IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/Cross-Appellant v. Paul E. COOPER Yeoman Second Class (E-5) U.S. Navy, Appellant/Cross-Appellee	**BRIEF ON BEHALF OF CROSS-APPELLEE** (ANSWER) Crim. App. Dkt. No. 201500039 USCA Dkt. No. 18-0282/NA

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

Maryann McGuire
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE, Bldg 58
Washington Navy Yard, D.C. 20374
(202) 685-7292
Maryann.n.mcguire@navy.mil
CAAF Bar No. 36940

INDEX OF BRIEF

TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

United States Constitution

Supreme Court of the United States

United States Court of Appeals for the Armed Forces

United States Circuit Courts of Appeals

United States District Courts

Statutes

Rules for Courts-Martial

Other Sources

CERTIFIED ISSUES

I.

DID THE LOWER COURT ERR NOT FINDING WAIVER OF THE RIGHT TO REQUEST INDIVIDUAL MILITARY COUNSEL WHERE CROSS-APPELLEE WAS ADVISED OF HIS RIGHT TO REQUEST AN INDIVIDUAL MILITARY COUNSEL, AGREED HE UNDERSTOOD THE RIGHT BUT WANTED INSTEAD TO BE REPRESENTED BY TRIAL DEFENSE COUNSEL, AND MADE NO MOTION FOR INDIVIDUAL MILITARY COUNSEL?

II.

DID THE LOWER COURT ERR IN NOT APPLYING THE *STRICKLAND* INEFFECTIVE ASSISTANCE TEST WHERE THE GOVERNMENT AND TRIAL JUDGE PLAYED NO PART IN THE DEFENSE'S FAILURE TO REQUEST INDIVIDUAL MILITARY COUNSEL, AND IF SO, DID CROSS-APPELLEE SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL?

III.

IF *STRICKLAND* DOES NOT APPLY, DID THE LOWER COURT CORRECTLY FIND CROSS-APPELLEE WAS DEPRIVED OF HIS STATUTORY RIGHT TO REQUEST INDIVIDUAL MILITARY COUNSEL?

IV.

DID THE LOWER COURT ERR IN ITS PREJUDICE ANALYSIS FOR CROSS-APPELLEE'S ASSERTED DEPRIVATION OF HIS STATUTORY RIGHT TO INDIVIDUAL MILITARY COUNSEL WHEN CROSS-APPELLEE DID NOT PRESERVE THE ISSUE AT TRIAL, RAISED THE ISSUE FOR THE FIRST TIME ON APPEAL, AND HAS ALLEGED NO SPECIFIC PREJUDICE?

Introduction

This Court is being asked to determine the appropriate legal standard to assess: waiver (Issue I) and errors depriving the accused of the right to select individual military counsel (Issues II, III, and IV). These issues pose foundational questions such as:

- Does an accused's right to counsel of choice derive from the Constitution, Uniform Code of Military Justice, or both? If derived from statute, is it a fundamental right?
- Does a waiver of the right have to be knowing, intelligent, and voluntary?
- What test is applied to assess errors involving the deprivation this right? Does the test change if the deprivation was caused by a confluence of factors, chiefly among them, errors committed by detailed defense counsel?

In establishing the appropriate framework to evaluate errors depriving an accused of the right to individual military counsel of choice, this Court should be cognizant of two separate lines of Supreme Court jurisprudence that, up to this point, have not crossed.

On one hand, the Supreme Court treats errors involving the deprivation of the right to counsel of choice (typically caused by the trial judge) as structural error. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Prejudice is not irrelevant, but it is presumed because of unquantifiable and indeterminate variables incapable of assessment. The Supreme Court, however, has not yet applied structural error analysis to the deprivation of the right to counsel of choice caused

by erroneous advice of counsel. A factually similar case is unlikely to arise outside the military context. This is because, unlike the civilian system, the requirements of R.C.M. 506 put detailed defense counsel in a unique position where they have a procedural role that can impact whether the right is exercised.

On the other hand, in cases involving the deprivation of various rights (not involving the deprivation of the right to counsel of choice) caused by erroneous advice of counsel, the Supreme Court has applied *Strickland v. Washington.* But when applying the second part of the *Strickland* test the Supreme Court requires the appellant to demonstrate a reasonable probability, but for counsel's error, he would have asserted the fundamental right in question. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000). This is different from the prejudice test the Supreme Court applies to defense counsel errors that do not result in the forfeiture of a fundamental right. Although the lower court did not cite this line of Supreme Court jurisprudence they completed the same assessment, albeit through its Article 59(a) review. This approach has, likewise, not been applied by the Supreme Court yet.

This Court should follow the first line of cases and apply structural error analysis to YN2 Cooper's case. But, should it apply *Strickland* instead, the prejudice assessment should mirror that line of Supreme Court cases where counsel's error resulted in the forfeiture of a fundamental right.

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ). 10 U.S.C. § 866(b). On June 18, 2018, the Judge Advocate General of the Navy certified four issues. This Court has jurisdiction over certified issues pursuant to Article 67(a)(2), UCMJ. 10 U.S.C. § 867(a)(2).

Statement of the Case

Contrary to his pleas, YN2 Cooper was convicted, by a panel of officer and enlisted members sitting as a general court-martial, of three specifications of sexual assault and one specification of abusive sexual contact in violation of Article 120, UCMJ. 10 U.S.C. § 920 (2012). (J.A. 29-31, 86, 266.) On September 19, 2014, YN2 Cooper was sentenced to a reduction to E-1, total forfeitures, confinement for five years, and a dishonorable discharge. (J.A. 308.)

On January 27, 2016, the convening authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed. (J.A. 329-332.) On April 16, 2015, in response to the NMCCA's order, the convening authority submitted a corrected Court-Martial Order. (J.A. 324-327.)

Before the NMCCA, YN2 Cooper alleged his detailed defense counsel's failure to submit his individual military counsel (IMC) requests deprived him of the right to effective assistance of counsel, his Sixth Amendment right to counsel

of choice, and his statutory right to IMC. (J.A. 2.) Presented with conflicting affidavits, the lower court ordered a hearing pursuant to *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1968), to determine if Captain (CPT) Neumann was requested as IMC, and if so, whether he was reasonably available to serve as IMC. (J.A. 4.) The *DuBay* military judge found YN2 Cooper did request CPT Neumann as IMC, and CPT Neumann would have been reasonably available. (J.A. 769, 772.)

On March 7, 2018, the NMCAA found that YN2 Cooper suffered material prejudice to his statutory right to IMC. (J.A. 22-23.) They set aside the findings and sentence, and authorized a rehearing. (J.A. 28.) On April 17, 2018, the NMCCA denied the Government's motion for reconsideration.

On June 16, 2018, YN2 Cooper filed a Petition for Grant of Review. On June 18, 2018, the Judge Advocate General certified four issues to this Court.

Statement of Facts

A. Sex with HM2 JP.

In the late summer/early fall of 2013, YN2 Cooper and HM2 JP checked into Naval Station Guantanamo Bay, Cuba. (J.A. 123, 221.) On October 27, 2013, they met at a praise team band practice session. (J.A. 124-126, 221-222.) After the service, at YN2 Cooper's request, HM2 JP gave YN2 Cooper a ride back to his residence. (J.A. at 128, 241.) They agreed to hang out and play musical instruments. (J.A. 130.)

They briefly stopped at HM2 JP's residence to get her guitar. (J.A. 223.) Next, they went to YN2 Cooper's residence. During the ride, they discussed their marital status—HM2 JP was single. (J.A. at 128, 224.)

Once inside, they played music together. (J.A. 130-131, 178-170, 225.) Hospital Corpsman Second Class JP commented on the large TV in the room, and a conversation about movies and games ensued. (J.A. 132, 225.) Sitting close enough to each other to share a small blanket, they turned off the light and watched a movie. (J.A. 133, 225-226.) Here are two separate stories of what happened next:

	YN2 Cooper's Trial Testimony	**HM2 JP's Trial Testimony**
How they went from sitting to laying	YN2 Cooper leaned over on his hand. When his hand fell asleep he laid down on his side. HM2 JP repositioned her body so that she was laying down in front of him in the spooning position. (J.A. 226.)	YN2 Cooper touched her thigh. She moved her legs away, but he continued to touch. HM2 JP used her hands to push his hands away, but he continued to touch. YN2 Cooper pulled HM2 JP into a spooning position. He held her close to him. She tried to push his hands away. (J.A. 134-135.)
After they laid down	While in a spooning position, still clothed, HM2 JP humped her buttocks against YN2 Cooper's penis, resulting in arousal. They kissed, she unbuttoned her pants, and YN2 Cooper pulled them off. (J.A. 230.)	YN2 Cooper's grip got tighter and HM2 JP lost the ability to move or control her body. YN2 Cooper kissed her neck, licked her ear lobe, and pulled her pants down. While this is happening, HM2 JP can think, but cannot talk or move. (J.A. 136-137.)
Oral Sex	YN2 Cooper performed oral sex on HM2 JP. HM2 JP was massaging YN2 Cooper's head while he was performing oral sex on her. (J.A. 231.)	YN2 Cooper performed oral sex on HM2 JP. HM2 JP's mind and body were not connected. She did not physically react to the oral sex. (J.A. 137-138.)

