IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

Kyle A. SHELBY
Sergeant (E-5)
U.S. Marine Corps

Appellant

SUPPLEMENT TO PETITION FOR GRANT OF REVIEW

Ct. Crim. App. Dkt. No. 202200213

USCA Dkt. No. 24-0186/MC

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

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Index of Supplement

Table of Authorities

UNITED STATES SUPREME COURT

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

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS CASES

OTHER MILITARY COURTS OF CRIMINAL APPEALS CASES

FEDERAL CIRCUIT COURT CASES

STATUTES

RULES

Issue Presented

DID THE MILITARY JUDGE ERR WHEN HE DISMISSED CHARGE II WITH PREJUDICE AFTER "CONSIDERING THE INTERESTS OF JUSTICE, THE ACCUSED'S RIGHT TO A FAIR TRIAL, AND THE CUMULATIVE ERROR" OF THE GOVERNMENT?

Introduction

This case is about a military judge's efforts to address an overzealous trial counsel's baseless charge, which had already been improperly referred twice. After giving the Government several chances to correct its substantive and procedural errors, the judge finally resorted to dismissing the charge with prejudice, having considered "the interests of justice, the Accused's right to a fair trial, and the cumulative error" of the Government.[1] The judge's citation to the cumulative error doctrine in this context was not erroneous, as the confluence of such repetitive errors at the trial level is precisely what that doctrine is designed to address.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) had jurisdiction to review this case under Article 62(a)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(A). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[1] App. Ex. XVII at 18.

Statement of the Case

On January 5, 2022, Sergeant Kyle Shelby was charged with false official statement, abusive sexual contact, indecent exposure, assault consummated by a battery, and indecent conduct, in violation of Articles 107, 120, 120c, 128, and 134, UCMJ.[2] On November 8, 2023, after months of pretrial litigation, which included the dismissal (without prejudice), re-preferral, and re-referral of the abusive sexual contact charge (Charge II and its sole specification), the military judge finally issued a ruling dismissing the charge with prejudice,[3] which the Government appealed. On April 24, 2024, the NMCCA issued an opinion vacating the military judge's ruling and remanding the case for further proceedings,[4] which Appellant timely petitioned this Court to review.

Statement of Facts

A. <u>At the outset, the alleged facts did not support charging Appellant with abusive sexual contact under Article 120.</u>

The charges against Appellant stem from a single alleged incident on October 31, 2022.[5] In her initial interview with law enforcement, the alleged victim claimed Appellant had ejaculated on her face and stomach without her

[2] Charge Sheet (*Shelby I).*
[3] App. Ex. XVII.
[4] *United States v. Shelby*, No. 202200213, slip op. (N-M. Ct. Crim. App. Apr. 24, 2024).
[5] App. Ex. XVII at 31.

consent. She never reported the semen had contacted her breasts; only her face, hair, pillow, and shirt.[6] In a subsequent interview with law enforcement, the alleged victim again explained the semen had contacted her face, not her breasts.[7] Additionally, several witnesses were interviewed by law enforcement who all remembered the alleged victim describing semen contacting her face, not her breasts.[8]

B. Realizing the alleged misconduct could only be charged as a violation of Article 120 if the semen also contacted the alleged victim's breasts, the trial counsel misrepresented the alleged victim's allegations to reflect that.

When the case arrived at the prosecution office, the trial counsel recognized the difficulty of charging the alleged misconduct as a violation of Article 120, UCMJ.[9] This is because the element of "sexual contact" requires "touching . . . either directly or through the clothing, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person with the intent . . . [to] gratify the sexual desire of any person," which "may be accomplished by any part of the body or an object." Article 120, UCMJ. Under this definition, it is not enough for semen to contact any part of the alleged victim's body; it has to be one of the listed sexual body parts to constitute abusive sexual contact. But despite two interviews with

[6] App. Ex. XLIII at 2.
[7] App. Ex. XIII at 49.
[8] App. Ex. XVII at 32.
[9] App. Ex. XIII at 50.

law enforcement, and several other statements to friends and colleagues, the alleged victim had never claimed the semen contacted her breasts.

Nevertheless, the trial counsel was motivated to charge the conduct as a violation of Article 120, explaining that "if [Appellant] is convicted in this case of an Article 120 violation, that evidence would become admissible via M.R.E. 413 in a potential case involving [other] allegations against [him]."[10] As a result, in his Case Action Memo (CAM) that he signed and submitted to the first convening authority on December 17, 2021, the trial counsel misrepresented the alleged victim's allegations, writing that she "alleged that the suspect ejaculated on her face *and breast*" and "awoke to the suspect masturbating close to her face and, seconds later, the suspect ejaculated on her face and the top of her *breasts*."[11] He then included significant analysis in the CAM on whether ejaculated semen could satisfy the contact element of an abusive sexual contact, but no hint of any evidentiary issue as to whether the semen had ever contacted the alleged victim's breasts (which was required to support an Article 120 offense).[12]

On December 20, 2021, the Sexual Assault Initial Disposition Authority (SAIDA) decided that abusive sexual contact should be included in the charges

[10] App. Ex. XLVIII at 6.
[11] App. Ex. XLVIII (emphasis added).
[12] *Id.*

preferred, based on the recommendation of the SJA who had reviewed the CAM with the trial counsel's misrepresentations.[13]

C. The trial counsel then interviewed the alleged victim prior to preferral, and she changed her story to reflect his misrepresentations, leading to the preferral of the Article 120 charge.

On January 4, 2022, the trial counsel telephonically interviewed the alleged victim in the presence of only her victim's legal counsel.[14] Following this interview, the trial counsel provided a discovery notice to Appellant that the alleged victim said "some of the accused's semen struck her breasts."[15]

The next day charges were preferred, including one for abusive sexual contact (Charge II) alleging Appellant had touched the alleged victim's breast with his semen.[16] Acting on the advice of his detailed trial defense counsel, Appellant waived his Article 32 hearing and the charges were referred to the first general court-martial (*Shelby I)*. [17] He was arraigned on February 24, 2022 and the trial was docketed for July 12, 2022.[18]

[13] App. Ex. XVII at 35.
[14] R at 415 (*Shelby I*).
[15] R. at 266 (*Shelby I*).
[16] Charge Sheet (*Shelby I).*
[17] App. Ex. I (*Shelby I*). R. at 3-4; Charge sheet (*Shelby I*).
[18] R. at 2.

D. Captain Adcock was appointed as Individual Military Counsel (IMC) for Appellant and secured dismissal of the Article 120 charge based on the trial counsel's misrepresentation.

Twelve days before the first scheduled trial, Appellant's detailed defense counsel notified the Court that he was unprepared for trial and requested a continuance in order for Appellant to secure an Individual Military Counsel (IMC).[19] The detailed defense counsel then requested Capt Adcock as IMC on behalf of Appellant.[20] In this request, the detailed defense counsel noted his relative inexperience compared to that of Capt Adcock and explained the IMC was necessary to ensure Appellant received adequate legal representation.[21] Capt Adcock was appointed as IMC, and the trial was continued until September 2022.[22]

When Capt Adcock joined the defense team, he immediately filed a round of motions and discovery requests.[23] This included re-litigating an M.R.E. 412 evidentiary issue, which resulted in the military judge reconsidering his previous ruling and allowing in certain M.R.E. 412 evidence.[24] The military judge also ordered the trial counsel to answer defense interrogatories in response to a defense discovery motion.[25]

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[19] App. Ex. XXVII at 2.
[20] App. Ex. XIII at 30.
[21] *Id.*
[22] R. at 80 (*Shelby I*).
[23] R. at 288 (*Shelby I).*
[24] App. Ex. XLI at 1 n.3.
[25] App. Ex. XIII at 41.

After considering the trial counsel's answers to the ordered interrogatories, Capt Adcock filed a motion to dismiss for unlawful command influence and prosecutorial misconduct based on the trial counsel's misrepresentations of the alleged victim's allegations.[26] The military judge granted this motion, finding the trial counsel's actions constituted unlawful command influence and prosecutorial misconduct.[27] Specifically, the military judge found "the CAM and CAM addendum were both clear attempts by the Trial Counsel to influence the decision-making of the SJA and SAIDA" and because they included misleading statements, the influence was unauthorized.[28]

The military judge also determined that the taint of the unlawful command influence had already impacted the court-martial and very likely "continues to persist regarding other disposition decisions, such as accepting plea agreements and dismissing Charge II."[29] As a result, the military judge disqualified the original trial counsel and original convening authority and ordered Charge II dismissed without prejudice.[30]

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[26] App. Ex. XVII at 30.
[27] App. Ex. XVII at 46.
[28] App. Ex. XVII at 44.
[29] *Id.*
[30] App. Ex. XVII at 16-17; R. at 5. App. Ex. XVII at 46.

