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

| | |
|---|---|
| UNITED STATES,<br>Appellant | APPELLEE'S ANSWER |
| v. | Crim.App. Dkt. No. 201600015 |
| JAMES A. HALE, III<br>Staff Sergeant (E-6)<br>U.S. Marine Corps,<br>Appellee | USCA Dkt. No. 17-0537/MC |

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

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## CERTIFIED ISSUE

**WHAT IS THE CORRECT TEST WHEN ANALYZING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED UPON A CONFLICT OF INTEREST NOT INVOLVING MULTIPLE REPRESENTATION?**

## STATEMENT OF STATUTORY JURISDICTION

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

## STATEMENT OF THE CASE

A panel of officer and enlisted members sitting as a general court-martial convicted Appellee, contrary to his pleas, of one specification of failing to obey a lawful general order, one specification of wrongful use of an anabolic steroid, two specifications of rape, one specification of aggravated assault, one specification of adultery, one specification of kidnapping, and one specification of indecent language, in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2006), and Articles 112a, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 920, 928, 934 (2012). The

Members sentenced Appellee to twenty-six years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The record was docketed with the lower court on May 2, 2016. Appellee assigned seven errors, including a claim that he received ineffective assistance of counsel due, in part, to the lead Trial Defense Counsel's conflict of interest. The lower court set aside the findings and sentence. *United States v. Hale*, No. 201600015, 2017 CCA LEXIS 364 (N-M. Ct. Crim. App. May 31, 2017).

On July 31, 2017, the Judge Advocate General of the Navy certified one issue to this Court: "What is the correct test when analyzing an ineffective assistance of counsel claim based upon a conflict of interest not involving multiple representation." Despite the limited nature of the certified issue, the Government asks this Court to expand the certified issue to include the additional issues at paragraphs C, D, and E of their Brief.

## STATEMENT OF FACTS

### Capt KC's Conflict and Adverse Effects

Capt KC was appellee's detailed defense counsel and was assigned to Marine Corps Service Organization, LSST-Miramar. Her husband was a

prosecutor under the supervision of LtCol CT, the Regional Trial Counsel for the Western Region, who was his Reporting Officer (RO). (J.A. 392, 393-94, 407.) LtCol CT was also the lead prosecutor in this case. (J.A. 4.) Capt KC was slated to transfer from the Defense Services Organization to the Trial Services Organization as her next assignment. (J.A. 396.) Appellee was also represented by Capt JS. (J.A. 207.)

Sometime after he was detailed to the case, LtCol CT came to the defense office to discuss appellee's case. During that conversation, he told Capt KC and Capt JS to ignore his rank during the litigation of the court-martial. (J.A. 379.) Prior to an Article 39(a) session held on 21 January 2015, LtCol CT came into Capt KC's office to discuss a discovery motion the defense filed. In the course of the conversation, LtCol CT told Capt JS that if he was LtCol CT's peer, he would have told Capt JS to "fuck off." (J.A. 395.) LtCol CT testified at the post-trial 39(a) session that he remembers "probably saying that" to Capt JS. (J.A. 511.) Following another Article 39(a) session held on February 19, LtCol CT commented to Capt KC that if she were her husband, who currently worked under him, he would "punch [her] in the face right now." (J.A. 12.)

A few days prior to trial, Capt KC went to LtCol CT's office to discuss witnesses and evidence with him. (J.A. 13.) After Capt KC informed him of

possible objections she may make, LtCol CT warned her by saying something to the effect of, "be careful, you are coming back to the Government soon." (J.A. 13.)

In addition, prior to appellee's trial and in the presence of Capt KC's husband, LtCol CT told a bystander "I have a case against his wife," adding "I am not going to stop holding that against you" referring to Capt KC's husband. (J.A. 12, 409.) Capt KC's husband stated that he told his wife about this comment that evening when he got home. He also "expressed to her some concern that he was my RO and that I may have to raise the issue of [LtCol CT] not writing my fitness report since he was involved in a contested case with [his wife]." (J.A. 408.) He further indicated that as the trial progressed Capt KC informed him that she was considering raising the issue of prosecutorial misconduct against [LtCol CT] and the Government's Highly Qualified Expert [GHQE]. He responded to his wife by telling her "that if she raised the issue I would probably have to ask that someone other than [LtCol CT] serve as my RO." (J.A. 12, 408.)