Sexual Intercourse (First Time)	YN2 Cooper got undressed and put on a condom. YN2 Cooper asked HM2 JP if she was ok with this. They had sex. (J.A. 232.)	YN2 Cooper got undressed, put on a condom, and they had sex. HM2 JP wanted to push him away, kick him, and run out of there but did not do any of those things because she had no physical control over her body. HM2 JP was motionless during sexual intercourse. (J.A. 138-139.)
The time between	YN2 Cooper used the bathroom. When he returned they continued spooning with HM2 JP in front and him behind. Again, they started humping, and HM2 JP used her hand to masturbate YN2 Cooper's penis. (J.A. 233.)	YN2 Cooper used the bathroom. When he returned, he got back into the spooning position with HM2 JP in front. HM2 JP is still unable to control her body. They resume watching the movie. YN2 Cooper uses HM2 JP's hand to masturbate himself. (J.A. 140.)
Sexual Intercourse (Second Time)	While spooning, YN2 Cooper inserted his penis into HM2 JP's vagina a couple of times before he stopped to get a condom. After he put the condom on, they continued to have sex in the missionary position. HM2 JP had her hands on his arms during sex. After they had sex he went to the bathroom to flush the condom down the toilet. (J.A. 234-235.)	YN2 Cooper moved HM2 JP's leg over him and inserted his penis into her vagina. He stopped, put a condom on, and continued to thrust his penis into her vagina. When he was done he got up and went to the bathroom. (J.A. 141-142.)
A Visitor Arrives	YN2 Cooper left the room to get his keys from RP2 Owens. They had a cigarette. *Id.* YN2 Cooper told RP2 Owens about what happened between him and HM2 JP. (J.A. 235.)	There was a knock at the door. YN2 Cooper got dressed and left the room. (J.A. 142-143.)
YN2 Cooper returns	YN2 Cooper returned to the room and resumed cuddling and watching TV with HM2 JP. HM2 JP fell asleep, woke-up, used the bathroom, and announced her	YN2 Cooper returned, got back into bed, and tried to kiss HM2 JP. She regains the ability to move her body. She moves her head away from a kiss, gets up,

	departure. YN2 Cooper invited her to stay the night, but she declined. YN2 Cooper walks her out to her car. (J.A. 236.)	gets dressed, and announces her departure. YN2 Cooper wants her to stay the night. She declines. YN2 Cooper walks her to her car. (J.A. 143-144.)

B. The Report.

The following day, HM2 JP reported she "may have been assaulted and wanted to file a complaint." (J.A. 212.) Asked whether it was consensual, she responded it was consensual. *Id*.

C. Upon learning of the accusations, YN2 Cooper sought counsel.

In November 2013, NCIS attempted to interrogate YN2 Cooper. (J.A. 12.) After being advised he was under investigation for sexually assaulting HM2 JP, YN2 Cooper invoked counsel and choose not to participate in the interrogation. *Id.* He then took steps to seek the advice of counsel. (J.A. 12, 770.) Initially, he approached Regional Legal Service Office Southeast's (RLSO SE) office in Guantanamo Bay, but was turned away and told he was not eligible for defense services. (J.A. 12, 770.)

"There was no judge advocate in Guantanamo Bay authorized to consult with sailors on criminal matters." (J.A. 12.) The lower court found the RLSO office was responsible for providing prosecution and command legal services, and should have connected YN2 Cooper with Defense Service Office Southeast for a private consultation with a defense attorney. (J.A. 12.)

During this timeframe, YN2 Cooper was assigned FOIA clerk duties in the Office of the Staff Judge Advocate. He worked in close proximity to several judge advocates including: CPT Neumann, Army National Guard (ANG); CDR Massucco, U.S. Navy Reserve; and Capt Neely, U.S. Marine Corps. (J.A. 769.) His direct supervisor was CPT Neumann, a judge advocate in the California Army National Guard. (J.A. 3.) In CPT Neumann's capacity as a legal assistance attorney, he formed an attorney-client relationship with YN2 Cooper covering two separate legal assistance matters. (J.A. 3, 770.) Realizing YN2 Cooper had "no one else to talk to, no one else to give him any guidance at all," CPT Neumann expanded the scope of the attorney-client relationship and provided legal advice on military justice matters. (J.A. 539, 770.)

D. Five months after his request to consult with counsel, Lieutenant Buyske was detailed as YN2 Cooper's military defense counsel.

As a result of HM2 JP's report, five specifications of violating Article 120 were preferred to a general court-martial. (J.A. 29-31.)[1] After preferral, LT Buyske, U.S. Navy, was detailed as defense counsel. (J.A. 3.) Lieutenant Buyske was stationed in Florida, and initial client communications occurred over the telephone. (J.A. 770.) At first, YN2 Cooper wanted LT Buyske to represent him at

[1] A single specification of violating Article 92, UCMJ, 10 U.S.C. § 892, for sexually harassing Ms. JJ was also referred. YN2 Cooper was acquitted on this Charge. (J.A. 266.)

his Article 32 hearing. (J.A. 770, 342.) However, after the hearing, YN2 Cooper was concerned about his legal representation and expressed his desire to exercise his right to request IMC. (J.A. 770, 343.)

E. Three separate requests for IMC.

Yeoman Second Class Cooper was keen to be represented by IMC. His first choice was CDR Massucco. (J.A. 343, 539.) After he told LT Buyske he wanted to IMC CDR Massucco, LT Buyske discussed the request with her supervisor. (J.A. 343, 539.) Lieutenant Buyske also sent CDR Massucco an email notifying him he was requested as IMC. (J.A. 657.) Lieutenant Buyske informed YN2 Cooper that CDR Massucco, whose reserve order were ending, was not a viable choice for IMC, and they agreed not to pursue an IMC request for him. (J.A. 3.)

Following his communications with LT Buyske about CDR Massucco's unavailability, YN2 Cooper had a chance encounter with CPT Neumann at Windjammer, an on-base facility. (J.A. 770, 345.) They discussed CPT Neumann's willingness and availability to be YN2 Cooper's IMC. *Id.*

Whether YN2 Cooper told LT Buyske he wanted CPT Neumann as his IMC was one of two seminal factual questions in the proceedings before the lower court. (J.A. 769.) Only two witnesses had first-hand knowledge of whether YN2 Cooper told LT Buyske he wanted CPT Neumann as his IMC: LT Buyske and YN2 Cooper. (J.A. 769.) They provided contradictory statements—both were credible,

and sure of their testimony. *Id.* Ultimately, the *DuBay* military judge found that YN2 Cooper did request CPT Neumann as IMC. (J.A. 769.)

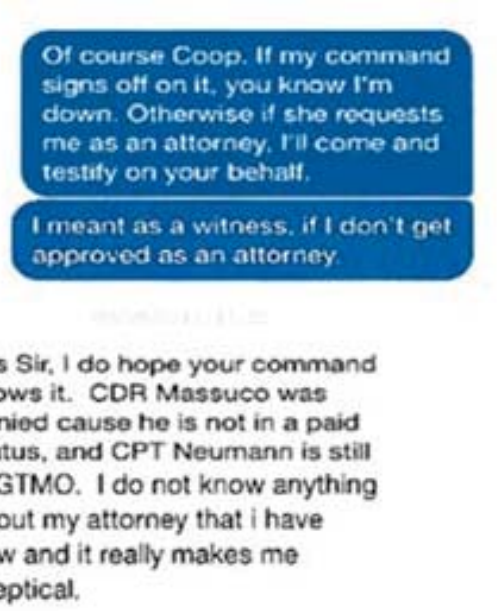
The *DuBay* military judge concluded circumstantial evidence corroborated YN2 Cooper's testimony. (J.A. 14, 771.) Specifically, the lower court and *DuBay* military judge emphasized two corroborating facts.

First, shortly after his conversation with YN2 Cooper at the Windjammer, CPT Neumann received an email from LT Buyske with a request to talk. (J.A. 666.) During their conversation, LT Buyske relayed her knowledge of his conversation with YN2 Cooper at the Windjammer. (J.A. 14, 771.) Captain Neumann's testimony corroborated YN2 Cooper's testimony. (J.A. 771.)

Second, after YN2 Cooper came to believe that CPT Neumann was not available as IMC he communicated with Capt Neely via Facebook. (J.A. 14, 771.) Those messages corroborate YN2 Cooper's testimony that he requested CPT Neumann, but was made to believe CPT Neumann was not available:

Will everything be ok to have you as my IMC? Two heads are better than one, and the Government has provided the accuser with two Attorneys.

I spoke with her just now, and she is going to draft the IMC request. She stated ultimately it is up to your command. I hope everything goes as planned cause this is my life on the line, therefore I need the best help which could be made available to me.



(J.A. 744-745.)

Based on these Facebook communications, the *DuBay* military judge and lower court found the following facts and reasonable inferences: (1) YN2 Cooper requested CDR Massucco as his IMC, and believed the request was denied because CDR Massucco was not in a paid status, (2) YN2 Cooper requested CPT Neumann as his IMC, but was under a misapprehension CPT Neumann could not be his IMC since he was located in Guantanamo Bay, (3) YN2 Cooper was skeptical of his detailed defense counsel, and (4) YN2 Cooper made a third IMC request for Capt Neely. (J.A. 12-15, 769-772.)

