IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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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?

Statement of Statutory Jurisdiction

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

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, 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). The Members sentenced Appellant to five years of confinement, forfeiture of all pay and allowances, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, order the sentence executed.

After the parties filed their briefs, the Court of Criminal Appeals ordered a hearing under *United States v. DuBay*, 17 C.M.A. 147 (C.M.A. 1968). After the *Dubay* hearing and additional briefing, the Court of Criminal Appeals set aside the Findings and Sentence. *United States v. Cooper*, No. 201500039, 2018 CCA

LEXIS 114 (Mar. 7, 2018). On April 6, 2018, the United States filed a Motion for Reconsideration. On April 17, 2018, the Court of Criminal Appeals denied the Motion for Reconsideration.

On June 16, 2018, Appellant filed a Petition for Grant of Review at this Court, which at this time is pending decision. On June 18, 2018, the Judge Advocate General certified four issues to this Court for review.

Statement of Facts

A. The United States charged Appellant with, *inter alia*, sexual assault.

In April 2014, the United States charged Appellant with sexual assault and abusive sexual contact by bodily harm of the Victim, and violating a lawful general order by sexually harassing Ms. JJ.[1] (Charge Sheet.)

B. Lieutenant (LT) JB was detailed to represent Appellant. At Arraignment, Appellant acknowledged his right to individual military counsel, but informed the Military Judge he wanted Detailed Defense Counsel LT JB to represent him.

In late April, after preferral of charges, LT JB was detailed under Articles 27 and 38 as Detailed Defense Counsel. (J.A. 76-77, 716.) LT JB advised Appellant of his right to individual military counsel, but Appellant did not request individual military counsel. (J.A. 534-35; 716.) LT JB was the sole counsel representing

[1] Appellant was acquitted of the charge related to Ms. JJ. (J.A. 266.) For purposes of this Brief, references to the "the Victim" indicated the Victim of the sexual assault charge for which Appellant was convicted.

Appellant at his Article 32 hearing in May 2014. (J.A. 536.)

At Appellant's Arraignment on August 20, 2014, the Military Judge asked whether any "individual military counsel [had] been requested in this case[.]" (J.A. 75, 77.) LT JB replied, "No, sir." (J.A. 77.) Appellant asked no questions and did not challenge this assertion. (J.A. 77.)

The Military Judge explained to Appellant his rights to counsel, including the "right to be represented by individual military counsel, provided that the counsel . . . is reasonably available." (J.A. 78-79.) Appellant confirmed that he understood his rights, elected to be represented by LT JB, and affirmed that he did not wish to be represented by any other counsel. (J.A. 79.)

C. Appellant elected to be represented by both LT JB as Detailed Defense Counsel and LCDR NG as Assistant Defense Counsel.

Before the next session of court, Lieutenant Commander (LCDR) NG, LT JB's supervisor, detailed himself as Appellant's Assistant Defense Counsel under Articles 27 and 38, UCMJ. (J.A. 87-88; 732-33.) On September 15, 2014, LCDR NG entered his appearance on the Record and informed the Military Judge that no other counsel had been requested. (J.A. 88.)

Appellant did not challenge LCDR NG's assertion and Appellant elected to be represented by LT JB as Detailed Defense Counsel and LCDR NG as Assistant Defense Counsel. (J.A. 88.)

D. At trial, both Detailed Defense Counsel represented Appellant. The Victim testified that Appellant sexually assaulted her and Appellant testified that all sexual activity was consensual.

1. The United States presented evidence that Appellant exaggerated things about himself and about his inappropriate actions towards women.

Ms. JJ testified about her interactions with Appellant while deployed to Guantanamo Bay. She described how she and Appellant drove through the gate and the female gate guard asked him to dim his lights. (J.A. 97.) After they passed the gate, Appellant said to Ms. JJ, "That fucking bitch. Who was she to ask me to do something? She doesn't know who I am. I have information—access to information. I'm going to make her life a living hell." (J.A. 97.)

After this, Ms. JJ decided she did not want to be around Appellant. But Appellant's persistence in contacting her after she did not return his calls, along with his response to the gate guard, made her uncomfortable. (R. 99-100, 120.)

2. The United States presented evidence that the Victim could not resist Appellant's sexual assault because she suffered from "tonic immobility."

a. The Victim testified that she was unable to move while Appellant had sex with her.

The Victim testified that she and Appellant met the night of the assault at praise band practice at church, and she agreed to give him a ride back to his room. (J.A. 125-27, 129-31.)

At Appellant's invitation, the Victim went into Appellant's room. (J.A. 129.) While they watched a movie together, Appellant touched her thigh and, though the Victim tried to pull his hand away, he continued to touch her. (J.A. 134-35.) Appellant then pulled her on the bed toward him and held her wrists near her waist, and tightened his grip as she tried to resist. (J.A. 135.) The Victim testified that she was afraid because of how "aggressive" he was, but felt "helpless" and could not "move at all." (J.A. 136.)