E. After the other charges were withdrawn and dismissed, Captain Adcock continued to represent Appellant, seeking a pre-trial resolution of the case.

After the military judge ordered Charge II dismissed without prejudice, the convening authority withdrew and dismissed the remaining charges.[31] The case was then forwarded to a second convening authority for further processing (*Shelby II*).

On February 15, 2023, after all the charges in *Shelby I* had been dismissed, Capt Adcock emailed the SJA for the new convening authority to discuss the possibility of a plea agreement so that the case could be expeditiously resolved.[32] He followed up with the SJA on March 6, 2023, to see if the new convening authority had received the case.[33] On April 7, 2023, the new charges were preferred against Appellant.[34] The new charges in *Shelby II* were identical to the charges in *Shelby I*, including the Article 120 charge that the original trial counsel had created through misrepresentations about the alleged victim's original claims (Charge II).[35]

Appellant's detailed defense counsel informed Appellant about this development through an email, emphasizing a collective defense effort (using the

[31] App. Ex. XIII at 81.
[32] App. Ex. IX at 4.
[33] App. Ex. IX at 2.
[34] Charge Sheet.
[35] Charge Sheet (*Shelby I); Charge Sheet (Shelby II).*

words “us” and “we”) in addressing the next steps his counsel would take.[36] The only person copied on this email was Capt Adcock.[37]

F. Appellant submitted an IMC request for Captain Adcock the day after he was notified Captain Adcock would not represent him in *Shelby II*.

On April 24, 2023—twelve days after the identical charges had been re-preferred, an Article 32 hearing had been ordered, and Capt Adcock had sought plea negotiations with the new convening au4erfmthority’s SJA—Capt Adcock informed Appellant that he was terminating his legal representation.[38] The next day (April 25, 2023) Appellant responded by submitting an IMC request via his detailed defense counsel for Capt Adcock.[39] In this request, Appellant did not claim an attorney-client relationship with Capt Adcock; however, he explained Capt Adcock had served as his IMC (in *Shelby I)* before the charges were withdrawn and dismissed as a direct result of unlawful command influence.[40] The IMC request noted the case was “factually equivalent to the prior litigation” and that Capt Adcock had become “intimately familiar with the case, factually and procedurally” as a result of his involvement in *Shelby I.*[41]

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[36] App. Ex. IX(a) at 4.
[37] *Id.*
[38] App. Ex. IX(a) at 2.
[39] App. Ex. III at 3.
[40] App. Ex. III at 3.
[41] *Id.* at 4.

Additionally, Appellant, through his detailed defense counsel, requested a continuance of the Article 32 hearing from the convening authority.[42] The continuance request stated that "[o]n 24 April 2023, Capt Adcock terminated his representation of Appellant due to the withdrawal and dismissal of prior charges."[43] The request further explained that Appellant's IMC request for Capt Adcock was still pending, and additional time was needed to ensure Appellant would be "adequately represented by counsel of his own selection."[44]

G. The second convening authority denied Appellant's IMC request for Captain Adcock.

On May 3, 2023, the second convening authority denied Appellant's IMC request for Capt Adcock.[45] The convening authority disapproved the request due to Capt Adcock's "imminent unavailability, the need for him to prepare for a PCS to the East Coast, and the possibility that this case could extend for at least several more months."[46] The convening authority noted that, according to the Manual of the Judge Advocate General (JAGMAN), counsel "performing the duties as an

[42] App. Ex. III at 9.
[43] *Id.*
[44] *Id.*
[45] App. Ex. III at 7.
[46] *Id.*

instructor at a service school" are not reasonably available.[47] On May 3, 2023, Capt Adcock was not performing the duties of an instructor at a service school.[48]

H. The Article 32 hearing was held, over defense objection, without Captain Adcock.

After the second convening authority denied the IMC request for Capt Adcock, Appellant submitted a second IMC request for a different trial defense counsel, LT Harris.[49] The convening authority positively endorsed this request and sent it to the Defense Service Office for action.[50]

On May 31, 2023, prior to the appointment of any IMC, the Article 32 hearing was conducted.[51] The Defense objected to the hearing being conducted without Capt Adcock.[52] The preliminary hearing officer overruled the defense objection, and the hearing was held without either Capt Adcock or LT Harris being present.[53]

[47] *Id.*
[48] App. Ex. III at 3, 7.
[49] App. Ex. III at 8.
[50] *Id.*
[51] Preliminary Hearing Officer's Report (June 7, 2023).
[52] *Id.* at 2.
[53] *Id.*

I. After the charges were re-referred, the Military Judge dismissed Charge II and its sole specification with prejudice.

After the Article 32 hearing was held over Appellant's objection, charges were referred to a second court-martial, at which various pretrial motions were litigated. Appellant filed a motion to compel Capt Adcock as IMC.[54] The Military Judge granted the motion and found that Appellant's IMC request for Capt Adcock had been improperly denied.[55] The Military Judge allowed Appellant to supplement his pleadings and modify the trial dates to allow for Capt Adcock's participation in his defense.[56] Appellant also filed a motion to dismiss for speedy trial violations, asserting unreasonable delays and other prejudicial errors by the Government.[57]

In response to the litigation of this motion, the military judge issued a nineteen-page, single-spaced ruling that "only pertain[ed] to the Defense's request to dismiss Charge II," in which he again dismissed Charge II and its sole specification, this time with prejudice.[58] The Military Judge explained that "dismissal with prejudice is warranted due to prior UCI and prosecutorial misconduct, combined with the impact of improper denial of Capt Adcock as the

[54] R. at 60
[55] App. Ex. XVII at 13.
[56] App. Ex. XVII at 15; R. at 73, 75.
[57] App. Ex. XII at 1.
[58] App. Ex. XVII.

Accused's IMC."[59] The Military Judge explained the original remedy, dismissal without prejudice, was predicated on the expectation that Appellant would be appropriately represented by counsel as Charge II was processed again.[60] Finding that expectation had clearly not been met for an alleged offense occurring over two years prior, he found that dismissing the charge without prejudice (again) was "not appropriate considering the interests of justice, the Accused's right to a fair trial, and the cumulative error discussed above."[61] Rather, he found that in light of the prejudice suffered by Appellant, "[d]elaying the prosecution any further to allow the Government to properly process Charge II after two failed attempts would be improper, unfair, and against the interests of justice."[62]

J. The lower court vacated the military judge's ruling.

Upon appeal by the Government, the lower court vacated the military judge's ruling, holding that "the cumulative error doctrine does not apply in a pretrial context."[63] While it agreed with Appellant's position that the IMC request for Capt Adcock had been improperly denied, the lower court did not consider

[59] App. Ex. XVII at 16.
[60] App. Ex. XVII at 2.
[61] App. Ex. XVII at 1.
[62] App. Ex. XVII at 18.
[63] *United States v. Shelby*, No. 202200213, slip op. at 17 (N-M Ct. Crim. App. Apr. 24, 2024).

whether the specific errors present in Appellant's case, individually or collectively, warranted dismissal.

Reasons to Grant Review

This Court should grant review because the lower court wrongly decided a question of law, which has not been, but should, be settled by this Court.[64] Specifically, the lower court rested its decision on the conclusion that, as a matter of law, the doctrine of cumulative error can never be applied before a trial on the merits has concluded. Splitting with another service court, the lower court is the only military appellate court to definitely reach this erroneous conclusion.

1. The lower court decided a question of law, which has not been, but should, be settled by this Court.

In its opinion, the lower court explained that "[p]retrial, a military judge is able to ensure a fair trial by addressing each error—as he did here—with a tailored remedy."[65] However, this holding makes two erroneous presumptions: first, that it is always possible for tailored remedies to effectively address each discrete issue of unfairness in a trial, and second, that a military trial judge presiding over a court-martial does not have the discretionary authority to address trial-level errors collectively as well as individually (just like appellate courts).

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[64] C.A.A.F. Rule 21.5(A).
[65] *United States v. Shelby*, No. 202200213, slip. op. (N-M Ct. Crim. App. Apr. 24, 2024).

Here, the military judge correctly determined that tailored remedies were inadequate to remedy the fundamental unfairness caused in Appellant's trial by the interaction of multiple trial-level errors. As this Court has long recognized, there are certain kinds of errors that impact the trial process that "nice calculations of prejudice" are either unavailable, inappropriate, or ineffective to address.[66] That is precisely what the doctrine of cumulative error recognizes: that sometimes the sum of trial-level errors can be greater than its individual parts, which can impact the remedy that must be employed to correct them.