Concluding that YN2 Cooper did request CPT Neumann, the *DuBay* military judge and lower court relied on two corroborative facts: CPT Neumann's recitation of his conversation with LT Buyske, and the Facebook messages between YN2

Cooper and Capt Neely. (J.A. 14, 71-72.) Two additional corroborative facts presented at the *DuBay* hearing also support the finding.

First is the conversation between LT Buyske and her supervisor, CDR Frederico, where they discussed YN2 Cooper's request to IMC CPT Neumann. (J.A. 603-608.) At the *DuBay* hearing, CDR Frederico was asked whether "Lieutenant Buyske had talked to you about an IMC request for Captain Neumann specifically…she was talking to you about a conversation she had about IMC-ing CPT Neumann where she specifically talked about YN2 Cooper's IMC request for CPT Neumann. That – that's what you told us, correct?" (J.A. 608.) Commander Frederico responded "sure, yes." *Id.*

Second is the conversation between YN2 Cooper's clemency attorney, LT Masterson, and LT Buyske. According to LT Masterson, "LT Buyske confirmed that no written IMC requests were ever filed." (J.A. 693.) Lieutenant Masterson "was left with the clear impression that LT Buyske acknowledged…YNSR Cooper had in fact specifically requested to her three IMCs, to include CDR Massucco, Captain Neely and Captain Neumann." (J.A. 693.)

Lieutenant Buyske remembered talking to LT Masterson about the IMC requests. (J.A. 584.) She was not able to recall with any degree of granularity what she told LT Masterton, but she stated if the topic of IMCing CPT Neumann came up she would have been clear that YN2 Cooper did not request CPT Neumann.

(J.A. 585.) Lieutenant Masterson believed the topic did come up, and LT Buyske did not clearly state CPT Neumann was not requested. (J.A. 693.) Lieutenant Masterson was led to believe CPT Neumann was requested as IMC. *Id.*

F. The Trial.

None of YN2 Cooper's requests for IMC were forwarded. Instead, LT Buyske and an assistant detailed defense counsel, LCDR Gross, represented YN2 Cooper at trial. (J.A. 3.) During his arraignment, the military judge advised YN2 Cooper of his right to be represented by IMC. (J.A. 18.) Acknowledging this rights, YN2 Cooper requested to be represented by LT Buyske. (J.A. 19.)

The essence of the Government's case against YN2 Cooper was that he sexually assaulted a person who was in a state of tonic immobility. There were only two persons present in YN2 Cooper's residence on the evening of August 27, 2013: YN2 Cooper and HM2 JP. Both testified. Yeoman Second Class Cooper told a story about a consensual sexual encounter with two active participants. (J.A. 226-236.) In contrast, the complainant told a story about a one-way sexual encounter where, although initially she was a fully functioning adult capable of speech and movement, she lost the ability to speak or move. (J.A. 134-144.) As result, she was unable to express, either through words or action, her lack of consent. *Id.*

The Government called an expert witness, Dr. Sweda, who carved a path for the members to give credence to HM2 JP's testimony that she was not capable of

speech or movement during the sexual assault. (J.A. 186-200.) The trial defense team did not challenge the Government's tonic immobility expert witness. *Id.* Nor did they, on this critical issue of great importance, call their own expert witness.

The members returned findings of guilty on all specifications involving HM2 JP. (J.A. 266.)

G. Post-trial allegations of ineffective assistance of counsel.

Captain Neumann was retained in his civilian capacity, at no cost to YN2 Cooper, to assist with submitting matters in clemency. (J.A. 487-488, 665.) Once it became apparent allegations of ineffective assistance of counsel would be presented as matters in clemency, the attorney-client relationship between YN2 Cooper and his trial defense team, LT Buyske and LCDR Gross, was severed. (J.A. 321-323, 593-594.) Lieutenant Masterson was detailed as military defense counsel for post-trial processing. (J.A. 692.)

H. Availability of CPT Neumann.

On November 19, 2013, CPT Neumann deployed to Guantanamo Bay, Cuba. (J.A. 452, 759.) For the duration of his deployment his orders assigned him to 40TH Infantry Headquarters, Headquarters and Headquarter Company (-) Forward. (J.A. 453, 656, 759.)

Assigned to: 0040 IN HQ HHC FWD 1 (WTSATA)

(J.A. 759.)

Lieutenant Colonel (LTC) Clements, ANG, was the commander of 40TH Infantry Headquarters, Headquarters and Headquarter Company (-) Forward. (J.A. 656.) In accordance with CPT Neumann's orders to deploy, LTC Clements was responsible for personnel service support, including "awards and decorations, UCMJ, and all other forms of personnel and legal administration support." (J.A. 761.) Had he received a request for CPT Neumann as IMC, LTC Clements would have found CPT Neumann reasonably available. (J.A. 656.)

Summary of Argument

I

The right to counsel of choice is a fundamental right. The waiver of a fundamental right—whether the right is derived from the Constitution or statute—is valid only if voluntarily, knowingly, and intelligently made. Lieutenant Buyske's advice to YN2 Cooper left him with the false impression his previous requests for IMC had been denied. As a result, he believed he had no options. Thus, his failure to assert his right to IMC on the record is not a valid waiver because it was not knowing and intelligent.

II

The right to counsel of choice is not derived from the right to a fair trial, but rather from a Constitutional guarantee. Deprivation of the right to counsel of choice has to be analyzed as a structural error because it is not possible to know

what the impact on the outcome would have been if different counsel was assigned.

Unlike in the civilian criminal system, the unique procedural requirements needed to exercise the right to IMC, established by the Government, place trial defense counsel in the middle of the process. Detailed defense counsel are uniquely positioned so that their inaction, incorrect assessment, or usurpation of decision making authority can deprive their client of the right to IMC.

If the *Strickland* framework, instead of structural analysis, applies when the deprivation of the right to IMC is caused by detailed defense counsel's failure to carry out her role in the process, then the ensuing prejudice analysis asks whether those errors materially prejudiced the substantial right at issue. In other words, the prejudice inquiry is whether there is a reasonable probability, but for LT Buyske's errors, YN2 Cooper would have exercised his substantial right to be represented by CPT Neumann. Not only is this the same standard applied by the lower court through its Article 59(a), UCMJ, assessment, it is the standard applied by the Supreme Court in cases where a criminal defendant forfeits a fundamental right as a result of incorrect advice from counsel.

The lower court's factual findings underlying their legal conclusion that YN2 Cooper suffered material prejudice are supported by the record, not clearly erroneous, and should not be disturbed.

III

The Government seeks a third opinion on the fact-specific question: was CPT Neumann reasonably available? The *DuBay* military judge's findings of fact are supported by the record. The NMCCA did not disturb his findings.

The *DuBay* military judge correctly assessed CPT Neumann's reasonable availability under AR 27-10. Under AR 27-10, the commander of the unit to which the IMC'd attorney is assigned has the sole discretion to make the reasonable availability determination. At all relevant times, CPT Neumann was assigned to the 40TH Infantry Division. His commander was LTC Clements. If presented with an IMC request for CPT Neumann, LTC Clements would have approved it.

IV

The lower court did not err when it found YN2 Cooper suffered material prejudice to his substantial right. To the extent prejudice arising from an error depriving a defendant of the right to counsel of choice is capable of being assessed, it can only be assessed by evaluating the error's impact on the ability to exercise the fundamental right in question. The deprivation of counsel of choice is an error that permeates all facets of the trial process. The impacts of the deprivation cannot be quantified. Instead of measuring the impact on the findings, the proper inquiry centers on whether, but for the alleged error, is there a reasonable probability YN2 Cooper would have exercised his fundamental right.

Argument

I

THE LOWER COURT CORRECTLY HELD YN2 COOPER DID NOT WAIVE HIS RIGHT TO REQUEST INDIVIDUAL MILITARY COUNSEL WHEN HIS DETAILED DEFENSE COUNSEL PREVENTED HIM FROM MAKING A KNOWING AND INTELLIGENT DECISION.

A. Standard of Review.

Courts indulge every reasonable presumption against waiver of fundamental rights and do not presume acquiescence in the loss of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). "The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances." *United States v. Elespuru*, 73 M.J. 326, 328 (C.A.A.F. 2014).

Whether the lower court applied the appropriate legal standard for determining what constitutes a valid waiver is a question of law reviewed *de novo*. *United States v. Rosenthal*, 62 M.J. 261, 262 (C.A.A.F. 2005). This Court assesses the findings of fact that inform this legal question under a clearly erroneous standard. *United States v. Barry*, No. 17-0162/NA, slip op. at 9__ M.J. __ (C.A.A.F. Sept. 5, 2018); *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

B. *Camanga's* application of waiver does not apply to these facts.

The Government cites *United States v. Camanga*, 38 M.J. 249 (C.M.A. 1993), for the proposition an accused can waive the right to counsel of choice by "failing to make a timely request." (Gov't Brief at 26.) The Government, however, has not offered any evidence that YN2 Cooper's request for IMC was untimely. Here, YN2 Cooper made a timely request for CPT Neumann to be his IMC. As contemplated by R.C.M. 506, he submitted his request to detailed defense counsel.

Unlike the appellant in *Camanga*, who had knowledge of the information needed to make an informed decision regarding choice of counsel but, for reasons not disclosed in the opinion, did not make a timely request, YN2 Cooper was not fully informed. Lieutenant Buyske failed to provide information required to make a knowledgably and informed decision. The facts of *Camanga* are inapposite.