Without her consent, Appellant then touched the Victim's stomach and breasts, performed oral sex on her, twice had sexual intercourse with her, and made her masturbate his penis. (J.A. 133-41.) Through these encounters, the Victim felt she could not respond or move on her own. (J.A. 138-40, 142, 161, 164-65, 179.)

Appellant briefly left his room after a knock at the door. (J.A. 142-43.) During cross-examination, the Victim stated that Appellant put a blanket over her before he left, but admitted that she originally told law enforcement she had put the blanket on herself. (J.A. 174-78, 184.) When Appellant returned to room, the Victim had regained the ability to move, so she dressed and left the room. (J.A. 144.) As she left, the Victim told Appellant not to contact her again, but he tried to kiss her, as though "he didn't hear a word" she said. (J.A. 145.)

b. Trial Defense Counsel consulted with their expert consultant before cross-examining the Government's "tonic immobility" expert witness.

After the Victim's testimony, an expert forensic psychologist testified about "tonic immobility." (J.A. 186-196.) The expert testified that tonic immobility is an "evolved defense strategy to threat or predation" that causes a person to become "immobile" in the face of a threat. (J.A. 192-93.) He opined that the Victim's behaviors with Appellant—except her statement about putting a blanket over herself—were consistent with tonic immobility. (J.A. 196.)

Before conducting cross-examination, Trial Defense Counsel consulted with the Defense's psychiatrist and expert consultant. (J.A. 196-97.) On cross-examination, the expert witness admitted that his opinion was based upon his review of police reports and the Victim's testimony, and that he never reviewed the Victim's medical documents, interviewed, or treated the Victim. (J.A. 199-200.)

3. Appellant's theory at trial was that the Victim actively consented to all sexual activity.

a. The Defense presented a witness who testified the Victim told him the sexual activity was consensual.

In the Defense case-in-chief, Trial Defense Counsel called a witness who testified the day after the assault, the Victim reported to him she "may have been assaulted and wanted to file a complaint." The witness asked the Victim whether the sexual activity was "consensual," and she responded, "yes." (J.A. 212.)

b. Appellant's testimony and written statement contradicted both Ms. JJ and the Victim's testimony.

Appellant's testimony contradicted most of Ms. JJ's testimony. (J.A. 246-48.) While he admitted that a gate guard told him to dim his lights, *see supra*, he denied saying anything threatening and claimed that he had never seen a woman guarding the gate. (J.A. 248.)

Appellant's testimony and written statement largely agreed with the Victim's testimony about the sequence of the sexual activity. (J.A. 228-36, 242-45; 309-10.) But Appellant claimed that before he started touching the Victim's thigh, she initiated contact, "hump[ed] [his] penis" and they started kissing. (J.A. 223, 225-27, 229, 255, 309-10.) Appellant testified that the Victim actively participated in foreplay and in the sexual activity. (J.A. 226-34.)

During cross-examination, Appellant conceded there were inconsistences between his written statement and his testimony. (J.A. 240-56.) He then recounted his conversation with another Sailor outside his residence while the Victim was inside:

> A. I told her (sic) that I had ate her out and we had sex twice, . . . told him [inaudible] like what had just happened between me and [the Victim].
>
> Q. Did you comment about her sexuality?
>
> A. I told him that she was it because she looks like a lesbian. I thought she was a lesbian.

Q. So what you're saying is you—you were having sex, but you had thought she was a lesbian.

A. Yes, sir.

(J.A. 257.)

During closing argument, Trial Defense Counsel argued, consistent with Appellant's testimony at trial, that the Victim consented to the sexual activity. (J.A. 635-55.)

E. The Members returned mixed findings, finding Appellant guilty of sexually assaulting the Victim and not guilty of sexual harassment. The Members sentenced Appellant to, *inter alia*, five years of confinement and a dishonorable discharge.

1. The Members returned mixed findings.

The Members convicted Appellant of abusive sexual contact and sexual assault. (J.A. 266.) They acquitted Appellant of violating a lawful general order by sexually harassing Ms. JJ. (J.A. 266.)

2. The Defense presented character witnesses at sentencing. While the Members deliberated, Appellant entered a period of unauthorized absence.

At sentencing, Trial Defense Counsel called two character witnesses from Appellant's chain of command from Guantanamo Bay, including Commander (CDR) Massucco, to testify on Appellant's behalf. (J.A. 273-91.) Appellant gave an unworn statement and apologized to the Victim. (R. 569-71.)

During deliberations, Appellant voluntarily absented himself from the

sentencing proceedings and the Members sentenced him in absentia to forfeit all pay and allowances, reduction to pay grade E-1, five years of confinement, and a dishonorable discharge. (J.A. 292-94.)

F. Appellant returned from unauthorized absence and hired Mr. TN to investigate his conviction. Appellant submitted clemency matters claiming Detailed Defense Counsel committed ineffective assistance of counsel at trial by not requesting individual military counsel.

In October 2014, after returning from his unauthorized absence, Appellant retained Mr. TN, a member of the California Army National Guard for whom Appellant worked while in Guantanamo Bay, as a private investigator. (J.A. 487-88, 665.) Mr. TN was not paid for his work. (J.A. 691.) Mr. TN contacted LT JB and told her Appellant hired him as a private investigator to conduct an "independent investigation" and evaluate the "evidence, witnesses, and testimony." (J.A. 665.)

