**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ARMED FORCES**

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| UNITED STATES,<br>Appellant,<br>v.<br><br>Staff Sergeant (E-5)<br>DANIEL H. CHIN<br>United States Air Force,<br>Appellee | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | BRIEF OF THE UNITED STATES MARINE CORPS DEFENSE SERVICES ORGANIZATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE<br><br>USCA Dkt. No. 15-0749/AF<br><br>Crim. App. No. 38452 |

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## ISSUE PRESENTED

**WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS (AFCCA) COMMITTED LEGAL ERROR BY FINDING THAT UNREASONABLE MULTIPLICATION OF CHARGES WAS NOT WAIVED, IN DIRECT CONTRADICTION OF THIS COURT'S BINDING PRECEDENT IN UNITED STATES V. GLADUE, 67 M.J. 311 (C.A.A.F. 2009).**

## STATEMENT OF STATUTORY JURISDICTION

This Court has jurisdiction to review this case under Article 67(a)(2), UCMJ, because the Judge Advocate General of the United Sates Air Force certified the above issue to this Court.

## STATEMENT OF THE CASE AND FACTS

*Amicus* adopts Appellee's statement of the case and statement of facts.

## SUMMARY OF ARGUMENT

An appellant is entitled to relief from a preserved, non-harmless error. An appellant is also entitled to relief from a forfeited error upon showing that the error was plain, obvious, and prejudicial. However, an appellant is not entitled to relief for a waived error; nevertheless, the Uniform Code of Military Justice, the Rules for Courts-Martial, and this Court's precedent all recognize that a court of criminal appeals has the discretion to grant relief to an appellant for a waived error.

No provision of a pretrial agreement can deprive a court of criminal appeals of its statutory jurisdiction. The Air Force Court of Criminal Appeals acknowledged that Appellee's pretrial agreement waived the issue of unreasonable multiplication of charges. Nevertheless, the Court of Criminal Appeals exercised its discretion to grant relief to Appellee for that issue.

The amended certified issue challenges the authority of the Court of Criminal Appeals to take such action, in light of the pretrial agreement, but not the appropriateness of the action taken. The certified issue must be answered in the negative because the jurisdiction of the Court of Criminal Appeals was unaffected by the pretrial agreement and the Court of Criminal Appeals had the authority to act as it did.

## ARGUMENT

### I. THE PRETRIAL AGREEMENT DOES NOT DEPRIVE THE COURT OF CRIMINAL APPEALS OF ITS JURISDICTION TO REVIEW APPELLEE'S CASE.

"Jurisdiction is the power of a court to try and determine a case and to render a valid judgment." United States v. Nealy, 71 M.J. 73, 75 (C.A.A.F. 2012). Appellee entered into a pretrial agreement in which he agreed to waive all waivable motions. That agreement "extinguished his right to raise [the issue of unreasonable multiplication of charges] on appeal." United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009). However,

that agreement did not – and could not - affect the jurisdiction of the Air Force Court of Criminal Appeals to act.

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." Article 66(c), UCMJ. An accused may waive such review under limited circumstances. See Article 61, UCMJ. However, such waiver may not be "compel[led], coerce[d], or induce[d]." Rule for Courts-Martial 1110(c). Further, "a term or condition in a pretrial agreement shall not be enforced if it deprives the accused of . . . the complete and effective exercise of post-trial and appellate rights," Rule for Courts-Martial 705(c)(1)(B).

Appellee's pretrial agreement did not waive appellate review and, even if it did, any such waiver would be invalid. In enacting Article 61, UCMJ, Congress provided "precise and particular" language permitting waiver of appellate review. United States v. Smith, 44 M.J. 387, 391 (C.A.A.F. 1996). In part, such a waiver is effective only if filed after the convening authority acts. Id. at 472; United States v. Hernandez, 33 M.J. 145, 147 (C.M.A. 1991). This Court has noted the "sound policy reasons" that support this legislative choice. Hernandez, 33 M.J. at 148-149. Moreover, this Court has observed that "the bargaining relationship between a service member and

the convening authority at the pretrial stage is fundamentally different from the circumstances in which rights may be waived during trial and post-trial proceedings." United States v. Tate, 64 M.J. 269, 271 (C.A.A.F. 2007). To resolve the certified issue this Court need only apply this settled law. Appellee's pretrial agreement with the convening authority did not and could not affect the appellate authority of the Court of Criminal Appeals in light of the statutory scheme enacted by Congress.

Moreover, in the Rules for Courts-Martial the President of the United States further limited the manner in which appellate review may be waived. "No person may compel, coerce, or induce an accused by force, promises of clemency, or otherwise to waive or withdraw appellate review." Rule for Courts-Martial 1110(c). Yet Appellee's pretrial agreement with the convening authority is a promise of clemency in exchange for a promise to give up certain rights. See Rule for Courts-Martial 705(b). That is an impermissible way to obtain a waiver of appellate review. The Rules also provide that a term of a pretrial agreement "shall not be enforced if it deprives the accused of . . . the complete and effective exercise of post-trial and appellate rights." Rule for Courts-Martial 705(c)(1)(B).

Accordingly, insofar as the waiver provision in the pretrial agreement deprives the Court of Criminal Appeals of the authority to render a valid judgment in Appellee's case, settled

law reveals that such a provision is invalid. The pretrial agreement did not in any way deprive the Air Force Court of Criminal Appeals of its authority to act in Appellee's case.