C. The right to select individual military counsel is a fundamental right rooted in the Sixth Amendment. To be valid, a waiver of this right must be voluntary, knowing, and intelligent.

The right to be represented by counsel is enshrined in both the Constitution and the Uniform Code of Military Justice. U.S. Const. amend. VI; Article 38, UCMJ, 10 U.S.C. § 838. In *United States v. Gonzalez-Lopez*, the Supreme Court held the Sixth Amendment affords criminal defendants the right to counsel of choice. 548 U.S. 140, 144 (2006). Although the right to counsel of choice is enshrined in the Sixth Amendment it is not an unfettered right. *Id.* Choice of

counsel must be balanced against "society's interest in the efficient and expeditious administration of justice." *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986).

When the balance between competing interests calls for it, the Supreme Court has circumscribed the right to counsel of choice. For example, in *Morris v. Slappy*, the Supreme Court held a trial judge did not violate a criminal defendant's right to be represented by counsel when he denied a continuance that would have enabled the defendant's first appointed public defender to represent him at trial. 461 U.S. 1, 11 (1983). Likewise, in *Wheat v. United States*, the Supreme Court did not find a Sixth Amendment violation of the right to counsel of choice when the selected counsel had previously been retained by coconspirators and was shrouded with an irreconcilable and unwaiverable conflict of interest. 486 U.S. 153, 164 (1988). The Supreme Court has also stated there is no right to choose a lawyer who is not a member of the bar, whose services the defendant cannot afford, or who, for other reasons, declines to represent the defendant. *Id.*, at 159.

Neither the Supreme Court nor a majority of this Court have weighed in on whether the Sixth Amendment right to counsel of choice extends to selection of individual military counsel.[2] Three compelling principles indicate it does.

[2] In a dissenting opinion, Judge Ryan, joined by Judge Stucky, wrote about the two aspects of the Sixth Amendment right to counsel afforded to military criminal appellants. *United States v. Lee*, 66 M.J. 387, 391 (C.A.A.F. 2008) (Ryan, J., and Stucky, J., dissenting). First, is the right to effective assistance of counsel; and second, is "the right to counsel of choice with certain limitations." *Id.*

First, it is well settled "the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." *Gonzalez-Lopez*, 548 U.S. at 144 (citing *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624-625 (1989)). Meaning the Constitutional right to counsel of choice is contingent upon an external factor—the defendant's ability to pay.

Second, the Supreme Court has recognized this Court's holding that "the right to counsel under the Sixth Amendment extends to military trials." *Parker v. Levy*, 417 U.S. 733, n.4 (1974) (citing *United States v. Culp*, 33 C.M.R. 411, 428-429, 431 (C.M.A. 1963) (opinions of Quin, C.J., Ferguson, J)); *Cf. Davis v. United States*, 512 U.S. 452 (1994). "The Sixth Amendment grants military defendant's the right to "Assistance of Counsel for his defense." *United States v. Lee*, 66 M.J. 387, 391 (C.A.A.F. 2008) (Ryan, J., and Stucky, J., dissenting). One of the two aspects of a service members right to counsel under the Sixth Amendment includes the "right to counsel of choice with certain limitations." *Id.*

Third, a service member has the right to be represented by military counsel of his own selection if that counsel is reasonably available. Article 38(b)(2)-(3), UCMJ, 10 U.S.C. § 838(b)(2)-(3) (2012). This is one of the most valuable rights

afforded to an accused. *United States v. Kinard*, 45 C.M.R. 74, 77 (C.M.A. 1972) (citing *United Stated v. Donohew*, 39 C.M.R. 149 (C.M.A. 1969)).

The Sixth Amendment does not afford the right to counsel of choice to all criminal defendants. Civilian criminal defendants who by virtue of luck or hard work have the financial resources to pay for counsel have this right. And military criminal defendants have this right by virtue of statute.

In the civilian criminal justice system, a criminal defendant's right to choose counsel is contingent upon two things: the size of their wallet or counsel's inclination to work for free, and selected counsel's willingness to form an attorney-client relationship. In the military justice system, the right to choose individual military counsel is also contingent upon two things: the continued existence of Article 38, and selected counsel's reasonable availability.

It may seem paradoxical that the right to choose IMC, or any Constitutional right, could turn upon a Congressional grant that can be revoked through legislation. But to ignore that the right to choose is derived from the Constitution would contradict the Supreme Court's holding in *Gonzalez-Lopez*. As the Supreme Court recognized in *Gonzalez-Lopez*, the right to counsel of choice does not apply to all criminal defendants, but only those who can afford to pay. If the defendant loses the ability to pay, he also loses the Constitutional right to counsel of choice. By establishing the right to select military counsel of choice, Congress put service

members on the same constitutional footing as those defendants contemplated in *Gonzalez-Lopez*—the ones that could afford to select counsel of choice.

Waivers of constitutional rights must be voluntary, knowing, and intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *Brady v. United States*, 397 U.S. 742, 748 (1970); s*ee also Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The right to counsel of choice would be nullified by a determination that an appellant's unintelligent and misinformed failure to claim his right removed the constitutional protection.

D. Even if the right to counsel of choice is not rooted in the Sixth Amendment, it is a fundamental right provided by Congress. There is a presumption against waiver of fundamental rights. To be valid, a waiver of the right must be voluntary, knowing, and intelligent.

In *United States v. Olano*, the Supreme Court provided a list of factors to be considered in determining what is required to effect a valid waiver of a right. 507 U.S. 725, 733 (1993). These factors include, "[w]hether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary." *Id.* Which of these factors apply and to what extent depends on the right at stake. *Id.* at 733. For fundamental rights, a waiver is only valid if it is informed. *New York v. Hill*, 528 U.S. 110, 114 (2000); a*ccord Johnson v. Zerbst*, 304 U.S. at 464-465.

In the military justice system, the right to counsel includes the right to IMC who are reasonably available. Article 38(b)(3), UCMJ, 10 U.S.C. § 838(b)(3) (2012). Any waiver of the right to counsel afforded by virtue of Article 38 must be voluntary, knowing, and intelligent. *See United States v. Hartfield*, 17 C.M.R. 67, 67 (C.M.A. 1967); *United States v. Lee*, 66 M.J. 387, 288 (C.A.A.F. 2008).

In *United States v. Booker*, this Court did two things. First, it reaffirmed that there is no right to counsel at summary court-martial. 5 M.J. 238 (C.M.A. 1977); *accord Middendorf v. Henry*, 425 U.S. 25 (1976). Second, it held constitutional due process would not tolerate the use of summary court-martial results at later court-martial proceedings to enhance sentences unless there was representation by counsel at the former proceeding, or valid waiver of assistance of counsel. *Id.*

This Court found that only a legally trained person could provide service members with the advice and information necessary to make an informed decision whether to accept summary court-martial. *Id.* at 243. As a result, only "[t]hose hearings in which the accused was represented by counsel, or has executed a valid waiver of assistance of counsel[22] may be used for the purpose of enhancement of the punishment." *Id.* (Superscript in original). Footnote 22 of the *Booker* opinion refers to footnote 20 for amplifying information on what would be considered a "valid waiver" of the assistance of counsel. *Id.* at n.22. To be a valid waiver, it is imperative the waiver be voluntary, knowing and intelligent. *Id.* at n.20.

In *United States v. Hartfield*, the appellant requested IMC, but a member of the convening authority's staff denied the request without elevating the request for the convening authority's personal decision. 17 C.M.R. 67, 67 (C.M.A. 1967). Hartfield did not renew his request for IMC on the record. Subsequently, on appeal, the Government argued Hartfield's silence on the record equated to a waiver of the right to IMC. Deciding whether the appellant's failure to assert the right to IMC constituted waiver, the Court of Military Appeals applied the *Johnson v. Zerbst* presumption against waiver of fundamental rights. *Id.* at 270. Hartfield's silence on the record was based on erroneous advice and information that the convening authority had denied his request. *Id.* As a result, Hartfield did not waive his right to request IMC by not renewing his request at trial. *Id.*

Hartfield was a pre-*Gonzalez-Lopez* case. In *United States v. Lee*, a post-*Gonzalez-Lopez* case, this Court stated, to be valid, any waiver of the right to select conflict-free counsel must be "knowing intelligent acts done with sufficient awareness of the relevant circumstances and consequences." 66 M.J. 387, 288 (C.A.A.F. 2008).

This Court has applied a voluntary, knowing, and intelligent standard for assessing waiver in cases involving other rights derived from statute and not the Constitution. For instance, in *United States v. Rosenthal*, this Court held waiver of the right to submit matters in clemency under R.C.M. 1105(d)(1) must be knowing

and intelligent. 62 M.J. 261, 262 (C.A.A.F. 2005); *accord United States v. Stephenson*, 33 M.J. 79, 83 (C.M.A. 1991). In *Rosenthal*, the appellant originally executed a valid waiver of his right to submit clemency matters. *Rosenthal*, 62 M.J. at 262. Two years after that waiver the NMCCA set-aside the convening authority's action and remanded for a new action. *Id.* Trial defense counsel did not take any action to inform the appellant of the new post-trial proceeding and the opportunity to submit new matters. *Id.* This Court did not find a knowing and intelligent waiver when trial defense counsel failed to fully apprise the appellant of his statutory right under Article 60, UCMJ, 10 U.S.C. § 860. *Id.* at 263.