In December 2014, LT JB requested an extension to submit clemency matters and shortly thereafter, LT JB and LCDR NG, their Commanding Officer severed their relationships with Appellant due to his intention to raise ineffective assistance of counsel in clemency. (J.A. 321-23, 593-94.) Another attorney represented Appellant for the remainder of the post-trial processing. (J.A. 668-81, 692-93.) In clemency, Appellant alleged that his Trial Defense team was ineffective because, *inter alia,* he claimed that LT JB did not submit Appellant's

requests for individual military counsel. (J.A. 692-93.) The Convening Authority approved the Findings and Sentence as adjudged.

G. On appeal, Appellant complained that LT JB was ineffective in failing to forward three individual military counsel requests for CDR Massucco, Capt Neely, and then-CPT TN.[2] LT JB stated that Appellant only asked her to request CDR Massucco and Capt Neely.

In Appellant's first brief to the lower court, Appellant complained that he received ineffective assistance of counsel in part because "lead trial defense counsel failed to submit [Appellant's] three IMC requests." (Appellant Br. at 24, Sep 17, 2015.)

1. Appellant submitted a sworn Declaration in support of his appeal.

Appellant filed a sworn Declaration at the lower court in September 2015: "LT [JB] later informed me there was an issue with CDR Massucco's active duty status because he was a reservist. She stated that her boss has denied my request." (J.A. 695.) About Capt Neely, Appellant averred, "LT JB told me Capt Neely could not be my attorney because he was a trial counsel. LT JB sent me the rule that explained why [Capt Neely's] request had been denied." (J.A. 695.)

Appellant said he agreed with LT JB's tactic to not request CPT TN, but only agreed because LT JB advised him that CPT TN "would not be available for

[2] "CPT TN" refers to the same person as "Mr. TN," who Appellant hired as a private investigator in his civilian capacity after CPT TN returned from Guantanamo Bay.

the dates the court-martial was scheduled . . . . [and they] would not be able to get a continuance." (J.A. 696.)

Appellant also claimed that LCDR NG told him that he detailed himself to Appellant's case because LT JB "was overwhelmed and stressed," and when Appellant asked her to request a post-trial Article 39(a) session, she responded, "I'm not going in front of a judge and telling him how I messed up your case." (J.A. 699.)

2. CPT TN submitted a Declaration in support of Appellant's appeal.

CPT TN, the reservist who as a civilian was the private investigator hired by Appellant, submitted a Declaration in support of Appellant's complaint. (J.A. 706-714.) He explained that Appellant came to him for legal assistance "relative to his pending charges," and discussed the possible impacts of a sexual assault conviction. (J.A. 707.)

He also claimed that in his single telephone conversation with LT JB, "At more than one point in the conversation I mentioned that [Appellant] and I had discussed his desire that I be included in his defense team and that I was willing and able to take on the role of IMC if approved." (J.A. 708-09.)

He claimed that he told LT JB that the length of his active duty orders would provide him sufficient time to represent Appellant at court-martial, and that "no

continuance would be necessary." (J.A. 709.) But he also claimed that LT JB did not "seem interested" in his offers to be assigned as individual military counsel and "was dismissive" each time he brought it up. (J.A. 709.)

He claimed that post-trial he was hired as "a private investigator and as an attorney" to investigate Appellant's conviction. (J.A. 711-12.) After Trial Defense Counsel informed him that they could not release the material "on the basis of confidentiality," CPT TN claimed that he "informed [LT JB] and [LCDR NG] of [his] attorney client relationship with [Appellant]." (J.A. 711-12.) CPT TN claimed that their delay in disclosure, as well as missing material from the case file, had a "negative and material impact on [his] ability to . . . investigate . . . and to assist in the preparation of [Appellant's] clemency request." (J.A. 712.)

3. LT JB submitted an Affidavit contradicting both Appellant's and CPT TN's claim that they spoke with her about individual military counsel.

LT JB's Affidavit states that Appellant expressed interest only in requesting CDR Massucco and Capt Neely, and that she advised Appellant of her research and consulted him before deciding to not formally request them as individual military counsel. (J.A. 720.) LT JB states that Appellant never requested CPT TN as individual military counsel, but instead asked that LT JB procure CPT TN only as a character witness and resource for contacting other potential witnesses. LT JB also states that CPT TN never mentioned having an attorney-client relationship

with Appellant or desiring individual military counsel when they discussed Appellant's case on July 31. (J.A. 721-22.)

H. The Court of Criminal Appeals ordered a *Dubay* hearing to resolve the conflicting Affidavits.

The Court of Criminal Appeals ordered a factfinding hearing to resolve conflicting Affidavits and the ineffective assistance of counsel claim. (N-M. Ct. Crim. App. Order, Apr. 6, 2016.)