Were this Court to hold otherwise, then the pretrial agreement would be the functional equivalent of a waiver of the right to appellate review. Such a holding would be a dramatic departure from this Court's precedent, inconsistent with the Rules for Courts-Martial, and contrary to the unambiguous language of the UCMJ.

## II. A COURT OF CRIMINAL APPEALS HAS THE POWER TO GRANT RELIEF FOR A WAIVED ISSUE.

The power of the courts of criminal appeals does not exist in a vacuum, nor is it unfettered; *should be approved* is a legal standard subject to appellate review. United States v. Nerad, 69 M.J. 138, 144-146 (C.A.A.F. 2010). See United States v. Waymire, 26 C.M.R. 32, 35 (C.M.A. 1958) ("it was never intended that a board of review be given the power to disapprove findings [purely] in its 'discretion'"). Yet "the words 'should be approved' do have some meaning." Nerad, 69 M.J. at 146. This Court recognizes that the courts of criminal appeals have the inherent authority to determine, in the interest of justice, that a certain finding or sentence should not be approved. United States v. Claxton, 32 M.J. 159, 162 (C.M.A. 1991). They may "determine the circumstances, if any, under which [they]

would apply waiver or forfeiture." United States v. Quiroz, 55 M.J. 334, 338 (C.A.A.F. 2001). They may even "act[] to disapprove findings that are correct in law and fact." Nerad, 69 M.J. at 147.

A valid waiver leaves no error to correct on appeal. United States v. Campos, 67 M.J. 330, 332 (C.A.A.F. 2009). But such waiver does no more than render the findings correct in law and fact. It does not deprive the Court of Criminal Appeals of its recognized power to disapprove findings despite the absence of error. Nerad, 69 M.J. at 147; Claxton, 32 M.J. at 162; Quiroz, 55 M.J. at 338.

"The legislative history of Article 66 reflects congressional intent to vest broad power in the Courts of Criminal Appeals." United States v. Tardif, 57 M.J. 219, 223 (C.A.A.F. 2002). Accordingly, this Court has "consistently recognized the broad power of a Court of Criminal Appeals to moot claims of prejudice by affirming 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." Id. (marks and citations omitted). "Thus . . . in addition to its determination that no legal error occurred within the meaning of Article 59(a), the court below was required to determine what findings and sentence should be approved, based on all the facts and

circumstances reflected in the record." Id. at 224 (marks omitted). That is precisely what the Court of Criminal Appeals did in this case when – despite the absence of legal error - it granted relief to Appellee.

Accordingly, the Court of Criminal Appeals possesses the power to grant relief for the unreasonable multiplication of charges despite Appellee's waiver.

## III. THE CERTIFIED ISSUE CHALLENGES ONLY THE EXISTENCE OF THE POWER OF THE COURT OF CRIMINAL APPEALS TO GRANT RELIEF FOR A WAIVED ISSUE, NOT THE MANNER IN WHICH IT WAS EXERCISED IN THIS CASE.

The facts of this case potentially present two separate questions: Whether there was an unreasonable multiplication of charges and whether the Court of Criminal Appeals was able to consider that issue despite the waiver in the pretrial agreement. The certification raises only the latter question, and the amended certified issue raises it only in the context of whether a court of criminal appeals is prevented from considering a waived issue as a matter of law. In particular, the amended certified issue removes the originally certified question of whether the Court of Criminal Appeals abused its discretion in considering the waived issue in this case.

When a court of criminal appeals disapproves findings that are correct in law and fact, as occurred here, this Court

"accept[s] the CCA's action unless in disapproving the findings the CCA clearly acted without regard to a legal standard or otherwise abused its discretion." Nerad, 69 M.J. at 147. Yet in the amended certified issue the Judge Advocate General of the Air Force removed the question of whether the Court of Criminal Appeals abused its discretion in this case. The certified issue now questions only whether the Court of Criminal Appeals could disapprove the findings of guilt to the unreasonably multiplied charges, and not whether it should have done so under the facts of this case.

*Amicus* respectfully suggests that this Court should confine its review to only the question presented and apply settled law to hold that the Court of Criminal Appeals had the authority to disapprove the findings of guilt to the unreasonably multiplied charges.

In finding an unreasonable multiplication of charges in this case, the Court of Criminal Appeals acknowledged that Appellee affirmatively waived any claim of an unreasonable multiplication and that its consideration of the issue "is a significant departure from [its] consistent practice of declining to review, on appeal, issues that were waived at trial." United States v. Chin, No. 38452, slip op. at 6 (A.F. Ct. Crim. App. June 12, 2015) (unpub. op. on recon) (J.A. at 6). However, the Court of Criminal Appeals differentiated this case

by the fact that "the totality of the circumstances presented here convinces [it] that the charging scheme grossly exaggerates [Appellee's] criminality." Ibid. The Court of Criminal Appeals then applied this Court's precedent regarding the issue of unreasonable multiplication of charges and concluded that "the charging decisions in this case constituted an unreasonable multiplication of charges as applied to both findings and sentencing." Id. at 10 (J.A. at 10). In so concluding, the Court of Criminal Appeals acted with regard to a legal standard, as is required. Therefore, this Court should not disturb the decision of the Court of Criminal Appeals.

The certified issue should be answered in the negative.

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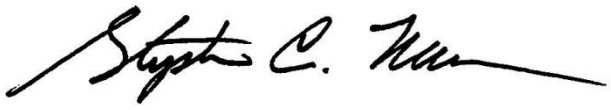

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**CERTIFICATE OF E-FILING AND SERVICE**

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