In another case, this Court applied the knowing and voluntary standard to waivers of the statutory right to an Article 32 hearing. *United States v. Von Bergen*, 67 M.J. 290, 294 (C.A.A.F. 2009).

Finally, in *United States v. Rodgers*, and its progeny, the Military Court of Appeals found that, to be valid, a waiver of the statute of limitations under the UCMJ must be consciously made. 24 C.M.R. 36, 38 (C.M.A. 1957).

E. <u>YN2 Cooper's waiver was not valid because it was not knowing and intelligent. He relied on erroneous representations about CPT Neumann's availability</u>.

The manifest weight of the evidence is clear, YN2 Cooper wanted an IMC. Acting on erroneous advice from LT Buyske—that the three judge advocates he identified as IMC were not reasonably available—YN2 Cooper told the military

judge he wanted to be represented by LT Buyske. (J.A. 79.) This was not a valid waiver because it was not knowing and intelligent.

The United States Court of Appeals for the Federal Circuit addressed a factually similar situation in *Fairchild v. Lehman*. 814 F.2d 1555, 1560 (Fed. Cir. 1987). The plaintiff, Sgt Fairchild, was offered nonjudicial punishment (NJP) under Article 15 for using marihuana. *Id.* at 1556. Military counsel advised Sgt Fairchild that if he refused NJP his case could be referred to court-martial and might result in a bad-conduct discharge, but if he accepted NJP he would not receive an adverse discharge. *Id.* at 1558.

Based on advice from counsel he accepted NJP. He was then separated from the Marine Corps with an adverse administrative discharge. *Id.* at 1558. The court found that Sgt Fairchild did not execute a valid waiver of the right to decline NJP when he received erroneous advice from counsel. His waiver was not valid because his attorney misinformed him of the consequences of electing NJP. *Id.* at 1560; s*ee also United States v. Crank*, 2012 U.S. Dist. LEXIS 36147, *14 (E.D.Va. 2012) ("[W]aiver [of statutory rights derived from the Uniform Code of Military Justice] cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.").

Like Sergeant Fairchild, YN2 Cooper relied on erroneous advice when he did not tell the military judge he wanted CPT Neumann as counsel. Contrary to the

Government's inference on page 29 of their brief, just because YN2 Cooper, a Yeoman with a high school degree and no legal training or experience, had recently been assigned as a Freedom of Information Act clerk in an office full of Judge Advocates, and had talked to several of them about his pending military justice problems does not mean he can be attributed with a judge advocate's level of knowledge and experience. (J.A. 742.) Expecting an accused to interrupt and contradict his bar certified, JAG certified lawyer is a bold legal maneuver beyond the prowess of the average accused. To expect it in a case like this where LT Buyske erroneously advised him about the availability of CPT Neumann for which YN2 Cooper had no reason to question her expertise is a bridge too far.

The NMCCA incorporated YN2 Cooper's *Dubay* testimony in their opinion. It is apparent from his testimony the reason he told the military judge he wanted LT Buyske to represent him was because "all his other requests had been denied." (J.A. 19.) The NMCCA concluded, "based on the fallacy of the appellant's belief, his waiver was not knowing or intelligent." (J.A. 19.)

The decision to abide by and accede to the advice of detailed military counsel who is certified by the Judge Advocate General as competent, a member of the bar, and a naval officer is not a waiver when the advice provided is fundamentally erroneous and results in the denial of substantial rights. On the record, the military judge asked detailed defense counsel, "has any other defense

counsel been detailed or individual military counsel been requested in this case?" (J.A. 77.) Lieutenant Buyske and LCDR Gross, at different times in the trial, responded "no." (J.A. 77, 88.) These responses did "violence to reality." *Glasser v. United States*, 315 U.S. 60, 72 (1942).

Recognizing the difficultly of speculating about what the judge would have done if LT Buyske responded truthfully, it is hard to imagine that had the military judge been informed, then and there, about YN2 Cooper's multiple requests for IMC and his very real desire to be represented by someone else he would have just sat on it. At the bare minimum, an accurate response from LT Buyske or LCDR Gross would have triggered a more robust discussion between the military judge and YN2 Cooper about his Article 38 rights. In short, there was not a valid waiver and the lower court did not err.

II

THE RIGHT TO CHOOSE COUNSEL IS FUNDAMENTAL, BUT NOT ABSOLUTE. THE PREJUDICE ARISING FROM THE DEPRIVATION OF THIS RIGHT IS INCAPABLE OF ASSESSMENT. THE *STRICKLAND* FRAMEWORK DOES NOT APPLY.

A. Standard of Review.

As briefed by the Government, the second certified issue is a compound issue consisting of three issues each with its own standard of review. The first issue is: Under the facts of this case, what legal framework applies to assess the

deprivation of the right to select IMC? The second issue is: Assuming *Strickland* applies what is required for YN2 Cooper to meet his burden under the prejudice prong? The last question is: Assuming the second prong of *Strickland* requires YN2 Cooper to prove, absent LT Buyske' s errors, there is a reasonable probability he would have had a more favorable trial outcome, did YN2 Cooper meet this burden?

The first two issues involve questions of law. Whether the lower court applied the appropriate legal standard is a question of law reviewed *de novo*. *United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013).

The last issue assumes that a particular legal standard applies, and questions whether the facts support a finding of prejudice. It assumes the second prong of *Strickland* requires YN2 Cooper to prove, absent the deprivation of CPT Neumann as IMC, there is a reasonable probability the members would have had reasonable doubt respecting guilt. (Gov't Brief at 40.) At its core, the third issue involves questions of fact. Findings of fact are reviewed under a clearly erroneous standard. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997). Factual matters are beyond this Court's statutory scope of review. Article 67(c), UCMJ, 10 U.S.C. § 867(c) (2016); *United States v. McCrary*, 1 C.M.R. 1, 2-3 (C.M.A. 1953).

B. Deprivation of the right to choose counsel is a structural error.

The two aspects of the right to counsel under the Sixth Amendment are the right to "effective assistance of counsel," and "to counsel of choice with certain limitations." *United States v. Lee*, 66 M.J. 387, 391 (C.A.A.F. 2008) (Ryan, J., and Stucky, J., dissenting). "They are different and separate aspects of the same right, and the alleged deprivations of each warrant a distinct and separate analysis." *Id.*

This distinction is center stage in this case. If an error depriving an accused of the right to select reasonably available military counsel is, as the Government argues, analyzed as an ineffective assistance of counsel claim then the *Strickland* framework applies. *Id*. On the other hand, if it is analyzed as a denial of the right to counsel of choice, then the error is structural and prejudice is presumed. *Id.* In contrasting the distinction between depriving an appellant of the right to the effective assistance as counsel versus the right to counsel of choice, the Supreme Court juxtaposes the nature and purpose of the deprived right.

The right to effective assistance of counsel is rooted in the right to a fair trial. *Gonzalez-Lopez*, 548 U.S. at 147. This right is only violated when the lack of effective representation prejudices the fairness of a conviction. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As a result, ineffective assistance claims only lie if there is a reasonable probability of a different outcome. *Id.*

On the other hand, the right to counsel of choice "has never been derived from the Sixth Amendment's purpose of ensuing a fair trial." *Gonzalez-Lopez*, 548 U.S. at 147-148. Instead, it is derived from the "Constitutional guarantee." The right is violated when the lawyer of choice—who is reasonably available—is erroneously prevented from representing the defendant. This is true "[r]egardless of the quality of representation received." *Id.* at 148. Deprivation of this right is a structural error. *Id.*

Structural error analysis applies when a court is faced with an error that defies analysis under harmless error or prejudice standards. The error must lie in the "trial mechanism" and be "so serious" as to undercut the Constitutional guarantee. *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (citing *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)).

While the precise reason why a structural error is not amendable to either prejudice or harmless error analysis varies, the Supreme Court has divided structural errors into three broad categories. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017). The first category resulting in structural analysis is "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest." *Id.* The second is, "if the effects of the error are too hard to measure." *Id.* And the last is, "if the error always results in fundamental unfairness." *Id*.

Deprivation of the right to counsel of choice falls into the second category. Instances where the second category has resulted in structural error include: denial of counsel of choice, *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006); denial of the right to individual military counsel of choice, *United States v. Hartfield*, 38 C.M.R. 67, 68 (C.M.A. 1967); deprivation of the statutory right (pre *Gonzalez-Lopez*) to request counsel pursuant to Article 38, UCMJ, *United States v. Beatty*, 25 M.J. 311, 316 (C.M.A. 1987); and denial of a defendant's autonomy to make fundamental choices about his own defense caused by defense counsel's action, *McCoy v. Louisiana*, 138 S. Ct. 1500, 1511 (2018). In *United States v. Hartfield*, this Court presumed prejudice when an IMC request was not forwarded to the convening authority. 38 C.M.R. at 68.

Through detailed defense counsel, YN2 Cooper repeatedly requested representation by IMC. One of the three choices for IMC, CPT Neumann, was reasonably available. (J.A. 18.) Lieutenant Buyske provided erroneous advice. (J.A. 19.) None of YN2 Cooper's requests for IMC were routed for a decision.

C. <u>The legal standard applied to errors involving the right to counsel of choice does not depend on what officer of the court created the error</u>.