The lower court's approach to the cumulative error doctrine—which in any event was not the sole basis for the military judge's ruling—leaves no room for a military judge to address the fundamental unfairness arising from the confluence of errors so imbedded in the trial process that, due to either their magnitude or quantity, dismissal with prejudice is the only appropriate remedy. If the lower court's opinion is allowed to stand, military judges could be forced to allow a trial to proceed on the merits, even when firmly convinced it will be fundamentally unfair.

[66] *See e.g. United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988) (declining to engage in "nice calculations as to the existence of prejudice" regarding a violation of the accused's right to an established attorney-client relationship).

But this Court has never required or expected a military judge to just "sit idly by" when faced with such circumstances.[67]

2. The Air Force Court of Criminal Appeals has not taken the same approach as the lower court.

Neither has the Air Force Court of Criminal Appeals (AFCCA), which, in an Article 62 appeal of a similar ruling, did not plainly reject the idea of applying cumulative error in a pretrial context.[68] Instead, in *United States v. Arma*, the AFCCA explained: "[w]e must also consider whether the matters taken together nonetheless warrant such a remedy."[69] While not upholding the military judge's ruling in that particular case, the *Arma* court nevertheless recognized that the cumulative effect of trial errors could rise to a level that justifies dismissal.[70]

This Court should grant Appellant's petition to resolve this split between NMCCA and AFCCA, and clarify the scope of a military judge's discretionary authority to dismiss a charge when a bevy or confluence of pretrial errors have irrevocably rendered the trial of one or more charges fundamentally unfair, such that any further attempts at trial would be, in the words of the military judge here, "improper, unfair, and against the interests of justice."[71]

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[67] *United States v. Zayas*, 24 M.J. 132, 135 (C.M.A. 1987).
[68] *United States v. Arma*, No. 2014-09, 2014 CCA LEXIS 802 at *22 (A.F. Ct. Crim. App. Oct. 22, 2014).
[69] *Id.*
[70] *Id.*
[71] App. Ex. XVII at 18.

Argument

The military judge did not abuse his discretion in dismissing Charge II with prejudice where the Government interfered with an established attorney-client relationship, infringed on Appellant's right to counsel of his choice, and allowed the taint of prosecutorial misconduct and UCI to prejudice his second court-martial.

A. Standard of Review.

In an Article 62 appeal, this Court "reviews the military judge's decision directly and reviews the evidence in the light most favorable to the party which prevailed at trial, which here is Appellant."[72] When addressing the military judge's findings of fact, this court uses a "clearly erroneous standard."[73] An abuse of discretion occurs where the military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law."[74] To find an abuse of discretion requires more than a mere difference of opinion—the challenged ruling must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous."[75]

A party prevailing at trial may assert on appeal any grounds in support of a

[72] *United States v. Becker*, 81 M.J. 483, 488 (C.A.A.F. 2021) (citations omitted).
[73] *Id.* (citing *United States v. Villareal*, 52 M.J. 27, 30 (C.A.A.F. 1999)).
[74] *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted).
[75] *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000).

judgment, whether or not the trial court relied upon or even considered that ground.[76]

B. The military judge did not abuse his discretion by looking at the cumulative effect of the errors in Appellant's court-martial.

In the original court-martial, the Military Judge dismissed Charge II and its sole specification, without prejudice, after determining the trial counsel's "manipulation of the criminal justice process negatively affected the fair handling and disposition of this case."[77] The ordered remedy was intended by the military judge to either allow the Government to go forward without the tainted charge, or re-process Charge II and its sole specification under fair conditions.[78] Imbedded in the latter of those options was the requirement that Appellant be properly represented by the counsel of his choice—specifically, Capt Adcock—during the re-processing of the tainted charge.[79] But as a result of the second convening authority's subsequent, improper denial of Appellant's IMC request, that did not happen.

[76] *United States v. Savala*, 70 M.J. 70, 79 (C.A.A.F. 2011) (citing *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970) (quotation marks and citations omitted).
[77] App. Ex. XVII at 45.
[78] App. Ex. XVII at 2.
[79] Article 38(b), UCMJ.

1. The improper denial of Captain Adcock interfered with an established attorney-client relationship and, under the totality of the circumstances, rendered a trial on Charge II fundamentally unfair.

As an initial matter, the military judge concluded, and the record supports, that the attorney-client relationship between Capt Adcock and Appellant was never severed.[80] The military judge further found that the Government improperly interfered with an established attorney-client relationship and undermined its sanctity when it denied Appellant's IMC request for Capt Adcock.[81] This finding is correct and supported by the record.

The Sixth Amendment guarantees "the right to counsel, and within that, the right to choice of counsel."[82] It is not enough that an accused be represented; he has the right to be represented by who he believes is best.[83] Article 38(b), UCMJ, gives military accused the statutory right to counsel of their choice, as long as the counsel requested is reasonably available.[84] Where a Sixth Amendment right to counsel of choice has been violated, there is structural error and prejudice is presumed.[85] Similarly, this Court has often declined to test for prejudice where there is an improper denial of an IMC request or interference with an established

[80] R. at 67.
[81] *Id.*
[82] *United States v. Watkins*, 80 M.J. 253 (C.A.A.F. 2020).
[83] *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006).
[84] Article 38(b), UCMJ.
[85] *Watkins*, 80 M.J. at 258 (C.A.A.F. 2020)(citing *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993).

attorney-client relationship.[86] One factor that weighs heavily in favor of a presumption of prejudice is "whether an existing attorney-client relationship was severed or effectively severed."[87]

In the instant case, the Government's interference with Appellant's attorney-client relationship with Capt Adcock is of a character where prejudice should be presumed. Appellant had a clearly established attorney-client relationship, which was unlawfully frustrated by the Government's erroneous action. Appellant was denied his choice of counsel for over seven months, during which time his case proceeded (for a second time) through plea negotiations, an Article 32 hearing, referral of charges (including the same tainted Charge II that Capt Adcock had successfully gotten dismissed in *Shelby I*), arraignment, and pre-trial motions. Importantly, all of this re-processing was necessary to attempt to remedy the taint of the original unlawful command influence.

This Court has consistently concluded that erroneously infringing on an accused's right to counsel of choice and to maintain an established attorney-client relationship have "consequences that are necessarily unquantifiable and

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[86] *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023); *United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975) (citing *United States v. Eason*, 45 C.M.R. 109 (C.M.A. 1972); *United States v. Andrews*, 44 C.M.R. 219 (C.M.A. 1972); *United States v. Murray*, 42 C.M.R. 253 (C.M.A. 1970); *United States v. Williams*, 40 C.M.R. 230 (C.M.A. 1969)).

[87] *United States v. Cooper*, 80 M.J. 664, 676 (N-M Ct. Crim. App. 2020).

indeterminate."[88] And courts have also "consistently held that the unlawful severance of an existing attorney-client relationship dictates reversal without regard to the amount of prejudice sustained."[89] "Harmless error analysis under such circumstances would be a 'speculative inquiry into what might have occurred in an alternate universe."[90]

It is impossible to determine what would have happened if Capt Adcock had represented Appellant throughout this critical time in *Shelby II*. While Appellant remained represented by his detailed defense counsel, "[t]o compare two attorneys, one whose services were denied, would require [this C]ourt to speculate upon what different choices or different intangibles might have been between the two."[91] It

[88] *See Watkins*, 80 M.J. at 258 (C.A.A.F. 2020).
[89] *United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975) (citing *United States v. Eason*, 45 C.M.R. 109 (C.M.A. 1972); *United States v. Andrews*, 44 C.M.R. 219 (C.M.A. 1972); *United States v. Murray*, 42 C.M.R. 253 (C.M.A. 1970); *United States v. Williams*, 40 C.M.R. 230 (C.M.A. 1969)).
[90] *Watkins*, 80 M.J. at 258 (C.A.A.F. 2020) (finding a violation of the accused's right to civilian counsel of choice constitutes structural error); *see, e.g., United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988) (declining to engage in "nice calculations as to the existence of prejudice" regarding a violation of the accused's right to an established attorney-client relationship); *United States v. Beatty*, 25 M.J. 311, 316 (C.M.A. 1987) (holding that a violation of the accused's statutory right to request IMC "cannot be analyzed in terms of specific prejudice" and mandates automatic reversal); *United States v. Allred*, 50 M.J. 795, 801 (N-M. Ct. Crim. App. 1999) (presuming prejudice where the accused was denied his statutory right to counsel of choice without good cause or his consent).
[91] *Watkins*, 80 M.J. at 258.

was no error for the military judge to dismiss the tainted charge with prejudice under such circumstances.