1. Pursuant to 10 U.S.C. § 12302, CPT TN was activated and attached to Joint Task Force Guantanamo Bay.

CPT TN is a California Army National Guard judge advocate who was activated and deployed to Guantanamo Bay, Cuba, from November 2013 to August 20, 2014, under orders pursuant to 10 U.S.C. § 12302 (2012). (J.A. 452-54; 753-54.) He mobilized and deployed with the California National Guard's 40th Infantry Division's Headquarters Company, commanded by Lieutenant Colonel (LTC) Clements. (J.A. 453; 656; 751-61.)

Once in Cuba, the Commander, Joint Task Force-Guantanamo Bay, assumed responsibility for all "personnel and legal administration support," except for "Reserve component promotional authority" of CPT TN and his Company. (J.A. 761.) As a member of the Joint Task Force, CPT TN was placed in the Office of the Staff Judge Advocate for Commander. (J.A. 763, 767.)

For the first two-and-a-half months of deployment, CPT TN was the

Freedom of Information Act Chief and Appellant worked directly for him. (J.A. 457-59; 706.) CPT TN also worked collaterally as the Chief of Legal Assistance. (J.A. 763; 767.) Due to manning limitations and to prevent conflicts of interest, one of CPT TN's Joint Task Force supervisors "directed JTF attorneys providing legal assistance not to form attorney-client relationships or otherwise represent service members with interests potentially adverse to the JTF or its subordinate commands." (J.A. 764.)

2. Appellant sought advice from multiple military attorneys in Guantanamo while he was being investigated for sexual assault.

During the investigation and prior to being transferred from Joint Task Force Guantanamo on July 22, 2014, Appellant discussed his pending case with multiple Joint Task Force judge advocates, including CPT TN, CDR Massucco, a Navy reservist, and Captain Neely, an active duty Marine. (J.A. 695-96.)

CPT TN testified that he and Appellant discussed matters related to his case. (J.A. 464-66.) He testified that Appellant was adamant about testifying at trial. (J.A. 465.) However, he testified that he "did not involve himself in military justice issues" and was "not representing him in a military justice capacity." (J.A. 522-23.)

3. Before trial, LT JB pursued options for individual military counsel.

Evidence presented at the *Dubay* established that after the Article 32 hearing, Appellant informed LT JB that he wanted her to request CDR Massucco as individual military counsel. (J.A. 343-44, 539; 717.)

LT JB emailed CDR Massucco on June 18, 2014, with the subject line "IMC," which read:

> I am emailing you because [Appellant] would like to request you as [individual military counsel] in his case. . . . I know that from our end I have to send a request to the convening authority. . . .

(J.A. 659.)

On July 21, 2014, after learning CDR Massucco was in an inactive status, LT JB notified Appellant that: "Under JAGMAN 0131(c)(2)(a), . . . if the requested counsel is not on active duty, the convening authority must disapprove the request for individual military counsel. What this means for you is that CDR Massuco [sic] will not be able to act as counsel in your case." (J.A. 660.) LT JB testified that Appellant agreed she should not forward the request (J.A. 540), but Appellant denied withdrawing the request. (J.A. 353-54.)

On July 22, 2014, Appellant was transferred from Cuba to Jacksonville, Florida. (J.A. 741-42).

In early August, Appellant asked LT JB to request Capt Neely as individual military counsel. (J.A. 706, 743.) LT JB emailed and phone conferenced the issue

with Capt Neely, discovering that Capt Neely was serving as a trial counsel. (J.A. 719-20.) The next week, LT JB emailed Appellant that because Capt Neely was a trial counsel, R.C.M. 506(b) stated that Capt Neely was unavailable to be an individual military counsel. (J.A. 658.)

4. LT JB discussed character witness issues with CPT TN by phone and email before trial. In the emails, neither raised the issue of CPT TN serving as individual military counsel.

On July 30, 2014, LT JB emailed CPT TN and after speaking with CPT TN on the phone the following day, the two exchanged emails about whether CPT TN knew how to contact potential character witnesses in Guantanamo Bay. (J.A. 662-64.) Neither raised CPT TN serving as individual military counsel. (J.A. 720-22.) LT JB and CPT TN had no further communication until after Appellant's trial. (J.A. 477, 748.)

5. After his conviction, Appellant hired then-Mr. TN as a private investigator.

Following his conviction, Appellant and his mother contacted CPT TN "in his civilian capacity" and asked CPT TN, as a private investigator, to "look into" Appellant's case. (J.A. 387-88; 665-66; 698-700.) Mr. TN emailed LT JB and requested a copy of the trial transcript and case file, as well as all requests for individual military counsel. (J.A. 665.) In his Declaration, CPT TN claimed that he was retained "as a private investigator and attorney." (J.A. 710-11.) He further

claimed that he informed LT JB and LCDR NG that he had an "attorney-client relationship" with Appellant and that delay in disclosure of Appellant's case file would hinder his ability to "assist in the preparation of [Appellant's] clemency request." (J.A. 711-12.)

Contradicting his Declaration, CPT TN testified that when he contacted LT JB post-trial, he did not do so in his capacity as an attorney, only as a private investigator, and was not "taking the case over." (J.A. 499.) However, he also testified that once he informed LCDR NG about his attorney-client relationship with Appellant, LCDR NG agreed to send him the file. (J.A. 484.) LCDR NG states that neither CPT TN nor Appellant informed LCDR Gross about an attorney-client relationship. (J.A. 733.)