Choice of counsel is an issue involving YN2 Cooper's autonomy. "Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind [the Supreme Court's] decisions have called structural" even when the autonomous

right was deprived, not by the judge or prosecutor, but by defense counsel. *McCoy*, 138 S. Ct. at 1511.

The Government asks this Court to establish a test requiring accused who have been deprived of the right to IMC because of counsel's error to prove, absent the error, the panel would have had reasonable doubt respecting guilt. (Gov't Brief at 41.) But the purpose of the right to counsel of choice is not to ensure a fair trial. *Gonzalez-Lopez*, 548 U.S. at 147. Instead, it is "regarded as the root meaning to the constitutional guarantee." *Id.* "It is one thing to conclude that the right to counsel of choice may be limited by the need for [a] fair trial, but quite another to say that the right does not exist unless its denial renders the trial unfair." *Id.* at n.3.

The Government's approach fails to account for the unique procedural steps required before the right to IMC can be exercised. While the UCMJ provides the condition precedent for the right, the Rules for Courts-Martial establish the procedures that must be followed in order to exercise the right. It was not Congress, but the President who established the procedural predicate for IMC requests made pursuant to Article 38, UCMJ. The President further delegated authority to the service secretaries to establish procedures used to determine if requested counsel are reasonably available. MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 506 (2012) [herinafter MCM]. Rule for Courts-Martial 506

provides that IMC requests shall be forward by the accused or counsel to either trial counsel or the convening authority. MCM, R.C.M. 506(b)(2).

Under the rules the Government promulgated, "a request for IMC must pass through multiple hands, creating multiple opportunities for failure." (J.A. 9.) The multiple opportunities for failure arise as a result of the procedures the President and Service Secretaries enacted. These procedures necessarily require an accused to directly contact the opposing prosecutor, or go through their detailed military defense counsel whom they prefer to replace or demote. MCM, R.C.M. 506(b)(2).

The procedures do not give detailed defense counsel decision making authority. Even if the selected IMC is clearly unavailable because they fall into one of the enumerated R.C.M. 506(b)(1) categories, the decision to deny rests with the convening authority, not defense counsel. MCM, R.C.M. 506(b)(2).

Here, the authority to declare CPT Neumann unavailable rested with CPT Neumann's commander, LTC Clements. (J.A. 16.) By failing to draft and submit YN2 Cooper's request for CPT Neumann, LT Buyske usurped LTC Clements' role and deprived her client of his substantial right to IMC.

Even if the error is attributable to defense counsel—and not improper government or judicial action—deprivation of an autonomous fundamental right such as the right to counsel of choice amounts to structural error. *See McCoy v. Louisiana,* 138 S. Ct. 1500 (2018). The Supreme Court published *McCoy v.*

Louisiana, after the NMCCA issued its ruling below, but before the Judge Advocate General certified this issue. 138 S. Ct. 1500 (2018). In *McCoy*, a defense counsel conceded a capital defendant's commission of the *actus reas* of murder over the defendant's express and unambiguous desire to contest the issue. *Id.* at 1505. McCoy's defense counsel violated his right to make a fundamental choice about his defense. *Id.* at 1511. Because the effects of defense counsel's concession were immeasurable, the error was deemed structural and McCoy did not have to show prejudice. *Id.*

A criminal defendant is only afforded a handful of autonomous rights that he, and only he, can make. *Id.* at 1508. The right to counsel of choice is one of those autonomous rights.

D. An alternative to structural error, and *Strickland*'s prejudice prong as the Government defines it—assessing for material prejudice to the substantial right to IMC.

The lower did not apply structural error analysis. (J.A. 22.) They assumed, without deciding, that it was inappropriate to presume prejudice. *Id*. Framing the issue presented as a deprivation of the statutory right to IMC, and not ineffective assistance of counsel, the lower court also declined to apply *Strickland*. (J.A. 20-22.) Using the standard articulated in Article 59(a), UCMJ, the NMCCA assessed for material prejudice to the substantial right to request IMC. *Id.*

The Supreme Court has applied a tailored *Strickland* test—analogous to the standard NMCCA applied here—where the erroneous advice of counsel results in the decision to forfeit the right to a judicial proceeding altogether. *See Hill v. Lockhart*, 474 U.S. 52, 62 (1985); *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000); *Lee v. United States*, 137 S. Ct. 1958, 1665 (2017). When counsel's erroneous advice results in the denial of a fundamental right prejudice is met by "demonstrating a reasonable probability that, but for counsel's errors, he would not have" forfeited the fundamental right at issue. *Lee*, 137 S. Ct. at 1965.

Situations where the Supreme Court has analyzed the impact of defense counsel's erroneous advice on the deprivation of a substantial right include the decision to waive the right to trial and accept a plea deal, *Lee v. United States*, 137 S. Ct. 1958 (2017), deficient failure to consult about filing an appeal that results in deprivation of the right of first appeal, *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), defense counsel's deficient failure to file an appeal as the client instructed, *Rodriquez v. United States*, 395 U.S. 327 (1969), and rejection of a plea deal based on erroneous advice of counsel, *Lafler v. Cooper*, 566 U.S. 156 (2012).

In these instances, the Supreme Court recognized the futility of analyzing—through conjecture and speculation—prejudice defined as the possible impact on the ultimate outcome. In these cases, the Supreme Court has narrowed the aperture of *Strickland's* second prejudicial impact prong. The prejudice inquiry focuses on

the prejudice to the substantial right that has been deprived because of counsel's erroneous advice, and not the ultimate outcome. *See Hill*, 474 U.S. at 62-63; *Flores-Ortega*, 528 U.S. at 484; *Lee*, 137 S. Ct. at 1965; *Lafler*, 566 U.S. at 157. Although the lower court did not refer to case law, their application of the standard articulated in Article 59(a), UCMJ—material prejudice to a substantial right—is consistent with Supreme Court jurisprudence involving the deprivation of a substantial right resulting from counsel's erroneous advice.

But for LT Buyske's erroneous advice regarding the availability of CPT Neumann, YN2 Cooper would have exercised his right to IMC. (J.A. 23.) After being notified he was the subject in a sexual assault investigation, YN2 Cooper sought the advice of counsel. (J.A. 22.) His requests for consultation were thwarted by a representative of the command responsible for trial and command legal advice. *Id.* In the intervening five months, between requesting counsel and being detailed counsel, YN2 Cooper formed an attorney-client relationship with CPT Neumann. (J.A. 22-23.)

Unimpressed and concerned by the quality of his detailed defense counsel's performance at his Article 32 hearing, YN2 Cooper unequivocally requested IMC. (J.A. 23.) Lieutenant Buyske did not forward any of his requests to trial counsel or the convening authority. (J.A. 23.) Yeoman Second Class Cooper's reliance on her

erroneous advice resulted in the deprivation of his right to be represented by a reasonably available judge advocate. (J.A. 23.)

Additionally, if LT Buyske answered the military judge's question, "has any…individual military counsel been requested in this case?" accurately, the military judge would have been on notice that YN2 Cooper desired to assert his right to IMC. The lowers court's finding that YN2 Cooper suffered material prejudice is supported by the record and not clearly erroneous.

E. If *Strickland's* prejudice prong as the Government defines it applies, then this case must be remanded to the lower court to conduct that analysis.

Quantifying the prejudicial impact of the deprivation of the right to IMC would "be a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150. However, if that is this Court's agreed upon course correction for the certified issue the reviewing court would need to determine the effect of the error on the verdict.

To do this, the reviewing court should at LT Buyske's errors and omissions, but also at the differences in the defense that CPT Neumann would have presented. The full spectrum of trial services is implicated. Including, who to call as a witness; questions asked during *voir dire*; filing of pretrial motions; pursuit of a plea agreement; cross-examination of government witnesses at trial and at the Article 32 hearing; lodging a challenge under the standards articulated in *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993), against the admissibility of

expert testimony on the issue of tonic immobility; contacting versus ignoring relevant sentencing witnesses the client proposes; utilization of a defense expert witness to rebut the government's expert witness testimony regarding tonic immobility; more robust, thorough, and challenging cross-examination of the government's expert witness; and intangibles such as argument style and ability to captivate and relate to the members. After the differences are identified, the reviewing court would have to "speculate upon what effect those different choices or different intangibles might have had." *Gonzalez-Lopez*, 548 U.S. 151.

The Supreme Court has found errors involving the denial of counsel of choice incapable of analysis. Should this Court come to a different conclusion, the appropriate remedy is to remand to the NMCCA for this analysis. Ineffective assistance of counsel issues reviewed under *Strickland* are mixed questions of law and fact. *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F. 2008). Findings of fact are reviewed under a clearly erroneous standard and conclusions of law are reviewed *de novo*. *Id*. The NMCCA did not make the findings of fact needed to address S*trickland's* second prong as defined by the Government, and this Court's jurisdiction does not extend to questions of fact. *United States v. Clark*, 75 M.J. 298 (C.A.A.F. 2015).

The following assignments of error were submitted to the lower court: (AOE 1) IAC because TDC did not submit YN2 Cooper's three requests for IMC, did not

challenge the testimony of the government's key expert witness, and did not rebut that testimony with their own expert witness; (AOE 8) ineffective assistance of counsel for failing to move to suppress a written statement seized from YN2 Cooper's backpack; (AOE 9) ineffective assistance of counsel for failure to question the victim about inconsistencies in her testimony; and (AOE 10) ineffective assistance of counsel for cumulative error. (J.A. 2.) The NMCCA did not reach these issues. They found that "setting aside the findings and sentence moot[ed]" those AOEs. (J.A. 2.) As a result, necessary findings of fact are not before this Court.