2. By recognizing the Government's "cumulative error," the Military Judge was seeking to protect Appellant's court-martial from the taint of unlawful command influence.

Here, the trial counsel manipulated the criminal justice system—committing both UCI and prosecutorial misconduct in the process—by misrepresenting the evidence underpinning Charge II and its sole specification. The military judge found that this manipulation had an actual impact on the disposition of Charge II, and recognized that the taint likely impacted the first convening authority's willingness to accept plea agreements.[92] Without this critical misrepresentation, it is unclear whether the Article 120 charge ever would have ever been preferred, let alone referred to a court-martial. Even now, the disqualified trial counsel remains the principle witness to the first statement the alleged victim ever made describing the alleged offensive touching in a way that would qualify as a violation of Article 120.[93]

In light of these serious concerns, a more experienced counsel like Capt Adcock might have negotiated a favorable plea agreement with the second convening authority or persuaded the preliminary hearing officer to recommend

[92] App. Ex. XVII at 36.
[93] App. Ex. XVII at 36.

against referring Charge II, if he had participated in the Article 32 hearing. Thus, when the Government interfered with Appellant's right to counsel of choice, it deprived Appellant the chance to meet Charge II purged of the prejudicial effects of the original trial counsel's misconduct.

Accordingly, the totality of the circumstances in this case make the consequences of Appellant's loss of counsel unquantifiable. The Government's interference with Appellant's established attorney-client relationship effectively denied him the judicial remedy intended to cure unlawful command influence and prosecutorial misconduct from tainting his proceeding. And it was this confluence of pretrial errors that the military judge considered under the doctrine of "cumulative error."[94]

This was not an abuse of discretion. To the contrary, when a military judge crafts a remedy for unlawful command influence, but key components of the remedy are not implemented, "the presumption of prejudice flowing from the unlawful command influence has not been overcome."[95] Accordingly, far from abusing his discretion, by taking action to address the interaction of these errors in Appellant's second trial, the military judge was protecting Appellant's "court-martial from the effects of unlawful command influence."[96]

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[94] App. Ex. XVII.
[95] *United States v. Douglas*, 68 M.J. 349, 357 (C.A.A.F. 2010).
[96] *Id.* at 354.

As this Court stated decades ago, unlawful command influence is the "mortal enemy of military justice."[97] Charged with acting as sentinels against this enemy, military judges have "broad discretion in crafting a remedy to remove the taint of unlawful command influence," which includes dismissal with prejudice.[98] Dismissal of charges is appropriate when "an accused would be prejudiced or no useful purpose would be served by continuing the proceeding."[99]

Here, the military judge originally ordered Charge II dismissed without prejudice, as a tailored remedy for the unlawful command influence and prosecutorial misconduct in *Shelby I.* However, when the Government interfered with Appellant's attorney-client relationship, it necessarily failed to implement a "key component" of the remedy designed to cure the UCI. Thus, the military judge rightly recognized this interaction as greater than the sum of its parts. While the taint of unlawful command influence or an interference with an established attorney-client relationship could each separately rise to the level of warranting dismissal, in this case it was the unique interaction between these two errors—in other words, their cumulative effect—that rendered Appellant's trial fundamentally and irrevocably unfair. Ordering a remedy designed to address both errors at the same time was no abuse of discretion.

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[97] *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986).
[98] *Douglas*, 68 M.J. at 354.
[99] *Id.*

3. Cumulative error is a doctrine grounded in due process, which protects against allowing a fundamentally unfair trial to proceed.

The cumulative error doctrine is grounded in traditional notions of due process.[100] As the Supreme Court has explained, "the combined effect of multiple trial court errors violate due process where it renders the resulting criminal trial fundamentally unfair."[101] The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal.[102] This doctrine recognizes the importance of looking at the interaction of multiple trial-level errors when determining prejudice.

While cumulative error is typically only raised on appeal, its rationale does not prohibit its use before a trial has been concluded, particularly where, as here, the errors individually could justify dismissal. Military judges enjoy "broad discretion" in selecting the appropriate remedy to correct a wrong, including the "drastic remedy" of dismissal.[103] Accordingly, if the confluence of pretrial errors deprives an Accused of the possibility of a fair trial, a military judge has discretion to consider their interaction when crafting an appropriate remedy. Such

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[100] *Parle v. Runnels*, 505 F.3d 922, 927 (9th Cir. 2007).
[101] *Id.* (citing *Chambers v. Miss.*, 410 U.S. 284 at 298, 302-03 (1973) (combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial")).
[102] *Chambers*, 410 U.S. at 290 n.3.
[103] *United States v. Douglas*, 68 M.J. 349, 354-55 (C.A.A.F. 2010).

aggregation of considerations is not reserved for appellate courts, since no traditional notion of due process is furthered by requiring a trial to proceed to findings under the taint of prejudicial errors that, individually or collectively, cannot be rendered harmless.[104]

4. This case is like *United States v. Gilmet*.

In *United States v. Gilmet*, a senior Marine Corps judge advocate made statements to individual military counsel about his career being negatively impacted by his service as appellant's defense counsel.[105] Finding these statements amounted to unlawful command influence, the presiding military judge dismissed the charges with prejudice. This Court agreed with the military judge that government action both frustrated the appellant's attorney-client relationship and was a violation of Article 38(b) that was itself prejudicial.[106] While noting that not all violations of Article 38(b) are necessarily prejudicial, the Court found the "character of government action in frustrating an existing attorney-client

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[104] *See United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023) (affirming the military judge's decision to dismiss charges with prejudice after UCI effectively severed an accused's attorney-client relationships); *United States v. Stellato*, 74 M.J. 473 (C.A.A.F. 2015) (affirming the military judge's decision to dismiss charges with prejudice for egregious discovery violations); *United States v. Floyd*, 82 M.J. 821 (N-M. Ct. Crim. App. 2022) (affirming the military judge's decision to dismiss a charge with prejudice for preferring charges unsupported by any evidence and discovery violations).

[105] *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023).

[106] *Gilmet*, 83 M.J. at 407-08 (quoting *Eason*, 45 C.M.R. at 112).

relationship is an important consideration when conducting the prejudice inquiry."[107]

As in *Gilmet*, where the government did not seek to violate the appellant's Article 38(b), UCMJ, rights, but the consequences of UCI nevertheless had that effect, here the Government's action in frustrating Appellant's attorney-client relationship cannot be divorced from the original UCI. Since Appellant's representation by Capt Adcock was a key component of the military judge's original remedy for the UCI, Capt Adcock's subsequent denial as IMC makes clear that the taint of the UCI was not purged from the re-referral of Charge II. And instead of remedying the denial of Capt Adcock when it became clear there was an established attorney-client relationship, the Government plowed ahead and continued to frustrate that relationship, benefiting from Appellant's weakened position. Just as dismissal with prejudice was an appropriate choice of remedy under the facts of *Gilmet*, it was an appropriate choice for the military judge here.

5. R.C.M. 906(b)(2) does not preclude the military judge from dismissing Charge II under the facts of this case.

Finally, while R.C.M. 906(b)(2) prohibits dismissing charges or otherwise effectively preventing trial from proceeding based on the denial of individual military counsel,[108] the issues in this case are far broader than just the denial of an

[107] *Id.*
[108] R.C.M. 906(b)(2).

IMC request. Here, just as in *Gilmet,* government action frustrated an established attorney-client relationship. While the mechanism happened to be an improper denial of an IMC request, the injustice created by the Government's interference with respect to Charge II stemmed from the prosecutorial misconduct and unlawful command influence that occurred in *Shelby I*. Thus, as in *Gilmet,* dismissal of Charge II with prejudice is an appropriate remedy not in conflict with R.C.M. 906(b)(2).

Conclusion

WHEREFORE, this Honorable Court should grant review, reverse the lower court's decision, and reinstate the military judge's decision to dismiss Charge II and its sole specification with prejudice.

Respectfully submitted.

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List of Appendices

A. *United States v. Shelby*, No. 202200213, slip op. (N-M Ct. Crim. App. Apr. 24, 2024).

Certificate of Compliance

1. This Supplement complies with the type-volume limitation of Rule 21(b) because it contains less than 9,000 words.
2. This Supplement complies with the type-style requirements of Rule 37 because it has been prepared with monospaced typeface using Microsoft Word with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that on July 15, 2024, the foregoing was delivered electronically to this Court, and that copies were electronically delivered to Appellate Government Counsel.

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United States Navy–Marine Corps Court of Criminal Appeals

Before
HOLIFIELD, GROSS, and BLOSSER
Appellate Military Judges

UNITED STATES
Appellant

v.