6. Appellant testified that he requested CPT TN as individual military counsel between requests for CDR Massucco and Capt Neely.

Appellant claimed that a few weeks after learning CDR Massucco was unavailable, he ran into CPT TN in Guantanamo Bay and the two discussed individual military counsel. (J.A. 345.) After that, and prior to asking for Capt Neely, LT JB informed him CPT TN would be unavailable. (J.A. 348.)

Contradicting his sworn Declaration, (J.A. 694-700), Appellant testified that he never withdrew his request for CPT TN. (J.A. 348.) Appellant instead claimed that the "request" "was denied."

7. LT JB testified at the *DuBay* hearing that Appellant never asked for CPT TN as individual military counsel.

LT JB adamantly denied that Appellant asked her to request CPT TN as an individual military counsel. (J.A. 546-47, 721.) She further testified that Appellant agreed that she should not submit the requests for CDR Massucco and Capt Neely since they would be denied. (J.A. 545.)

8. LCDR NG stated that he did not tell Appellant that LT JB was "overwhelmed and stressed."

Appellant claimed that LCDR NG told Appellant that he detailed himself to Appellant's case because LT JB was overwhelmed. LCDR NG denied saying that. (J.A. 732.)

I. The *DuBay* Judge found that Appellant requested CPT TN as individual military counsel, that CPT TN was reasonably available, and that Appellant and CPT TN had an ongoing attorney-client relationship.

1. The *DuBay* Judge found that Appellant requested CPT TN as individual military counsel.

The *DuBay* Judge acknowledged that LT JB and Appellant's testimony directly contradicted each other, but that Appellant proved "by preponderance of the evidence . . . based in large part by circumstantial evidence[,]" that he requested CPT TN as individual military counsel. (J.A. 769.)

He found that Appellant "was keen" to have individual military counsel represent him. (J.A. 771.) The *DuBay* Judge found that in the time between

Appellant and LT JB's discussions about CDR Massucco and Capt Neely's availability as individual military counsel, Appellant requested LT JB pursue CPT TN as individual military counsel. (J.A. 772.)

The *DuBay* Judge found that both Appellant and LT JB "appeared credible on the stand." He "[did] not find that LT JB sought to mislead the Court in her testimony." (J.A. 769.) But he relied on CPT TN as a "significant source of circumstantial evidence" to support Appellant's version of events. (J.A. 771.)

2. The *DuBay* Judge found that CPT TN was "reasonably available" to serve as individual military counsel.

The *DuBay* Judge found that if an individual military counsel request had been submitted, Appellant's National Guard Commander Lieutenant Colonel Clements would have found CPT TN "reasonably available" and that CPT TN's mobilization orders allowed him to remain on active duty until after Appellant's trial. (J.A. 772-73.)

The *DuBay* Judge further found that CPT TN and Appellant initially formed an attorney-client relationship for legal assistance purposes that did not involve Appellant's court-martial. (J.A. 775-76.) But after Appellant could not get legal advice about his pending charges, CPT TN "broadened his consultations" with Appellant to include military justice matters. (J.A. 775.) He found that the attorney-client relationship was "ongoing" at the time of Appellant's "request."

J. Pursuant Army regulations, CPT TN would not be authorized to form an attorney-client relationship without authorization from competent authority.

Army Regulation 27-26 governs the Army's rules regarding the formation of attorney-client relationships. Under the Regulation, forming an attorney-client relationship "is permissible only when authorized by competent authority." (J.A. 45-46.). An attorney-client relationship is not formed between a covered attorney and an individual absent specific authorization. (J.A. 52-53.) However, this limitation does not operate to override privileged communication that may occur even in the absence of an active attorney-client relationship. (J.A. 48-49.)

Army Regulation 21-3 governs the permissible scope of attorney-client relationships for legal assistance. "Attorneys providing legal assistance *will not* assist clients on matters outside the scope of the legal assistance program." (J.A. 37-38.) Military justice matters are outside the scope of legal assistance, and an attorney is required to inform his client about the limited nature of the scope of his representation. (J.A. 39, 57.)

K. The "commander or head of the organization" to which an attorney is assigned determines whether that attorney is "reasonably available" as individual military counsel. Army units attached to Combined Joint Task Force Guantanamo Bay fall under Task Force operational and administrative control unless explicitly limited.

Army Regulation 27-10 governs requests for and availability of individual military counsel within the Army. (J.A. 55-57.) Requested counsel who are not

per se unavailable[3] are considered "reasonably available" unless the responsible authority determines otherwise. (J.A. 55.) The "responsible authority" is "the commander or head of the organization . . . to which the requested person is assigned." R.C.M. 506(b)(1).

Under the Regulation, determining whether a counsel is reasonably available includes, *inter alia*: (1) counsel's workload; (2) ethical concerns that might limit representation; and, (3) impact of counsel's absence on his unit's ability to perform required missions. (J.A. 55); *see also* R.C.M. 506(b)(1).