Thus, even if this Court applies *Strickland's* prejudice prong as the Government defines it this case must be remanded.

III

THE LOWER COURT DID NOT ERR WHEN IT ADOPTED THE *DUBAY* MILITARY JUDGE'S FINDINGS OF FACT. THE DETERMINATION THAT CPT NEUMANN WOULD HAVE BEEN REASONABLY AVAILABLE, IF REQUESTED AS IMC, IS NOT CLEARLY ERRONEOUS.

A. Standard of Review.

Whether the lower court applied the proper legal standard is a question of law reviewed *de novo*. *United States v. Evans*, 75 M.J. 302, 304 (C.A.A.F. 2016). This Court assesses the findings of fact that inform legal questions under a clearly erroneous standard. *United States v. Barry*, No. 17-0162/NA, slip op. at 9,

__M.J.__ (C.A.A.F. Sept. 5, 2018). In this third certified issue, the Government appeals the lower court and *DuBay* military judge's findings of fact. When the *DuBay* military judge makes detailed findings of facts that are supported by the record this Court adopts those findings. *Id.*

B. The lower court's findings of fact are not clearly erroneous, and should not be disturbed.

The Government argues there was no error because the attorney requested, CPT Neumann, was not reasonably available. (Gov't Brief at 52-58.) The Government predicates its argument on facts that contradict the *DuBay* military judge's findings of fact. The Government does so without showing those findings were clearly erroneous.

The Government—unhappy with the *DuBay* military judge and lower court's finding that CPT Neumann was reasonably available—seeks a third opinion. However, this Court gives great deference to the lower court's findings of fact and will not disturb them unless they are unsupported by the record evidence or clearly erroneous. *United States v. Sprigg*, 52 M.J. 235, 244 (C.A.A.F. 2000). The *DuBay* military judge's findings of facts are supported by the record and are not clearly erroneous.

1. In accordance with Article 38, UCMJ; R.C.M. 506; JAGMAN § 0131; and AR 27-10, CPT Neumann was reasonably available to serve as IMC.

An accused has the right to be represented by counsel and may be represented by military counsel of his own selection if that counsel is reasonably available. Article 38, UCMJ, 10 U.S.C. § 838(b); MCM, R.C.M. 506. Congress and the President have delegated the authority to establish regulations defining reasonable availability to the Service Secretaries. *Id.*

Under service regulations applicable to the Department of the Navy, if a judge advocate from a service other than the Navy or Marine Corps is requested as IMC, reasonable availability will be determined under the service regulations applicable to the requested judge advocate. (J.A. 63.) Because CPT Neumann is in the Army National Guard, Army Regulation 27-10 governs. (J.A. 63, 772.)

Pursuant to AR 27-10, the commander of the unit to which the judge advocate is assigned has the authority to decide whether the requested judge advocate is reasonably available. (J.A. 56, 772.) "The availability determination is a matter within the sole discretion of this authority." (J.A. 56.) Adverse decisions may be reviewed upon request to the next higher commander. *Id.*

2. CPT Neumann was assigned to the 40TH Infantry Division. Lieutenant Colonel Clements was the commander of 40TH Infantry Division.

CPT Neumann's mobilization orders instructed him to report to Fort Bliss in preparation for a deployment with his assigned unit, the "40 IN HQ HHC FWD 1."

(J.A. 752, 754-757.) In accordance with his follow-on deployment orders, CPT Neumann remained "Assigned to: 0040 IN HQ HHC FWD 1." (J.A. 753.)

The commander of 40 IN HQ HHC FWD 1 was LTC Clements. (J.A. 656.) Though CPT Neumann supported Operation Enduring Freedom Guantanamo Bay, he was not assigned to the Joint Task Force. (J.A. 753.) At all times during his deployment, CPT Neumann was assigned to 40 IN HQ HHC FWD 1 under the command of LTC Clements. (J.A. 656.)

Rule for Courts-Martial 506(b)(2) and AR 27-10 require IMC requests to be forwarded to the commander of the organization to which the requested attorney is assigned. LTC Clements never received an IMC request for CPT Neumann. (J.A. 56, 656.) If LTC Clements would have received such a request, he would have determined that CPT was reasonably available to serve as YN2 Cooper's IMC. (J.A. 656.)

3. <u>The Government wants this Court to adopt "facts" not supported by the record</u>.

The Government argues the *DuBay* military judge and lower court incorrectly determined LTC Clements was the commander of CPT Neumann's unit. (Gov't Brief at 54). Instead, the Government asserts the "combatant commander assumed both administrative and operational control of a soldier attached to his command." (Gov't Brief at 55).

This is not the law. Congress established that the Service Secretaries bear this responsibility:

> The Secretary of Defense, with the advice and assistance of the Chairman of the Joint Chiefs of Staff, shall provide for the administration and support of forces assigned to each combatant command. Subject to the authority, direction, and control of the Secretary of Defense and subject to the authority of commanders of the combatant commands…the Secretary of a military department is responsible for the administration and support of forces assigned by him to a combatant command.

10 U.S.C. § 165. Service Secretaries are responsible for administration. DoDD 5100.01, Functions of the Department of Defense and Its Major Components, December 21, 2010, encl.6. Army Service Component Commanders, such as LTC Clements, are delegated administrative responsibility by the Secretary of the Army for Army forces assigned to Combatant Commanders. (J.A. 59-60.)

Even if the Combatant Commander, and not the Secretary of the Army, was responsible for troop administration, nothing in the record supports a finding that the Combatant Commander would have opposed the IMC request, or that he delegated his administrative responsibility to the Joint Task Force Commander.

Joint Task Force (JTF) Guantanamo operationally reports to U.S. Southern Command, the Combatant Command. U.S. SOUTHERN COMMAND COMPONENT COMMANDS AND UNITS, http://www.southcom.mil/About/SOUTHCOM-Components-and-Units (last visited Sept. 5, 2018). There are only ten Combatant Commanders, and the Commander, Joint Task Force Guantanamo Bay, is not one

of them. DOD UNIFIED COMMAND PLAN, https://dod.defense.gov/About/Military-Departments/Unified-Combatant-Commands (last visited Sept. 5, 2018).

The Government argues the JTF Commander, and not LTC Clements, had the authority to declare CPT Neumann not reasonably available. (J.A. 53, 55-56.) The following three assumptions, unsupported by the record, need to be established in order to arrive at the starting point of the Government's argument. First, because the authority to make the administrative reasonable availability determination rests with the commander to which the requested person is assigned, this Court must assume the documentation assigning CPT Neumann to the 40TH IN HQ HHC does not exist or is clearly erroneous. Second, this Court must assume 10 U.S.C.§ 165 gives Combatant Commanders—and not the Service Secretaries—administrative responsibility over individual troops. Lastly, this Court must assume the Combatant Commander's (U.S. Southern Command's) alleged authority was delegated to the JTF Commander.

On top of these assumptions, to reach the Government's ultimate conclusion—that YN2 Cooper cannot demonstrate the JTF Commander would have found CPT Neumann reasonably available—this Court would have to ignore the presumption of availability contained in the applicable service regulations. (J.A. 55.) While the record contains the recommendation of the JTF Staff Judge

Advocate[3], the record does not contain a statement from the JTF Commander. It is unlikely the JTF Commander would have concurred with the recommendation from his SJA, CDR Boveri.

First, in recommending denial, CDR Boveri pointed out the abundance of well-trained, qualified attorneys stateside who were readily available to act as YN2 Cooper's IMC. (J.A. 768.) This advice missed the point and role of IMC in the military justice system. The availability of alternative counsel is not a factor in determining whether a specifically identified individual is reasonably available. MCM, R.C.M. 506; AR 27-10; JAGMAN § 0131.

Second, CDR Boveri would have found it difficult to positively endorse any IMC request for any attorney assigned to the SJA's office. (J.A. 768.) This position is inconsistent with the rules requiring an inquiry into the facts and determinative factors regarding the specific attorney being requested. While the SJA does mention the high demand signal and operation tempo for his office, especially for attorneys assigned to the FOIA office, he does not include any specific information that would have been required in order to make a fully informed decision. For example, the JTF Commander would need to know specific

[3] The record contains affidavits from two successive Staff Judge Advocates to the JTF Commander: CAPT Romero, and CDR Boveri. Because YN2 Cooper's IMC request for CPT Neumann would have occurred at the time when CDR Boveri was SJA, the recommendation from CAPT Romero is irrelevant.

information about how CPT Neumann's temporary absence from his FOIA office duties would have impacted the JTF mission. Any viable recommendation would contain CPT Neumann's responsibilities, work load, and the office's current and projected manning levels so the impact of CPT Neumann's temporary absence could have been projected. Commander Boveri's recommendation does not contain details. It is likely that, had such a recommendation been forwarded, it would not have been followed. Furthermore, even if the JTF Commander did have authority to make the decision, and even if he agreed with his SJA, his decision could have been subject to review. (J.A. 56.)

Regardless, the one person with the authority to make the call on CPT Neumann's reasonable availability, LTC Clements, has attested he would have found CPT Neumann reasonably available. The lower court did not err in finding YN2 Cooper was denied his IMC right.