During the post-trial R.C.M. 1102 hearing addressing possible unlawful command influence, prosecutorial misconduct, and ineffective assistance of counsel in this case LtCol CT admitted that his alleged "coming back to the Government" comment, if spoken, would have been inappropriate:

> Q. I mean, if that comment was uttered, is there any doubt in your mind that that is a facially inappropriate comment, no matter what the context?

A. If it was uttered by me, sure.
Q. Yeah.
A. If a prosecutor says that, there's a problem.

(J.A. 512.) At the end of the hearing, the military judge presiding over it stated for the record "I believe that a comment regarding [Capt KC] going back to the government, in some capacity, was made." (J.A. 513.)

During her cross-examination of SK, Capt KC explored the issues surrounding the text message exchanges between her and GHQE. (J.A. 278-79.) Apparently, LtCol CT was very offended by this. The following is how he characterized it during his closing:

> What you got presented to you from the defense is that now the highly qualified expert for the government, [GHQE], has now done something wrong. She has now provided emotional support for someone who has never had success with law enforcement, who has lived that hard life we've talked about. And because she maintains contact with that person, because she is someone that helped get her here 19 months later, after that man raped her in the cab of a truck, it is now insidious.
>
> Members, that's a front. The entire process, it's in[sic] a front. Every one of us that are standing right here, that somehow, someway an agent of the government is providing something that's not appropriate, that's disgusting. I sit back and listen to that, again, I think back to my original points to you. The government just can't win because everybody says we're wrong. As you heard the vouching from [Capt KC], liar, liar; SK lies; Det. S is biased. [AR], why did she have another kid? Clearly she's lying. Clearly she has a dog in the fight.

(J.A. 503.) He went on to refer to the defense's challenge of AR's testimony:

> Now, a couple of highlights that we had from the defense focused a lot on [AR], strangely, Tech Sergeant [AR]. And as we sat through and looked at their timeline that they've presented, there is an absolute "aha" moment that came out about [AR's] vengeance, if you will, reason to cry rape ten years later. That's because on a 39(a) session in August of 2014, she testified under oath that [KH] and [SH] owned the apartment during the alleged assault.
>
> But on the stand this past Thursday when asked the same question, she thought they were in the bedroom. We got her, game over. Members, don't believe anything that [AR] said. His bedroom is not in the apartment. She doesn't remember where they are. It was ten years ago. Were they in an apartment? Possible. Were they not? That's also possible; many things are possible. But I went through all of this discussion with you before. But to go ahead and discredit [AR] because of that minor inconsistency, that's absurd.

(J.A. 504.)

**Capt KC's Violation of The Duty of Loyalty**

Capt KC cannot recall if she ever informed SSgt Hale about her next assignment as a prosecutor, or that, at the time of his trial, LtCol CT was her husband's RO. (J.A. 394.) At least in regards to her husband's situation, she didn't think this was "significant." (J.A. 394.) She certainly never requested that he execute any sort of waiver. (J.A. 394.) Nor did she disclose the "coming back to the Government" comment to appellee, the fact that she "was under the impression

that I was being scrutinized" by a senior officer in that shop, that she might be compromised, or make him aware that they could request a new prosecutor. (J.A. 397, 399-400.) Capt KC also failed to alert the military judge to this misconduct, indicating "that's not how we do things in the Marine Corps," and fearing that, to do so, would cause a "shit storm." (J.A. 507.)

Capt KC made a "resolution" to herself that she was not going to allow LtCol CT's behavior affect the manner in which she litigated the case. (J.A. 508.) However, during LtCol CT's argument on the prosecutorial misconduct motion regarding the text message exchanges between GHQE and SK, Capt KC became visibly shaken. (J.A. 241-46, 386.) And, in the opinion of DHQE, "the conduct of the prosecutor had succeeded in backing [Capt KC] down from doing some things that I thought should be done during the course of trial" and that LtCol CT's tactics were successful "in cowering [Capt KC] from effectively representing [appellee]." (J.A. 505, 506.) When asked at the post-trial R.C.M. 1102 hearing "would it have been important to get [LtCol CT] off this case so your client could have a fair trial," Capt KC answered, "I think that probably would have been a good route to take." (J.A. 509-10.)

## SUMMARY OF ARGUMENT

The court of criminal appeals properly applied *Cuyler v. Sullivan* where a concurrent conflict of interest breached the defense counsel's duty of loyalty and was not disclosed to the accused or the military judge until after the trial. 446 U.S. 355 (1980). Appellant's arguments in paragraphs C, D, and E of their Brief were not certified under Article 67(a)(2) and (c) and are not otherwise before this Court.