Per Department of Defense and Army Regulation, Joint Task Force Guantanamo Bay falls under United States Southern Command, which exercises direct administrative and operational control over Army units deployed in support of its mission. (J.A. 58, 61-62.) This authority may be limited by "regulation, policy, delegation, or other issuance." (J.A. 61-62.)

[3] The United States does not assert that CPT TN was *per se* unavailable under applicable statutory or regulatory authorities.

Argument

I.

APPELLANT WAIVED REPRESENTATION BY INDIVIDUAL MILITARY COUNSEL UNDER R.C.M. 905 BY NOT RAISING IT PRIOR TO PLEAS. APPELLANT ALSO KNOWINGLY AND VOLUNTARILY WAIVED THE ISSUE: HE WAS PROPERLY ADVISED AND UNDERSTOOD HIS RIGHTS TO COUNSEL BUT AFFIRMATIVELY CHOSE TO BE REPRESENTED BY DETAILED AND ASSISTANT DEFENSE COUNSEL.

A. Standard of Review.

Whether an appellant has waived an issue is a question of law reviewed de novo. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

B. Different types of waiver exist, including: (1) procedural waivers that directly result from failure to take an action; and, (2) knowing and voluntary waivers resulting from affirmative statements from or on behalf of an appellant.

Waiver "is the intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (internal quotation marks omitted) (quoting *United States v. Olano*, 507 U.S. 725, 732-33 (1993)). "Whether 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, all depend on the right at stake." *United States v. Harcrow*, 66 M.J.

154, 156 (C.A.A.F. 2008) (quoting *Olano*, 507 U.S. at 733).

C. By not raising the matter prior to pleas, much less prior to adjournment, Appellant waived representation by individual, rather than Detailed and Assistant Defense Counsel, under R.C.M. 905.

1. The right to request individual military counsel is statutory and regulatory—not constitutional—and there is no presumption against waiver.

"[T]here is a presumption against waiver of constitutional rights . . . ." *Harcrow*, 66 M.J. at 157 (citations and quotations omitted). Statutory and regulatory rights carry no such presumption. *See United States v. Hardy*, No. 17-0553/AF, 2018 CAAF LEXIS 324, at *7 (C.A.A.F. June 5, 2018); *Ahern*, 76 M.J. at 197. Failure to raise objections that must be raised before pleas are entered, and failure to raise all other objections or motions before adjournment, constitutes waiver. R.C.M. 905(e).

In *Hardy*, this Court held that the failure to raise an objection to unreasonable multiplication of charges constituted waiver based on the plain language of R.C.M. 905(b) and 905(e). 2018 CAAF LEXIS 324, at *8-9. This Court stated: "The plain language of R.C.M. 905(b)(2) and (e) leads to the conclusion that Appellant waived his [unreasonable multiplication of charges] objection by not raising it before pleading guilty. *Id*. at *8. Likewise, in *Swift*, this Court stated that failure to bring a motion to suppress a confession before trial under R.C.M. 905(b)(3) permanently waived it under the language of the first two

sentences of R.C.M. 905(e). 76 M.J. 210, 217-18 (C.A.A.F. 2017).

Individual military counsel rights stem from Article 38, UCMJ. 10 U.S.C. § 838. But as with *Hardy* and *Swift*, the right is not absolute. The requested counsel must be "reasonably available" as defined by regulations established by the service Secretary. *Id.* Furthermore, "[T]he accused is not entitled to be represented by more than one military counsel." *Id*.

The President further limits this right in the Rules for Courts-Martial. An accused must object to a denial of individual military counsel before pleas are entered. R.C.M. 905(b)(6). The only remedies a military judge may provide are "reasonable continuances" and to "make findings." R.C.M. 906(b)(2). A military judge "may not dismiss the charges or otherwise effectively prevent further proceedings based on" a denial of individual military counsel. *Id*. Moreover, even assuming this error falls outside "denial of [a] request for individual military counsel," all other "motions, requests, defenses, or objections . . . must be raised before the court-martial is adjourned." R.C.M. 905(e).

As in *Swift* and *Hardy*, this Court should apply the plain language of R.C.M. 905(e) and find Appellant waived this issue.

2. *Camanga* should control. The statutory right to request counsel is waived by failing to make a timely request.

In *United States v. Camanga*, the appellant informed the military judge he

wished to be represented by trial defense counsel. 38 M.J. 249, 252 (C.M.A. 1993). However, after sentencing, trial defense counsel informed the court that, just prior to closing arguments, the appellant asserted that he wished to be defended by an unnamed civilian counsel. *Id*. Noting that even prior to closing arguments the request would be untimely, this Court held that "[w]hile appellant has the right to change his mind as to counsel, failure to make a timely request will be considered waiver of the right to individually request counsel." *Id*. at 253 (citing *United States v. Kinard*, 21 C.M.A. 300 (C.M.A. 1972)).

The statutory right to be represented by civilian counsel or individual military counsel stems from Article 38. *See* 10 U.S.C. § 838(b)(2). Thus as in *Camanga*, that statutory right can be waived by failing to make a timely request.