IV

IF DEPRIVING A MILITARY DEFENDANT OF HIS RIGHT TO COUNSEL OF CHOICE IS NOT STRUCTURAL ERROR, BUT RATHER, TESTED FOR MATERIAL PREJUDICE, THEN THE LOWER COURT DID NOT ERR IN ITS APPLICATION OF ARTICLE 59(a), UCMJ.

A. Standard of Review.

"A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial

rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a). Certain errors of law are incapable of being assessed for material prejudice. Deprivation of the right to counsel, whether the right is derived from the constitutional mandate or from statute, is one of those errors. *United States v. Beatty*, 25 M.J. 311, 316 (C.M.A. 1987). "Deprivation of a statutory right to request counsel cannot be analyzed in terms of specific prejudice but, instead, mandates automatic reversal." *Id.*

The lower court did not apply a presumption of prejudice. (J.A. 22.) Instead, they assessed for material prejudice to YN2 Cooper's substantial right to IMC of choice. (J.A. 22-23.) Whether it was appropriate to assess for material prejudice as opposed to applying a presumption of prejudice is a question of law reviewed *de novo*. *United States v. Evans*, 75 M.J. 302, 304 (C.A.A.F. 2016).

B. The right to counsel of choice was not at issue in *United States v. Hutchins*.

Relying on *United States v. Hutchins*, the Government argues the appropriate test for material prejudice is whether the deprivation of the right to IMC "had an appreciable difference on the findings." (Gov't Brief at 63.) Neither the right to counsel of choice, nor the right to effective assistance of counsel were at issue in *Hutchins*. *United States v. Hutchins*, 69 M.J. 282, 284 (C.A.A.F. 2011). The only issue in *Hutchins* was whether there was an error in following the procedural rules regulating severance of counsel. *Id.* This Court set the standard for appellate courts to apply in analyzing that issue.

In *Hutchins*, the severed attorney, Capt Bass, was an assistant detailed defense counsel and the third attorney on the defense team totem pole behind civilian counsel (lead counsel) and primary detailed defense counsel. *Id.* at 292. Here, LT Buyske was the lead counsel throughout the entirety of the court-martial. She was the only counsel from preferral until after pleas were entered. (J.A. 88.)

Hutchins did not allege he was deprived of his right to select Capt Bass as IMC. *Hutchins*, 69 M.J. at 284. Here, YN2 Cooper alleged, and the lower court found, he was deprived of his right to be represented by IMC. Hutchins did not allege he received ineffective assistance of counsel. *Id.* at 289. Here, there are four additional assignments of error alleging ineffective assistance of counsel that the lower court did not address, finding them moot. (J.A. 2.) The substantive, procedural, and factual differences between *Hutchins* and this case limit its applicability.

C. Yeoman Second Class Cooper was materially prejudiced. He did not receive effective assistance of counsel.

Yeoman Second Class Cooper "did not receive the level of legal services statutorily afforded to every Sailor, anywhere in the world," not only because he was deprived of the right to consult with an attorney for months, but also because the attorney he was detailed provided ineffective representation. (J.A. 22.)

Yeoman Second Class Cooper received ineffective assistance of counsel when LT Buyske:

- failed to submit three by-name requests for IMC,
- failed to challenge the expert opinion of the Government expert's testimony on the subject of tonic immobility,
- failed to retain and utilize an expert witness who could have provided beneficial information to rebut the Government's theory of the case,
- failed to complete YN2 Cooper's testimony by ending her direct examination earlier than agreed,
- failed to interview sentencing witnesses identified by YN2 Cooper,
- failed to file a motion to sever the charges involving two different victims,
- failed to challenge the sufficiency of the Article 32 investigation,
- failed to move to suppress an unlawfully seized statement, and
- failed to effectively cross-examine the complaining witness.

(J.A. 2, 786, 797-797-798.) Alone or cumulatively, these errors undermine the Government's contention that depriving YN2 Cooper of the right to have CPT Neumann represent him as IMC is "wholly collateral to the underlying facts of his conviction." (Gov't Brief at 62.) Here, the selection of counsel permeated all aspects of the court-martial.

It is impossible to know whether CPT Neumann would have provided better, equal, or worse representation. That is why deprivation of the right to IMC is an error incapable of assessment. At a bare minimum, detailed defense counsel's erroneous advice and failure to submit any of YN2 Cooper's IMC requests prejudiced his substantial right to be represented by counsel he thought gave him the best chance of success. Given the number of by-name requests, LT Buyske

knew or should have known her client wanted the assistance of IMC. Not only did LT Buyske not forward any requests, she made misleading statements to her client indicating his IMC requests were denied. (JA 695-696.) She took no further action to locate reasonably available IMC.

D. The Government's reliance on the factual sufficiency determination of the lower court is misplaced because the lower court applied an incorrect standard of review for factual sufficiency.

The Government pointed to the lower court's factual sufficiency determination as proof that the deprivation of IMC did not materially prejudice YN2 Cooper's substantial right. Reliance on the lower court's factual sufficiency determination is misplaced because the lower court misapplied this Court's factual sufficiency standard. Additionally, this argument impermissibly assumes that CPT Neumann's representation would have resulted in no change to the presentation of evidence or argument—either weakening the government's case or strengthening YN2 Cooper's case.

The test for factual sufficiency is whether, after weighing the evidence and making allowances for not having seen or heard the witnesses, the court is convinced of YN2 Cooper's guilt beyond a reasonable doubt. *See United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987); Article 66(c), UCMJ, 10 U.S.C. § 866(c). In conducting its factual sufficiency review, the lower court must apply "neither a presumption of innocence nor a presumption of guilt," and make its "own

independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The lower court failed to follow this Court's precedence when it searched for evidence beyond the record—placed the burden on YN2 Cooper to provide the extra-record evidence—and based its factual sufficiency review on his failure to provide the lower court with what it was looking for. (J.A. 24-25.)

The NMCCA highlighted detailed facts showing the Government failed to prove lack of consent, and that there was no mistake of fact as to consent. (J.A. 25.) This included highlighting HM2 JP's statement accompanying her report of sexual assault that the sexual encounter was consensual. (J.A. 24.) Even still, the NMCCA found the verdict factually sufficient because YN2 Cooper failed to present evidence—to the appellate court—of HM2 JP's motive to fabricate. *Id.*

When reviewing for factual sufficiency under Article 66(c), UCMJ, courts of criminal appeals are limited to the evidence presented at trial. *United States v. Beatty*, 64 M.J. 456, 458 (C.A.A.F. 2007). Here, the lower court overstepped the limits of its statutory authority when it placed a post-trial burden on an appellant to "offer a credible motive for [HM2 JP] to fabricate her allegation of sexual assault." (J.A. 25.)

Conclusion

Under the facts of this case, the outcome under both the standard the lower court applied (material prejudice to a substantial right), and the standard YN2 Cooper argues for (structural error) is the same. Under both standards, the findings and sentence should be set-aside and a rehearing authorized.

The Government argues for two standards in the alternative: *Strickland's* two-pronged approach or plain error analysis. For an appellant to successfully navigate both standards he has to ultimately prove prejudice. Should this Court apply either of the Government's requested standards, YN2 Cooper's prayer for relief would depend on whether the test for prejudice applies broadly to the ultimate outcome, i.e. the findings (an impossible test that would be based on conjecture and speculation), or narrowly to the impact on the right to exercise the right to counsel of choice (standard capable of assessment and applied by the court below). If it is the former and the test for prejudice under either *Strickland* or plain error applies broadly, then this Court would need to specify the parameters of the requirement to show prejudice and remand to the lower court for application of the specified standard. If it applies narrowly, it is not necessary to remand because the lower court already conducted the necessary fact finding when it found material prejudice to YN2 Cooper's substantial right.

If this Court were to set aside the lower court's findings as to material prejudice, as the Government argues under the fourth certified issue, this Court should remand to the lower court for a new review conducted under Article 66(c), UCMJ. Specifically, a new review is needed to: first, ensure application of the correct factual sufficiency standard; and second, review the remaining assignments of error, specifically the three separate ineffective assistance of counsel assignments of error and one assignment of error based on cumulative errors committed by trial defense counsel.

Maryann McGuire
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE, Bldg 58, Ste. 102
Washington Navy Yard, D.C. 20374
(202) 685-7292
Maryann.n.mcguire@navy.mil
CAAF Bar No. 36940

CERTIFICATE OF COMPLIANCE WITH RULE 24(C)

This brief complies with the type-volume limitation of Rule 24(c). The brief contains 12,898 words. This brief complies with the typeface and type style requirements of Rule 37.

Attorney for the Cross-Appellee
September 7, 2018

CERTIFICATE OF FILING AND SERVICE

I certify that on September 7, 2018, the foregoing was electronically delivered to this Court, and to the Deputy Director, Appellate Government Division; Major Kelli O'Neil, Attorney for the Cross-Appellant; and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity.

Maryann McGuire
Major, U.S. Marine Corps
Appellate Defense Counsel
Navy-Marine Corps Appellate Review Activity
1254 Charles Morris Street SE, Bldg 58, Ste. 102
Washington Navy Yard, D.C. 20374
(202) 685-7292
Maryann.n.mcguire@navy.mil
CAAF Bar No. 36940