## ARGUMENT

### I.

### THE *CUYLER* TEST IS THE CORRECT TEST WHEN ANALYZING A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL INVOLVING A CONFLICT OF INTEREST THAT COMPROMISES THE DUTY OF LOYALTY WHERE THE ACCUSED AND TRIAL COURT WERE NOT AWARE OF THE CONFLICT DURING THE TRIAL.

### Standard of Review

This Court reviews claims of ineffective assistance *de novo. United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004).

### Argument

**a. The Cuyler test is the appropriate test for ineffective assistance of counsel where a defense counsel labors under an actual conflict of interest.**

"The Sixth Amendment right to effective assistance of counsel at trials by court-martial is a fundamental right of servicemembers." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citations omitted). The right to counsel includes "a correlative right to representation that is free from conflicts of interest." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

Generally, courts review claims of ineffective assistance of counsel using the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) (requiring deficient performance and prejudice). The prejudice prong under *Strickland* requires an appellant must show "such prejudice as to indicate a denial of a fair trial or a trial whose result is unreliable." *Id.* at 694.

In limited circumstances involving conflicts of interest, a reduced standard of prejudice may apply. *See Cuyler*, 446 U.S. at 351; *Lee*, 66 M.J. at 388. For example, in cases involving a defense counsel's actual conflict of interest that breaches the duty of loyalty to the accused, the standard for prejudice is reduced. *See Cuyler*, 446 U.S. at 349-50. The reduced standard under *Cuyler* becomes whether the actual conflict adversely affected counsel's performance. *See id.* at 348; *see also Mickens*, 535 U.S. at 175.

When an actual conflict exists, the accused can waive the conflict with a knowing and voluntary waiver. *Lee,* 66 M.J. at 388. The accused, of course, must first be aware of the conflict in order to waive it. *Id* In such a case, the military judge, after having been made aware of the conflict, should incorporate it into the record. *Mickens*, 535, U.S. at 172-73.

If the conflict is not waived, the question is when should the *Cuyler* test be applied over *Strickland*. The Supreme Court has applied the *Cuyler* standard in one other case. *See Mickens v. Taylor,* 535 U.S. 162 (2002). Both cases involved a conflict due to representation of multiple defendants. *Id.* at 163. The result is that the *Cuyler* standard must be applied when a defense counsel actively represents conflicting interests during a trial. *Id.*

In *Cuyler*, the defense attorney actively represented three defendants in a murder trial. 466 U.S. at 338. Sullivan, one of the defendants, was tried separately and was aware of his counsel's representation of two co-accused. *Id.* Nonetheless, Sullivan did not object at trial to the representation. *Id.* On appeal, the Supreme Court declined to extend a per-se presumption of prejudice. *Id.* at 347-48 (declining to extend *Holloway v. Arkansas*, 435 U.S. 475 (1978)). Rather the Court held that where a defense attorney actively represented conflicting interests, the

petitioner must show that the conflict "adversely affected [the] lawyer's performance." *Id.* at 348.

In *Mickens*, a murder trial, one of the defense counsel previously represented the victim on unrelated charges. 535 U.S. at 164. The judge in *Mickens* was the same judge that heard the victim's case previously, and was thus aware that the defense attorney was the same for both cases. *Id.* at 165. The Court held that the *Cuyler* standard of requiring the petitioner to show that the conflict adversely affected the lawyer's performance was the appropriate standard, however, Mickens failed to meet that standard. *Id.* at 175. The Court acknowledged the difference between *Mickens* and *Cuyler* in that the representation in *Mickens* was not concurrent with the conflicted prior representation. *Id.* at 175. The Court noted that the true measure of when to apply the Cuyler standard is when counsel "actively represented conflicting interests." *Id.* at 175.