Kyle A. SHELBY
Sergeant (E-5), U.S. Marine Corps
Appellee

No. 202200213

Decided: 24 April 2024

Appeal by the United States Pursuant to Article 62, UCMJ[1]

Military Judge:
Adam M. King

Arraignment 24 February 2022 before a general court-martial convened at Camp Foster, Okinawa, Japan.

For Appellant:
Lieutenant Colonel James A. Burkart, USMC
Major Tyler W. Blair, USMC

For Appellee:
Lieutenant Commander Leah M. Fontenot, JAGC, USN

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[1] 10 U.S.C. § 862.

Judge BLOSSER delivered the opinion of the Court, in which Chief Judge HOLIFIELD joined. Judge GROSS filed a separate opinion concurring in the result.

PUBLISHED OPINION OF THE COURT

BLOSSER, Judge:

This case is before us on an interlocutory appeal pursuant to Article 62(a)(1)(A), Uniform Code of Military Justice [UCMJ].[2] The Government asserts one assignment of error [AOE]: the military judge erred when, before trial, he dismissed Charge II and its sole specification on grounds of cumulative error. We find error, vacate the military judge's ruling, and remand for further proceedings not inconsistent with this opinion.

I. BACKGROUND

On 9 February 2022, the Commanding General, III Marine Expeditionary Force [CG, III MEF] referred five charges, including an allegation that Appellee committed an abusive sexual contact upon a Marine sergeant in violation of Article 120, Uniform Code of Military Justice [UCMJ],[3] to a general court-martial.[4] On 3 February 2023, the military judge dismissed, without prejudice, Charge II and its specification (alleging abusive sexual contact) from the first court-martial based on unlawful command influence [UCI].[5]

On 7 February 2023, CG, III MEF directed the withdrawal and dismissal of the remaining charges, and, on 6 March 2023, forwarded the case to Commander, Marine Corps Forces Pacific [COMMARFORPAC] for disposition.[6]

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[2] 10 U.S.C. § 862(a)(1)(A).

[3] 10 U.S.C. § 820.

[4] Previous Charge Sheet, dated 4 January 2022.

[5] App. Ex. XVII at 2-3.

[6] App. Ex. XVII at 3.

On 4 April 2023, COMMARFORPAC authorized preferral of the same charges.[7] The Government preferred the present charges on 7 April 2023.[8]

Between dismissal of all charges on 7 February 2023 and preferral of the same charges on 7 April 2023, Captain [Capt] Adcock, USMC—Appellee's individual military counsel [IMC] for the first court-martial—took at least three actions on Appellee's behalf. On 15 February, he emailed trial counsel, asking if he had an update on the way forward with the case.[9] Also on 15 February, he emailed several judge advocates in the current convening authority's Office of the Staff Judge Advocate [OSJA], seeking a time to discuss the case and stating, "[w]e are interested in resolving this case efficiently considering my client's life circumstances and the case's procedural posture."[10] One of the judge advocates from the OSJA responded the same day, indicating they had not "heard anything about the case yet."[11] On 6 March, Capt Adcock emailed a different judge advocate from the OSJA to determine whether trial counsel had presented the case to him.[12] The military judge's ruling does not reflect whether the OSJA responded to this query.

On 19 April 2023, the convening authority scheduled the Article 32, UCMJ, preliminary hearing for 26 April 2023.[13] The appointing order for the preliminary hearing identified Capt Wilson, USMC, and Capt Adcock as Appellee's detailed defense counsel.[14]

Despite the actions he took on Appellee's behalf during the preceding months, on 24 April 2023, Capt Adcock provided Appellee a "Termination of Representation" letter.[15] The letter stated, "Since you no longer have charges pending at [the first] court-martial, this completes my representation of you. I will close your file and take no further action on your behalf. . . . Because your

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[7] App. Ex. XVII at 4; App Ex. XV at 3.

[8] Current Charge Sheet, dated 7 April 2023; App. Ex. XVII at 4.

[9] App. Ex. XV at 3.

[10] App. Ex. XVII at 3; App. Ex. IX at 4.

[11] App. Ex. XVII at 3; App. Ex. IX at 3.

[12] App. Ex. XVII at 3; App. Ex. IX at 2.

[13] App. Ex. XVII at 4.

[14] *Id*. This appointing order is the only document in the Record indicating Capt Adcock was detailed to the current court-martial. The convening authority, of course, has no authority to detail defense counsel. Accordingly, we believe this to be a scrivener's error.

[15] *Id*.

case is now closed, I will consider you a former client."[16] Appellee did not consent to Capt Adcock's purported termination of representation.[17]

The next day, Appellee, via Capt Wilson—Appellee's only detailed defense counsel—requested that Capt Adcock be assigned as his IMC.[18] The request stated, "An attorney-client relationship does not currently exist with the requested Individual Military Counsel."[19] Despite an express statement that no attorney-client relationship existed, the request went on to argue that Capt Adcock's:

> extensive involvement in the previous [court-martial] weigh [sic] in favor of this request being granted. [Capt Adcock] previously served as [IMC] prior to the dismissal and re-preferral of the charges. . . . While the current charges have been newly preferred and will be referred by a new convening authority, it is factually equivalent to the prior litigation. As a result of his involvement in the previous proceedings, [Capt Adcock] became intimately familiar with the case, factually and procedurally. This would make his participation in the pending court-martial invaluable to [Appellee's] defense.[20]

The same day he submitted the IMC request, Capt Wilson also requested a continuance of the preliminary hearing until no earlier than 29 May 2023, noting that Capt Adcock was "no longer [Appellee's] attorney" but would be requested as IMC.[21]

As of 27 April 2023, Capt Adcock had detached from the Defense Services Organization and was administratively reassigned to Combat Logistics Company 33 in preparation for execution of permanent change of station [PCS] orders directing him to the United States Naval Academy [USNA] no later than 10 June 2023 for assignment as a military instructor.[22]

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[16] *Id*.

[17] *Id*.

[18] App. Ex. XVII at 4; App. Ex. III at 3.

[19] *Id*.

[20] App. Ex. XVII at 5; App. Ex. III at 3–4.

[21] App. Ex. XVII at 5.

[22] App. Ex. XVII at 5–6.

On 3 May 2023, the convening authority denied Appellee's IMC request, finding Capt Adcock not reasonably available because he would soon detach from his current command for follow-on duty as an instructor at the USNA.[23]

Following the denial of Capt Adcock as IMC, Appellee requested Lieutenant [LT] Harris, JAGC, USN, be assigned as his IMC. Appellee also requested the convening authority continue the preliminary hearing "to ensure [Appellee] is adequately represented by counsel of his own selection if that request is granted. . ."[24]

Capt Wilson initially objected to the preliminary hearing occurring before a decision was made on the IMC request for LT Harris. Capt Wilson ultimately withdrew his objection to proceeding without LT Harris, but maintained an objection to proceeding without Capt Adcock.[25] At the preliminary hearing, Capt Wilson voiced his continued objection to proceeding without Capt Adcock. Nonetheless, the preliminary hearing proceeded without Capt Adcock or LT Harris on 31 May 2023.[26]

On 8 June 2023, the preliminary hearing officer recommended referral of all charges to a general court-martial, which the convening authority did on 27 June 2023.[27]

Appellee was arraigned on 11 July 2023. At the arraignment, the parties noted that Appellee's IMC request for LT Harris was still pending.[28] Appellee stated that he wished to be represented by Capt Adcock even though that particular request had been denied.[29]

Appellee's IMC request for LT Harris was approved on 17 July 2023.[30]

In a memorandum to Capt Wilson dated 30 August 2023, Capt Adcock stated that his attorney-client relationship with Appellee ended "on or about

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[23] App. Ex. XVII at 5–6.

[24] App. Ex. XVII at 6.

[25] *Id*.

[26] *Id*.

[27] App. Ex. XVII at 6–7.

[28] App. Ex. XVII at 7.

[29] *Id*.

[30] App. Ex. XVII at 6-7.

10 February 2023, when the trial counsel withdrew and dismissed all pending charges and specifications against [him]."[31]

On 2 September 2023, Appellee filed a motion to compel Capt Adcock as IMC[32] and a motion to dismiss all charges and specifications with prejudice due to an alleged speedy trial violation.[33] In the motion to compel IMC, Appellee reversed course and contended Capt Adcock's termination of representation was improper.[34] In its response, the Government argued an attorney-client relationship did not exist for the charges in the current court-martial.[35] During the ensuing Article 39(a), UCMJ, hearing on 11 October 2023, Capt Wilson admitted that he was incorrect when he wrote in the IMC request that an attorney client relationship did not exist.[36]

The military judge ruled orally, granting the motion to compel Capt Adcock as IMC.[37] The military judge concluded that good cause did not exist to sever the attorney-client relationship, and that Capt Adcock's purported termination of representation was without authority.[38] The military judge, therefore, concluded an attorney-client relationship still existed between Capt Adcock and Appellee.[39] The military judge found the convening authority improperly denied the IMC request, reasoning the convening authority had "several moments in time . . . to look into this scenario a bit further and determine whether

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[31] App. Ex. XVII at 7.