D. Even ignoring rule-based waiver and applying the more stringent knowing and intelligent constitutional waiver standard, Appellant's statements on the Record reflect that he understood his right to be represented by individual military counsel. Failing to assert that right at trial constitutes waiver.

1. Appellant's Record statements demonstrate a knowing and voluntary waiver of his right under Article 38(b)(3), UCMJ, to be represented by individual military counsel.

When an appellant "intentionally waives a known right at trial, it is extinguished and may not be raised on appeal." *Gladue*, 67 M.J. at 313 (citing *Harcrow*, 66 M.J. at 156).

"The law ordinarily considers a waiver knowing, intelligent, and sufficiently

aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances . . . ." *United States v. Ruiz*, 536 U.S. 622 (2002) (emphasis in original). Generally, "'no objection' constitutes an affirmative waiver of the right or admission at issue." *Swift*, 76 M.J. at 217 (citing *United States v. Campos*, 67 M.J. 330, 332-33 (C.A.A.F. 2009)).

In *Swift*, the court found the appellant waived any alleged error by the military judge in admitting the appellant's confession, in part because his counsel stated, "no objection" to the evidence. 76 M.J. at 217. The court concluded that the appellant "was fully aware of the content of the statement, and he had numerous opportunities to contest its admission and use." *Id*; *see also United States v. Davis*, 76 M.J. 224, 229 n.6 (C.A.A.F. 2017) (stating "the accused may choose to affirmatively waive certain required instructions.").

In *Iowa v. Tovar*, the Iowa Supreme Court held that the respondent's guilty plea was not "knowing and intelligent" because though the judge properly advised the respondent of his right to consult with counsel, he failed to instruct the respondent of all the risks associated with waiving the right. 541 U.S. 77, 86 (2004). The Supreme Court rejected this expanded view of Sixth Amendment waiver, holding that the *constitutional* requirement for a knowing, intelligent, and voluntary waiver of the right to counsel prior to entering a guilty plea was satisfied when the judge advised the defendant "the nature of the charges against him, *of his*

right to be counseled regarding his plea, and the range of allowable punishments . . . ." *Id*. at 80 (emphasis added). It emphasized its prior holdings that whether a waiver is intelligent depends on the "facts and circumstances" in the case and that a defendant lacking a "full and complete appreciation of the consequences flowing from the waiver[] . . . does not defeat the State's showing that the information it provided to him satisfied the constitutional minimum." *Id*. at 92.

This Court, in *United States v. Johnson*, noted that "express warnings of rights are frequently utilized as a means of assuring that waiver of those rights is knowing and voluntary," and confirmed that a military judge must establish on the record that an accused understands his rights to individual military counsel. 21 M.J. 211, 214 (C.M.A. 1986). And while the military judge's advice to an appellant must be correct, *see id*., there is no requirement for the judge to go beyond that inquiry to meet the standard required to establish a valid waiver. *See United States v. Gray*, 51 M.J. 1, 54 (C.A.A.F. 1999) (no support for contention that military judge's failure to inform appellant of counsel's inexperience in death penalty litigation rendered waiver of individual military counsel unintelligent or unknowing).

Here, Appellant was properly advised of his rights to individual military counsel, and Appellant confirmed that he understood those rights. *Cooper*, 2018 CCA LEXIS 114, at *35-36. Appellant personally and through counsel waived

any right to individual military counsel. The Military Judge twice asked if any other military or civilian counsel had been retained. (J.A. 77, 87-88.) And twice, in front of Appellant, counsel correctly responded, "No." (J.A. 77, 87-88.) Appellant, recently completing a tour with a staff judge advocate's office where he spoke with three uniformed attorneys about his case and individual military counsel rights, did not dispute his counsel's response.

Appellant also affirmed that he understood his right to request individual military counsel—and that he wanted to be represented by his Trial Defense Counsel. (J.A. 78, 87-88.) And at no point in the trial did he alert the Military Judge that he was concerned with the performance of his counsel.

Nothing in the Record supports that the Military Judge should have been on notice that Appellant did not understand his right to request individual military counsel or validly waive the opportunity to seek judicial enforcement of that right—to the contrary, Appellant assured the Judge he understood the right to make that request, yet said nothing to the Judge. *Cf. Swift*, 76 M.J. at 271-18 (voluntary waiver when appellant fails his burden to raise objection to the court); *United States v. Robinson*, 753 F.3d 31 (1st Cir. 2014) (holding without "indicia of intent" to request substitution of counsel, judge not required to explicitly inquire into waiver of choice of counsel).

Appellant waived this issue by his affirmative statements at trial, which

effectively foreclosed any action by the Military Judge, Trial Counsel, or Convening Authority with respect to his right to request individual military counsel.

2. The lower court erred by ignoring the plain language of the rules and by relying instead on *Mott*—which dealt with a different right.

The lower court, citing *United States v. Mott*, 72 M.J. 319, 327 (C.A.A.F. 2013), found "no valid waiver of the [Appellee's]" right to request individual military counsel because his statements to the Military Judge were not "knowing and intelligent." *Cooper*, 2018 CCA LEXIS 114, at *35-36.

