Record. *See id.* at 671.

Additionally, Appellant's comparison to the consideration of perceived fairness in challenges for implied bias and in assessing unlawful command influence is inapt, (Appellant's Ans. at 20), since both are rooted in either the

Rules for Courts-Martial or the Code—along with the Constitution and other affirmative grants of right in statute and regulation—the sole sources of rights military appellate courts may look to, along with an assessment of *this* Record, in granting relief. *See* Art. 37(a), UCMJ, 10 U.S.C. § 837(a) (2016); R.C.M. 104(a)(2); R.C.M. 912(f)(1)(N); *see also Vasquez*, 72 M.J. at 19.

D. Review of certified cases is mandatory. As to recommended issues, in practice this Court sometimes uses certified issues to limit review, sometimes disregards the limited wording of certified issues, and sometimes decides issues implicit in certified issues.

This Court "shall review the record" in "all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to [this Court] for review." Art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012). This Court "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law" by the lower court. Art. 67(c), UCMJ, 10 U.S.C. § 867(c). In a certified case, "that action need be taken only with respect to the issues raised by" the Judge Advocate General. *Id.* This "negative implies that action *may* be taken by [this] Court with respect to issues other than those certified . . . and [this Court has] always exercised [its] jurisdiction in this manner." *United States v. Kelly*, 14 M.J. 196, 200 (C.M.A. 1982).

Here, the Judge Advocate General forwarded "the Record of Trial and the decision of [the lower court] . . . for review" and "recommended" consideration of a single issue. (Certificate for Review, Jan. 8, 2021.) But once the Judge

Advocate General provides this Court jurisdiction by forwarding the record, this Court decides how to resolve any recommended issues, and also what action should be taken beyond merely answering recommended issues. *See* Art. 67(c), UCMJ, 10 U.S.C. § 867(c); *cf. United States v. Cuthbert*, 11 C.M.A. 272, 277 (C.M.A. 1960) (Ferguson, J., dissenting) (noting his "reading of the opinion of the board of review" led him "to attribute a broader meaning to the certified issues" than majority); *cf. also Cooper*, 78 M.J. at 283 (declining to answer three of four Certified Issues since resolution of first rendered them moot); *Kelly*, 14 M.J. at 200 (declining to answer certified issue because answer would have been advisory).

Nor can this Court ignore portions of the Record, including a full reading of the lower court's Opinion, should they be necessary to resolve the Certified Issue. *Cf. United States v. Engle*, 3 C.M.A 41, 43 (C.M.A. 1953) (finding "nothing in [Article 67] permitting [the Court] to refuse to consider any record which has been certified").

In practice, the recommendation of issues by the "quasi-judicial" Judge Advocate General, *United States v. Monett*, 16 C.M.A. 179, 180 n.1 (C.M.A. 1966), and the resulting appellate litigation, produces a variety of results. Sometimes this Court considers issues not explicitly raised in the recommended issues. *See, e.g.*, *United States v. Thornton*, 8 C.M.A. 446, 448 (C.M.A. 1957); *United States v. Anazlone*, 43 M.J. 322, 328 (C.A.A.F. 1995) (Wiss, J., concurring)

(noting majority decides issue "not within the certified issue"); *cf. United States v. Cosner*, 35 M.J. 278, 279 (C.A.A.F. 1992) (looking to issues implicit in granted issue). And the Court has rejected arguments not explicitly certified for reasons other than lack of certification. *See United States v. Clifton*, 71 M.J. 489, 493 (C.A.A.F. 2013) (Erdmann, J., concurring) (noting he would have rejected Government's waiver argument because Government did not certify issue after Court granted petition); *id.* at 496 (Stucky, J., concurring) (noting Court could decide waiver issue regardless of whether Government certified or raised it).

Sometimes the Court treats issues not explicitly certified as "law of the case." *United States v. Grooters*, 39 M.J. 269, 272–73 (C.A.A.F. 1994). Other times this Court both limits its review to the explicit recommended issues and also proceeds to prospectively rule on the "real underlying issue." *See, e.g.*, *United States v. Banks*, 7 M.J. 92, 93–94 (C.M.A. 1979) (declining to answer underlying issue for instant case but nonetheless announcing rule for prospective cases).

As noted above, the lower court's presumption of prejudice is within the scope of the Certified Issue because it was inextricably linked to its misapplication of *Chin*. *See supra* Section A.2. Regardless, Appellant's argument that this Court should decline to consider the United States' argument that the lower court erred applying a presumption of prejudice in its *Strickland* analysis is a parsimonious view of this Court's power to review certified cases and recommended issues from

the Judge Advocate General, as well as of historical practice. (*Contra* Appellant's Ans. at 21.)

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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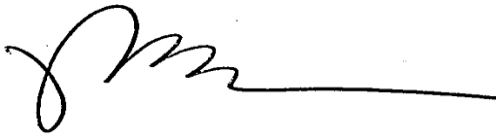

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I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on May 17, 2021.

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