As noted by the court of criminal appeals, there is a circuit split with regard to extending *Cuyler*'s concurrent representation standard to breaches of the duty of loyalty. *Hale*, 2017 CCA LEXIS 364, at *14. The Fifth and Eighth Circuits have declined to extend *Cuyler* to types of representation outside of concurrent representation. *Beets v. Scott*, 65 F.3d 1258, 1270 (5th Cir. 1995); *Caban v. United States*, 281 F.3d 778, 781-83 (8th Cir. 2002). However, the First, Second, Third,

Fourth, Seventh, Ninth, and Tenth have decided that *Cuyler* extends to conflicts where counsel violates the basic duty of loyalty owed to a client.[1]

This Court has refused to limit the application of *Cuyler* to cases involving concurrent representation as numerous C.A.A.F. decisions have applied *Cuyler* to other situations where the interests of client and counsel are in conflict. *See Lee*, 66 M.J. 387 (C.A.A.F. 2008); *Cain*, 59 M.J. 285; *United States v. Babbit*, 26 M.J. 157 (C.M.A. 1988).

In *Lee*, the appellant alleged that "his detailed defense counsel's failure to disclose a conflict of interest resulted in an uninformed selection of counsel." 66 M.J. at 388. The defense counsel informed the appellant that he would be a

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[1] *See United States v. Segarra-Rivera*, 473 F.3d 381, 385 (1st Cir. 2007) (addressing conflict between attorney's personal interest and client's interests); *LoCascio v. United States*, 395 F.3d 51, 56 (2nd Cir. 2005) (addressing conflict between attorney's personal interest and client's interests); *Chester v. Comm'r of Pa. Dep't of Corr.*, 598 Fed. Appx. 94, 105, unpublished op. (3d Cir. 2015) (per curiam) (addressing conflict between attorney's personal interest and client's interests); *Rubin v. Gee*, 292 F.3d 396, 406 (4th Cir. 2002) (addressing conflict between attorney's personal interest and client's interests); *United States v. Lafuente*, 426 F.3d 894, 898 (7th Cir. 2005) (addressing successive representation of potentially conflicted clients); *Campbell v. Rice*, 408 F.3d 1166, 1170 (9th Cir. 2005) (addressing conflict between attorney's personal interest and client's interests); *United States v. Flood*, 713 F.3d 1281, 1286 n.1 (10th Cir. 2013) (applying *Cuyler* to third-party fee arrangement).

prosecutor in the future, but failed to inform him that he would be prosecuting cases *while* he was acting as Appellant's defense counsel. *Id.* Therefore, detailed defense counsel was simultaneously acting as a prosecutor and defense counsel on the same installation. *Id.*

This Court in *Lee* ultimately remanded the case for a *DuBay* hearing, but endorsed applying the *Cuyler* standard to cases of this nature. *Id.* at 389-90. In determining the issues to be decided on remand, the *DuBay* hearing was directed to determine, "[w]hat effects on the representation can the accused point to resulting from any claimed conflicts of interest on the part of his detailed defense counsel." *Id.* at 390. Essentially, the *DuBay* hearing was convened to investigate what, if any, were the adverse effects of the conflict. *Id.* As the lower court pointed out in the present case, this demonstrates this Court's endorsement of the *Cuyler* standard for cases in which detailed defense counsel fails to disclose a conflict of interest. *See Hale*, No. 201600015, 2017 CCA LEXIS 364.

Moreover, while the *Lee* court split in deciding whether to remand the case for a *DuBay* hearing, all five justices agreed on the application of the *Cuyler* standard in these types of cases. *Id.* at 392 (Ryan, J. dissenting). In fact, the dissent explicitly states

> "[t]he Supreme Court explicitly provided for this type of case, holding that prejudice may be presumed, when

> defendant's counsel is burdened by an actual conflict of interest . . . . But to establish an actual conflict of interest, the defendant must demonstrate that his counsel actively represented conflicting interests' *and* that 'an actual conflict of interest adversely affected his lawyer's performance."

*Id*. (quoting *Cuyler*, 446 U.S. at 348) (internal citations omitted). Therefore, the *Cuyler* standard applies in cases involving conflicts other than concurrent representation.

In *Babbit*, the civilian defense counsel had sex with the appellant the evening before the final day of the trial. 26 M.J. at 158-59. The C.M.A. determined that in an actual conflict of interest case, prejudiced can be presumed. *Id.* at 159. Citing *Cuyler*, the court determined the appropriate standard to be whether defense counsel actively represented conflicting interests and the actual conflict adversely affected performance. *Id.* But Babbit failed to demonstrate any adverse effect on performance due to the civilian defense counsel's extensive and effective preparation. *Id.* Having failed the test under *Cuyler*, the court applied the two-prong *Strickland* test and determined that no prejudice existed. *Id.* (internal citations omitted).