[32] App. Ex. VIII; App. Ex. XVII at 7.

[33] App. Ex. XII; App. Ex. XVII at 1.

[34] App. Ex. XVII at 7.

[35] App. Ex. XVII at 7; App. Ex. X at 1–2. In support of this position, the Government relied on Capt Adcock's impermissible attempt to unilaterally terminate his representation of Appellee, Capt Wilson's faulty assessment that no attorney-client relationship existed, and Appellee's reliance on his two counsel's legal analysis. We reject this view as we find no support for it in law or regulation. *See also* R. at 42 (trial counsel responding in the negative when the military judge asked if there was "any authority that supports a counsel unilaterally terminating their representation . . . from an accused who has not released the counsel").

[36] App. Ex. XVII at 7; R. at 29.

[37] R. at 60.

[38] App. Ex. XVII at 13.

[39] App. Ex. XVII at 13; R. at 67–70.

or not there was an attorney-client relationship, even in spite of the Defense's original misstatement that there wasn't."[40]

Ultimately, after ordering Capt Adcock be assigned as IMC, the military judge stated:

> The Court will allow the defense to file additional motions, and the Court intends to issue a ruling on the defense's motion to dismiss for speedy trial violations. That's still pending. That's still before the Court. The Court will permit the defense, with [Capt Adcock's] assistance, to—will permit the defense the opportunity to supplement its motion once [Capt Adcock] is afforded the opportunity to prepare pleadings, to meet with counsel, to meet with the accused, and to engage in preliminary negotiations if there are any.[41]

The military judge went on:

> And the Court is going to permit [Capt Adcock] to consult with the defense and determine whether or not modified trial dates are required, whether or not additional filing dates are requested, and the Court will be open to considering modifications to the trial deadlines, once [Capt Adcock] is able to rejoin the defense team that he should not have been severed from in the first place.[42]

The Article 39(a), UCMJ, hearing ended with trial counsel requesting, and the military judge scheduling, a pre-trial conference[43]on 19 October 2023 "in case the defense [was] not able to get in contact with [Capt Adcock] and deal with schedules, and things of that nature."[44]

The next action reflected in the Record is the military judge's 8 November 2023 written ruling captioned: "Ruling – Defense Motion to Dismiss (Violation of Right to Speedy Trial)."[45] Initially, the ruling appears ambiguous about whether its scope includes a speedy trial analysis. The military judge first wrote:

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[40] R. at 71.

[41] R. at 73.

[42] R. at 75.

[43] Pursuant to R.C.M. 802.

[44] R. at 76–77.

[45] App. Ex. XVII.

> [I]n terms of scope and the issues considered, this ruling involves both the *consideration of the Defense's motion to dismiss for speedy trial violations* and the matters considered within the Court's 3 February 2023 ruling [in the previous court-martial]. Within this conduct, the Court also considers the impact of the cumulative error doctrine. Additionally, this ruling memorializes the Court's ruling granting the Defense's motion to compel [Capt Adcock] as an IMC made orally at the 11 Oct 23 Article 39(a) session.[46]

But then, in a footnote just following that passage, he wrote, "As noted above, in terms of scope and the issue considered, this ruling is an extension of the Court's 3 February 2023 ruling, *as opposed to a ruling on the Defense's motion to dismiss for speedy trial violations*."[47] Similarly, in his cumulative error analysis, the military judge "defer[red] ruling on whether speedy trial violations occurred until Capt [Adcock] has the sufficient opportunity to supplement the Defense's pleadings on that matter."[48] Any ambiguity about the scope of the ruling is sufficiently clarified, however, in the document's final section where the military judge wrote, "Charge II is dismissed with prejudice *due to the cumulative error* detailed above, *not for alleged violations of the Accused's right to a speedy trial*."[49]

Additional facts necessary to resolve Appellant's AOE are discussed below.

II. DISCUSSION

A. Jurisdiction

The Government may only appeal interlocutory matters in a court-martial with express congressional authorization.[50] Congress provided the Government limited authority to appeal in Article 62, UCMJ, which states in relevant part:

> (a)(1) In a trial by general or special court-martial . . . the United States may appeal the following:

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[46] App. Ex. XVII at 2–3 (emphasis added).

[47] App. Ex. XVII at 3, n. 8 (emphasis added).

[48] App. Ex. XVII 15–16.

[49] App. Ex. XVII at 19 (emphasis added).

[50] *United States v. Badders*, 82 M.J. 299, 302 (C.A.AF. 2022) (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977)).

> (A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.
>
> . . .
>
> (e) The provisions of this section shall be liberally construed to effect its purposes.[51]

Our superior court has held that "an appeal must actually fall within the strictures of Article 62(a)(1)(A) . . . ,UCMJ, to create appellate jurisdiction."[52]

Here, we have jurisdiction to review the military judge's dismissal as it terminated the proceedings with respect to Charge II and its specification. Similarly, we have jurisdiction to review the military judge's ruling on Appellee's IMC request as it formed the basis, in part, for the ultimate dismissal. We do not have jurisdiction to review the military judge's UCI ruling in the first trial.[53]

B. Standard of Review

We review a military judge's ruling to dismiss a charge and its specification for an abuse of discretion.[54] It is an abuse of discretion if the military judge: (1) "predicates his ruling on findings of fact that are not supported by the evidence"; (2) "uses incorrect legal principles"; (3) "applies correct legal principles to the facts in a way that is clearly unreasonable"; or (4) "fails to consider important facts."[55] In an appeal under Article 62, UCMJ, we review "the evidence in the light most favorable to the party which prevailed below," which in this case is Appellee.[56] However, we are limited to acting only with respect to matters of law.[57] On matters of fact, we are "bound by the military judge's factual

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[51] Article 62(a)(1)(A), (e), UCMJ, 10 U.S.C. § 862(a)(1)(A), (e).

[52] *United States v. Jacobsen*, 77 M.J. 81, 85 (C.A.A.F. 2017).

[53] The Government could have appealed the military judge's dismissal of charge II and its sole specification in the first trial but chose not to within the prescribed timeline. *See* Article 62(a)(2)(A), UCMJ (trial counsel must provide military judge notice of appeal within 72 hours of the order or ruling).

[54] *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004); *United States v. Floyd*, 82 M.J. 821, 828 (N-M. Ct. Crim. App. 2022).

[55] *United States v. Commisso*, 76 M.J. 315, 321 (C.A.A.F. 2017) (citing *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (internal citation omitted).

[56] *United States v. Buford*, 74 M.J. 98, 100 (C.A.A.F. 2015).

[57] R.C.M. 908(c)(2).

determinations unless they are unsupported by the record or clearly erroneous."[58] We may not "find [our] own facts or substitute [our] own interpretation of the facts."[59]

The denial of an IMC request "is a matter within the sole discretion of that authority [prescribed by the Secretary concerned]."[60] We review such a denial for an abuse of discretion.[61]

C. Individual Military Counsel Ruling

1. Right to Individual Military Counsel and Process for Determining Availability

An accused has a statutory right to be represented in his defense at a general court-martial, special court-martial, or Article 32 preliminary hearing "by [individual] military counsel [IMC] of his own selection if that counsel is reasonably available."[62] Congress mandated that the Secretaries of the Military Departments, "by regulation, define 'reasonably available' for the purpose of [IMC requests] and establish procedures for determining whether the [requested IMC] is reasonably available."[63] The IMC regulations issued by each Military Department are subject to the criteria established by the President in Rule for Courts-Martial 506(b).

Rule for Courts-Martial 506(b)(1) established eight categories of judge advocates who are "not reasonably available" "[*w*]*hile so assigned*" to certain duties or positions, including "instructor . . . at a Service school or academy."[64] However the President granted each Secretary the discretion to "prescribe circumstances under which exceptions may be made to the prohibitions of [Rule for Courts-Martial 506(b)] when merited by the existence of an attorney-client relationship regarding matters relating to a charge in question."[65]

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[58] *United States v. Becker*, 81 M.J. 483, 489 (C.A.A.F. 2021) (internal quotation marks omitted).