In the present case, the lower court followed C.A.A.F's precedent, holding that the *Cuyler* standard is intended to protect the accused from the "deleterious, hard-to-quantify effect on the reliability of the proceeding[s]" caused by an actual

conflict of interest and a breach of duty of loyalty. *Hale*, No. 201600015, 2017 CCA LEXIS 364 at *25. Certainly, the effects of a conflict of interest are exponentially more difficult to ascertain where Appellee and the military judge were not even aware of the conflict at the time of trial. At the most fundamental level, the lack of Appellee's, and the military judge's, awareness prejudiced Appellee.

The defense counsel stripped the Appellee of his ability to object or consent to conflicted representation. He was unable to fire his conflicted defense counsel or request that the Military Judge recuse the conflict-causing prosecutor.

Similarly, the defense counsel effectively stripped the military judge of the ability to meaningfully address the actual conflict. Having not been informed of the conflict, the military judge was unable to take any protective or corrective actions, or increase his vigilance of counsel's conduct throughout the proceedings to look for adverse effects of the conflict. Finally, the military judge was not able to ensure that Appellee was aware of his rights and the options he had to deal with the conflict. *See Lee*, 66 M.J. at 388.

This egregious and unnecessary loss of protection of Appellee's constitutional right to conflict-free counsel, in and of itself, warrants a reduced

standard of prejudice under *Cuyler*. This is because the conflict adversely affected Appellee's ability to invoke his constitutional right to conflict-free counsel. *Id.*

Accordingly, *Cuyler* is the appropriate standard to apply for ineffective assistance of counsel where the defense counsel represents conflicting interests and where the accused and trial court were unaware of the conflict.

**b. The Lower Court's determination of an actual conflict of interest required a determination that a conflict existed and that the conflict adversely affected performance. Whether analyzed separately or together is of no import.**

The Government asserts that the lower court erred by bifurcating the analysis of whether a conflict existed, and whether the conflict adversely affected performance. Appellant's Brief at 30. This argument is a red herring. An actual conflict of interest that violates the right to counsel under the sixth amendment requires a conflict of interest and an adverse effect on performance. *Mickens*, 535 U.S. at 172 n.5. The analysis remains the same regardless of the order in which the issues are analyzed, so long as the adverse effects are caused by the conflict. In this case, the numerous adverse effects on performance that the lower court relied on were all caused by the Capt KC's conflicts of interest. *See Hale*, No. 201600015, 2017 CCA LEXIS at *37-44.

The Government also asserts that the lower court erred by noting that LtCol CT was Capt KC's prospective reporting officer. Assignments in the military are

fluid and certainly, LtCol CT could have been Capt KC's reporting officer in her next assignment in the same office. Regardless, this is merely one fact in a case full of conflicts. Accordingly, it is not dispositive of whether a conflict existed or whether the conflict adversely affected performance.

**c. The *Cuyler* test does not require consideration of reasonable alternative strategies outside of a conflict based on concurrent representation.**

Finally, the Government argues that *Mickens* required the lower court to consider reasonable alternative defense strategies that the defense counsel might have pursued, and that the lower court failed to consider any such alternative strategies. Appellant's Brief at 36. In stating this requirement, the Government relies on the Fourth Circuit's holding in *Mickens*. *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (citing *Unites States v. Tatum*, 943 F.2d 370, 376 (4th Cir. 1991). That requirement, however, is deeply rooted in, and limited to, conflicts involving conflicting duty of loyalty to multiple clients. *See id.*

The Fourth Circuit explained its reasoning for an inquiry into reasonable alternative defense strategies in multiple representation cases:

> His representation of conflicting interests, however, is not always as apparent as when he formally represents two parties who have hostile interests. He may harbor substantial personal interests which conflict with the clear objective of his representation of the client, or his continuing duty to former clients may interfere with his consideration of all facts and options for his current client. When the attorney is actively engaged in legal representation which requires him to account

> to two masters, an actual conflict exists when it can be shown that he took action on behalf of one. The effect of his action of necessity will adversely affect the appropriate defense of the other. Moreover, an adverse effect may not always be revealed from a review of the affirmative actions taken. Rather, the failure to take actions that are clearly suggested from the circumstances can be as revealing. Thus, the failure of defense counsel to cross-examine a prosecution witness whose testimony is material or the failure to resist the presentation of arguably inadmissible evidence can be considered to be actual lapses in the defense…With these principles in focus, we now analyze whether Gavin's representation of Tatum denied Tatum his right to the effective assistance of counsel. Resolution of that question can lead to the yet more difficult one of whether Kemp's representation of Tatum healed the adverse effects, if any, of Gavin's failures.