[59] *United States v. Cossio*, 64 M.J. 254, 256 (C.A.A.F. 2007).

[60] R.C.M. 506(b)(2).

[61] *United States v. Allred*, 50 M.J. 795, 799 (N-M. Ct. Crim. App. 1999).

[62] Article 38(b)(3)(B), UCMJ, 10 U.S.C. § 838(b)(3)(B).

[63] Article 38(b)(7), UCMJ, 10 U.S.C. § 838(b)(7).

[64] R.C.M. 506(b)(1)(F) (emphasis added).

[65] R.C.M. 506(b)(1).

The Secretary of the Navy, via the Judge Advocate General [JAG], issued the Department's IMC regulations in section 0131 of the Manual of the Judge Advocate General [JAGMAN].[66] Section 0131 also provides a non-exhaustive list of factors to be considered when determining if a requested counsel is reasonably available.[67] The JAGMAN places the "burden . . . on the accused or counsel for the accused to state in the request . . . clearly whether the accused claims to have an attorney-client relationship with the requested counsel regarding one or more charges pending before the proceeding, and the factual basis underlying that assertion."[68]

If a "request does not claim an attorney-client relationship regarding any charge pending before the proceeding, and the requested counsel is not reasonably available" by reason of being assigned to one of the enumerated duties or positions, "the convening authority will promptly deny the request."[69] Conversely, if the request clearly states that an attorney-client relationship exists or the requested counsel is not assigned to one of the enumerated duties or positions, "the convening authority will forward the request to the determining authority" and provide specified information for the determining authority's consideration.[70] Neither the Rules for Courts-Martial nor the JAGMAN require or permit *the convening authority* to forecast the requested counsel's future availability.

On the other hand, *the determining authority* must independently determine if the requested IMC "has an attorney-client relationship with the accused regarding any charge pending before the proceeding."[71] "If the determining authority finds that there is an attorney-client relationship regarding any

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[66] JAGINST 5800.7G.

[67] JAGINST 5800.7G, 0131b(4). Section 0131b(4) also supplements Rule for Courts-Martial 506(b)(1)'s list of persons not reasonably available by virtue of their current assignment.

[68] JAGINST 5800.7G, 0131c(1).

[69] JAGINST 5800.7G, 0131c(2)(b); *see also* R.C.M. 506(b)(2) ("convening authority shall deny the request").

[70] JAGINST 5800.7G, 0131c(2)(c); *see also* R.C.M. 506(b)(2) ("If the accused's requests makes [a claim of an existing attorney-client relationship regarding a charge in question], or if the person is not among those so listed as not reasonably available, the convening authority shall forward the request to the commander or head of the organization, activity, or agency to which the requested person is assigned.")

[71] JAGINST 5800.7G, 0131d(1). In making such a determination, counsel, staff judge advocates, and decision makers would be wise to remember that "withdrawal

charge pending before the proceeding, then the requested counsel should ordinarily be made available to act as [IMC] without regard to whether he or she would otherwise be deemed reasonably available [by reason of being assigned to one of the enumerated duties or positions], unless there is 'good cause' to sever that relationship."[72] The JAGMAN lists the requested counsel's release from active duty and terminal leave as two examples of when good cause may exist.[73]

In accordance with section 0131, the Marine Corps' Legal Support and Administration Manual [LSAM], defines the determining authority for counsel assigned to Marine Corps commands.[74] "The determining authority for IMC requests for counsel not assigned to the [Defense Services Organization], including auxiliary defense counsel with active defense cases, is that attorney's [officer in charge] or commanding officer."[75]

If a military judge finds an IMC was improperly denied, he "may not dismiss charges or otherwise effectively prevent further proceedings based on [denial of IMC]. However, the military judge may grant reasonable continuances until the requested military counsel can be made available[.]"[76] Similarly, if a military judge finds a defect in the Article 32, UCMJ, preliminary hearing, "the

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and dismissal of charges may terminate a court-martial proceeding, but they do not, without more, sever the 'relationship' that exists between an accused and counsel with respect to those charges." *Allred*, 50 M.J. at 800. "Once established, an existing attorney-client relationship can only be severed by an express release from the accused, a judicial order, or other good cause." *Id*. at 799-800 (citing R.C.M. 505(d)(2)(B). "A military defense counsel may not unilaterally withdraw from representing an accused once the attorney-client relationship is established." *Id*. (citing *United States v. Acton*, 33 M.J. 536, 537 (A.F.C.M.R. 1991); *United States v. Hutchins*, 69 M.J. 282, 289–291 (CA.A.F. 2011). "An administrative action . . . made solely to accommodate the change of duty station of [an accused's defense counsel] cannot be a proper basis for severance." *Allred*, 50 M.J. at 800 (citing *United States v. Murray*, 42 C.M.R. 253, 254 (1970)); *see also United States v. Eason*, 45 C.M.R. 109, 111 (1972) (observing an attorney-client relationship "may not be severed or materially altered for administrative convenience").

[72] JAGINST 5800.7G, 0131d(2).

[73] *Id*.

[74] JAGINST 5800.7G, 0131b(2)(b); Marine Corps Order [MCO] 5800.16 CH-7, Volume 3, 011201.

[75] MCO 5800.16 CH-7, Volume 3, 011201.E.

[76] R.C.M. 906(b)(2).

military judge should ordinarily grant a continuance so the defect may be corrected."[77]

2. Military Judge's Ruling

We find that the military judge relied on incorrect legal principles to reach the conclusion that the convening authority improperly denied Appellee's request for Capt Adcock to serve as his IMC.

The military judge found fault in the convening authority's reliance on Capt Wilson's representation that an attorney-client relationship did not exist.[78] But, by placing the burden on the accused to clearly state whether an attorney-client relationship exists, that is precisely what the JAGMAN requires a convening authority to do. The military judge's analysis imposed a responsibility on the convening authority that applies *only* to the determining authority (i.e., the requested counsel's officer in charge or commanding officer). Unlike a determining authority's responsibility to independently assess if an attorney-client relationship exists based on a list of prescribed criteria, a convening authority has only two, simple questions to answer in reviewing an IMC request: 1) does the accused *clearly claim* that an attorney-client relationship exists with the requested counsel; and 2) if not, is the requested counsel *currently assigned* to one of the duties and positions enumerated in Rule for Courts-Martial 506(b)(1) and JAGMAN section 0131. The convening authority has no discretion and shall deny the request only if it does not *clearly claim* an attorney-client relationship and the requested counsel is *currently assigned* to one of the enumerated duties or positions. In all other instances, the convening authority must forward the request to the determining authority.

The convening authority correctly regarded the request as not clearly claiming an attorney-client relationship.[79] By imposing on the convening authority a duty to look beyond Appellee's express representation of no attorney-client relationship, the military judge applied an incorrect legal principle and absolved Appellee from his burden to clearly claim the existence of such a relationship. As such, the military judge abused his discretion by applying an incorrect view of the law.

Nonetheless, we reach the same conclusion as the military judge that the convening authority improperly denied the IMC request, but we do so for a different reason. The convening authority simply had no authority to deny the

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[77] R.C.M. 906(b)(3) Discussion.

[78] App. Ex. XVII at 14.

[79] App. Ex. XVII at 4.

request. Captain Adcock's *future* assignment to the USNA was not a relevant part of the convening authority's analysis. Based on Capt Adcock's detachment from the Defense Services Organization at the time of the denial, the convening authority's only permissible action was to forward the request to Capt Adcock's commanding officer, as the appropriate determining authority.

The determining authority's requirements are much more expansive than the convening authority's, requiring an in-depth analysis using the criteria listed in JAGMAN section 0131b(3), to determine if an attorney-client relationship existed. And we agree with the military judge that an attorney-client relationship still exists between Capt Adcock and Appellee (despite Capt Wilson's initial representations and Capt Adcock's continued contention to the contrary).

We, therefore, reach the same conclusion—albeit through a different analytical framework—as the military judge that the convening authority improperly denied Appellee's request for Capt Adcock to serve as his IMC.[80]

While we do not know whether the determining authority would have found Capt Adcock reasonably available if the convening authority had properly forwarded the IMC request, we do not require an answer that question under the facts of this case. In its appeal, the Government concedes that "[a]ny error by the Convening Authority was remedied by the Judge's Ruling compelling [Capt Adcock] as counsel for Appellee."[81] This is consistent with the JAGMAN's mandate that a requested counsel ordinarily be made available if an attorney-client relationship exists.