*Tatum*, 943 F.2d at 376.

The government's attempt to require such an inquiry outside of the context of multiple representation fails. The Fourth Circuit makes clear in *Mickens* and *Tatum* that the analysis of alternative trial strategies is to aid the court in determining whether a duty to one client altered the trial strategy during the representation of another. Nowhere is this stated as a mandated requirement for all conflicts under *Cuyler* – The Supreme Court does not even make such a requirement in *Mickens*. *See Mickens*, 535 U.S. at 174.

Accordingly, the failure to analyze plausible alternative defense strategies is irrelevant when analyzing a conflict of interest outside the realm of multiple representation.

## II.

## THE GOVERNMENT ATTEMPTS TO BOOTSTRAP AN ADDITIONAL ISSUE TO THIS APPEAL THAT IS NOT CERTIFIED FOR REVIEW BY THE JUDGE ADVOCATE GENERAL AND HAS THEREFORE BEEN WAIVED.

This Court derives its jurisdiction from Article 67, U.C.M.J., 10 U.S.C. §867, and "[i]t is solely within this Court's discretion under Article 67 to determine whether an issue is properly raised." *United States v. Walker*, 57 M.J. 174, 181 (C.A.A.F. 2002) (citing *United States v. Johnson*, 42 M.J. 443, 446 (C.A.A.F. 1995)); *see also Silber v. United States*, 370 U.S. 717 (1962); *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000).

Issues come before this Court in the ordinary course of appeal in one of three ways:

1) this Court grants review of issues that a convicted service member appeals from a service court of criminal appeals, Art. 67(a)(3); C.A.A.F. Rule 18(a)(1);

2) the Judge Advocate General certifies a case to this Court, Art. 67(a)(2); Art. 67(c) ("In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him."); C.A.A.F. Rule 18(a)(2); or

3) in a case properly before this Court, this Court may specify issues.

C.A.A.F. Rule 5.

In the present case on appeal by the United States, the Judge Advocate General certified only one issue:

> What is the correct test when analyzing an ineffective assistance of counsel claim based upon a conflict of interest not involving multiple representation.

The Government attempts to bootstrap an additional issue into this appeal that is waived. It is waived because they are not before the Court through one of the three avenues listed above.[2] It attempts to do this by nesting the issue within the single "Issue Presented." Specifically, the Government asks this Court to review the following additional issue nested in subheading 'E.' of their argument:

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[2] "[A] waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009); *United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) (recognizing waiver is the "'intentional relinquishment or abandonment of a known right'") (quoting *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). Appellate courts will not review waived issues. *Olano*, 507 U.S. at 733. It is well established that the government can implicitly waive issues by failing to raise them. *Tokatly v. Ashcroft*, 371 F.3d 613 (5th Cir. 2004) (citations omitted); *see also United States v. Quiroz*, 22 F.3d 489, 490-91 (2d Cir. 1994) (holding the Government waived its waiver argument by raising it for the first time in a petition for rehearing); *United States v. Beckham*, 968 F.2d 47, 54 n.5 (D.C. Cir. 1992) (noting the Government waived any waiver argument it might have made by failing to raise the issue in its appellate brief); *Fagan v. Washington*, 942 F.2d 1155, 1157 (7th Cir. 1991) (same).

> E. Because there was no legal error under any extant legal tests governing Appellee's right to counsel, the lower court exceeded its Article 66(c) authority in disapproving the findings with an incorrect view of the law.

*See* Appellant's Brief, paragraphs E.

The certified issue, however, unmistakably does not include this issue. Nor is it necessary to decide this issue in order to decide the certified issue. Accordingly, this, or other, issues are not properly before this Court. Thus, a response is not appropriate.

## CONCLUSION

WHEREFORE, appellee respectfully requests that this honorable Court affirm the decision of the Navy-Marine Corps Court of Criminal Appeals.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(c) because: This brief contains 4,813 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because: This brief has been prepared in a monospaced typeface using Microsoft Word Version 2010 with 14-point, Times New Roman font.

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**CERTIFICATE OF FILING AND SERVICE**

I certify that the foregoing was delivered to the Court and a copy served on opposing counsel on September 29, 2017.

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