D. Military Judge's Cumulative Error Analysis

1. Cumulative Error Doctrine is not Applicable in the Pretrial Context

The cumulative error doctrine was not born in military courts, but has been used by military appellate courts for more than seven decades[82] as an expansion of the mandate in Article 59(a), UCMJ, that authorizes military appellate

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[80] We note that the convening authority was not the only person to err regarding Appellee's IMC request. Capt Adcock erred by attempting to unilaterally terminate his representation of Appellee. Capt Wilson erred by representing, in Appellee's IMC request, that "[a]n attorney-client relationship does not currently exist with the requested Individual Military Counsel." Nonetheless, we decline to speculate about what the convening authority would have done if the IMC request had accurately represented the existence of an attorney-client relationship.

[81] Appellant's Reply Br. at 12.

[82] *See, e.g.*, *United States v. Yerger*, 16 C.M.R. 191, 209 (C.M.A. 1954).

courts to set aside a finding only if an error "materially prejudices the substantial rights of an accused."[83] The cumulative error doctrine is a test for prejudice that looks retrospectively at a trial's execution and results to assess the "cumulative effect of all plain errors and preserved errors."[84] Under the doctrine, criminal courts of appeal determine if "'a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding.'"[85] We then reverse only if we find that the cumulative effect of the errors denied an appellant a fair trial.[86]

We are aware of no statute, rule, or case that permits the use of the cumulative error doctrine in the pretrial context. To the contrary, one can hardly assess the cumulative effect of errors on the fairness of a trial if the trial has not yet commenced and a verdict has not yet been announced.

2. The Military Judge Erred by Dismissing for "Cumulative Error"

The military judge illustrated his cumulative error analysis with the following series of Government actions, which he described as "includ[ing] UCI and prosecutorial misconduct":

> (1) the initial misleading representation of the disqualified [t]rial [c]ounsel to the original SJA, which created misinformed preferral and referral decisions regarding Charge II;
>
> (2) the delayed and ultimately compelled disclosure of required discovery surrounding [the alleged victim's] 3 January 2022 interview with the disqualified [t]rial [c]ounsel;
>
> (3) the nonresponsive, confrontational, and accusatory answers submitted by the disqualified [t]rial [c]ounsel to the Defense pursuant to Court-ordered discovery;
>
> (4) the initial improper denial of [Appellee's] IMC request for Capt [Adcock] (including a neutral forwarding endorsement memo from the [s]enior [t]rial [c]ounsel that omitted both analysis and a recommendation);
>
> (5) the decision to proceed with the Article 32[,UCMJ,] [p]reliminary [h]earing over Defense objection regarding Capt

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[83] 10 U.S.C. § 859(a).

[84] *United States v. Pope*, 69 M.J. 328, 335 (C.A.A.F. 2011).

[85] *Pope*, 69 M.J. at 335 (quoting *United States v. Banks*, 36 M.J. 150, 170–71 (C.M.A. 1992)).

[86] *Banks*, 37 M.J. at 171.

> [Adcock]'s absence based on the convening authority's improper denial;
>
> (6) the continued denial of Capt [Adcock] to serve IMC [sic] from the Article 32 hearing through the filing of pleadings and the 11 October 2023 Article 39(a) session; and
>
> (7) the resulting delay in Capt [Adcock] being produced to assist [Appellee] in defending against Charge II from the denial of the IMC request to the present date.[87]

As an initial matter, to the extent the military judge may have reconsidered his 3 February 2023 ruling on UCI in this ruling,[88] doing so would be improper. A military judge cannot reconsider a ruling from a court-martial that no longer exists. A military judge may, however, conduct a new analysis of all facts *affecting the current court-martial*, including any relevant facts related to a previous court-martial—provided those facts are raised in the current court-martial.

In concluding that "the cumulative error doctrine . . . may . . . be considered at the trial level," the military judge relied on the First Circuit's decision in *United States v. Padilla-Galarza*[89] and the Army Court of Criminal Appeals' decision in *United States v. Badders*.[90] The military judge's reliance on these cases was misplaced.

While the court in *Padilla-Galarza* wrote that cumulative error "claims are *typically* raised . . . for the first time on appeal," the decision was the culmination of the court's *post-trial review* of the appellant's convictions.[91] And nothing in that decision supports a conclusion that cumulative error analysis is appropriate in the pretrial context.

Our sister court's review in *Badders* came via an unusual Article 62, UCMJ, procedural path. Appellee moved, *post-trial*, for entry of a finding of not

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[87] App. Ex. XVII at 17–18.

[88] "[T]his ruling involves . . . the consideration of . . . the matters considered within the Court's 3 February 2023 ruling." App. Ex. XVII at 2–3; *see also* App. Ex. XVII at 17–18 (UCI and prosecutorial misconduct, and examples 1–3 occurred during previous trial).

[89] *United States v. Padilla-Galarza*, 990 F.3d 60, 85 (1st Cir. 2021) (finding appellant's post-trial cumulative error claim "fanciful").

[90] *United States v. Badders*, No. ARMY 20200735, 2021 CCA LEXIS 510 (Army Ct. Crim. App. Sep. 30, 2021) (unpublished).

[91] *Padilla-Galarza*, 990 F.3d at 85 (emphasis added).

guilty, dismissal with prejudice, or a mistrial.[92] Following a post-trial Article 39(a), UCMJ, session to address the motion, the military judge relied on the cumulative error doctrine to declare a mistrial, citing the "cumulative effect of two evidentiary rulings she determined were erroneous yet non-prejudicial and her post-trial finding of implied bias linked to one panel member[.]"[93] The Government appealed the military judge's decision under Article 62, UCMJ.

The Army court first concluded that assessing a member's implied bias under cumulative error is improper, reasoning that such an error is not tested for prejudice and has only one remedy: declaration of a mistrial.[94] However, the court went on to determine the military judge erred in her "cumulative error math," and abused her discretion by finding implied bias and declaring a mistrial.[95] Nothing in *Badders* supports a military judge conducting a pretrial cumulative error analysis.

We hold that the cumulative error doctrine does not apply in a *pretrial* context.[96] Pretrial, a military judge is able to ensure a fair trial by addressing each error—as he did here—with a tailored remedy.

III. CONCLUSION

The Government's appeal is **GRANTED**. The military judge's dismissal of Charge II and its specification is **VACATED**. The record of trial is returned to the Judge Advocate General for remand to the convening authority and delivery to the military judge for further proceedings consistent with this opinion.

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[92] *Badders*, 2021 CCA LEXIS at *1–2.

[93] *Id.* at *2.

[94] *Id.* at *30–31.

[95] *Id.* at *43.

[96] We need not decide if a military judge may conduct a cumulative error analysis *post-trial*.

GROSS, Judge (concurring in the result):

I concur with the Court's decision that the military judge erred by applying the cumulative error doctrine at the trial level, prior to the court reaching findings. I write separately because I do not believe that the military judge's ruling directing the appointment of Capt Adcock as Individual Military Counsel [IMC] is properly before this Court. I would therefore limit our decision solely to the question of whether the military judge's dismissal for cumulative error was correct in law. While the majority opinion does an excellent job of detailing the regulatory and statutory framework for consideration and decision on a request by an accused for appointment of an IMC, the military judge's order granting Capt Adcock—by itself—did not terminate the proceedings with respect to a charge or specification or otherwise amount to a ruling that would permit the Government to invoke this Court's jurisdiction under Article 62, UCMJ.

The military judge issued his order directing the appointment of Capt Adcock on 11 October 2023. The Government did not seek reconsideration of his ruling, nor did the Government seek relief from this Court in the nature of an extraordinary writ. "When a party does not appeal a ruling, the ruling of the lower court normally becomes the law of the case."[1] Although the military judge considered the Government's actions in denying Capt Adcock as one of the many Government missteps (some apparently intentional) leading to his decision to dismiss Charge II with prejudice, his ruling is based on the compilation of errors with the IMC denial and subsequent intransigence apparently being the proverbial "straw that broke the camel's back." While the majority may be right that the military judge reached the right answer on the IMC question but for the wrong reasoning, I would find that the Government's decision not to appeal that ruling leaves nothing for us to review.

Despite the fact that we vacate the military judge's ruling, nothing in this opinion should be read as condoning the Government's behavior in how it has sought to prosecute Appellee up to this point. The military judge's ruling sets forth a series of concerning actions and decisions by the Government both in the current court-martial and the prior proceedings that could be construed to demonstrate a "win at all costs" mentality. Trial counsel would be wise going forward to remind themselves of the Supreme Court's famous exhortation to be:

[1] *United States v. Parker*, 62 M.J. 459, 464 (C.A.A.F. 2006).

the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[2]

FOR THE COURT:

MARK K. JAMISON
Clerk of Court

[2] *Berger v. United States*, 295 U.S. 78, 88 (1935).