In *Mott*, this Court considered the "knowing and intelligent" waiver of a Fifth Amendment right to have counsel during a custodial interrogation. 72 M.J. at 326. There, an appellant with a severe mental disease waived his *Miranda* and Article 31(b) rights before a law enforcement interrogation without consulting counsel. *Id*. at 326-32. The lower court's reliance on *Mott* is error for two reasons.

First, the lower court's ruling ignores the plain language of the President's rule-based waiver found in R.C.M. 905(b)(2) and (e), and this Court's holdings in *Swift* and *Hardy*, and instead applied the higher "knowing and voluntary" doctrinal waiver standard. Second, as discussed in *Harcrow*, waiver—and what is required for waiver—depends on the right at stake, which here is a statutory and regulatory right to appointed counsel—not a constitutional right to counsel of choice. *See*

Harcrow, 66 M.J. at 156; *cf. Morris v. Slappy*, 461 U.S. 1 (1983) (no Sixth Amendment right to "meaningful relationship" with an *appointed* public defender; where petitioner indicated he was satisfied with his new appointed counsel, lower court should have reviewed trial court's denial of continuance to regain the initial appointed counsel under the regular abuse of discretion standard).

A statutory right to request individual military counsel is fundamentally different than Fifth Amendment right to counsel or the Sixth Amendment right to retained counsel of choice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). Appellant was not in a custodial interrogation. Nor did he seek to exercise the Sixth Amendment right to counsel of choice, which does not apply to defendants with appointed counsel. *Id.* at 144 (internal citations omitted). Rather, Appellant was present at the Court-Martial, represented by properly appointed Detailed and Assistant Defense Counsel, and apprised by the Military Judge of his right to request individual military counsel.

The "procedural safeguards" implemented by *Miranda* and *Edwards* to protect the Fifth Amendment privilege against self-incrimination and to counsel, and the fundamental right to retained counsel of choice, are inapposite in this context. *See Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966); *Edwards v. Arizona*, 451 U.S. 477, 483-84 (1981). Nothing supports applying a waiver standard crafted to protect constitutional rights to this context, particularly where

Appellant gave no indication to the Court of the concerns he first brought to a court's attention during appellate review.

Finally, any claim that Appellant's waiver was not knowing or intelligent based on erroneous advice from Trial Defense Counsel is more appropriately handled as an ineffective assistance of counsel claim, *see infra* Part II. *See Barrow v. Uchtman*, 398 F.3d 597, 608 (7th Cir. 2005) (requiring a showing of *Strickland* prejudice for the appellant's claim that his fundamental right to testify was not properly waived due to erroneous legal advice); *cf. Broce v. United States*, 488 U.S. 563, 573-74 (1989) ("A failure by counsel to provide advice may form the basis of a claim for ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea.").

II.

AN APPELLANT CLAIMING HE WAS DENIED THE RIGHT TO INDIVIDUAL MILITARY COUNSEL REPRESENTATION BECAUSE OF HIS TRIAL DEFENSE COUNSEL'S FAILURE TO SUBMIT THE REQUEST MUST DEMONSTRATE BOTH ERROR AND PREJUDICE UNDER *STRICKLAND* IN ORDER TO GAIN RELIEF.

A. Questions of law are reviewed *de novo*.

When "the issue appealed involves pure questions of law," appellate courts review *de novo*. *United States v. Watson*, 71 M.J. 54, 56 (C.A.A.F. 2012).

B. If Detailed Defense Counsel created the alleged error either by incorrect advice or inaction, the lower court erred in not applying *Strickland*.

1. The right to individual military counsel is a statutory right, and the deprivation thereof is tested for prejudice.

Structural error can only arise from constitutional error. *Gonzales-Lopez*, 548 U.S. at 149 n.4 (referring to two categories of constitutional error deemed structural); *Weichmann*, 67 M.J. at 462; *Brooks*, 66 M.J. 221. The Sixth Amendment right to choice of counsel does not extend to appointed counsel. 548 U.S. at 151. Indeed, the right to individual military counsel is a statutory, not a constitutional creation, providing protections above what the Constitutional right to counsel demands. *See United States v. Spriggs*, 52 M.J. 235, 237 (C.A.A.F. 2007).

2. The lower court's refusal to apply *Strickland* conflates the statutory deprivation of individual military counsel with the constitutional right to choice of counsel.

Despite correctly recognizing that the right to individual military counsel is "rooted only in statute," *Cooper*, 2018 CCA LEXIS 114, at *7, and that any deprivation resulted from Trial Defense Counsel's inaction, *id.* at *18, the lower court inexplicably held that the unpreserved error should not be tested under the *Strickland* framework. *Id*. at *20. They reasoned that because the right to the Sixth Amendment choice of counsel is "independent" from the right to effective

assistance of counsel, to require an appellant to prove *Strickland* prejudice would "hollow out the right to [individual military counsel]." *Id*. at 20.

3. The lower court's decision conflates the error with the prejudice and creates a quasi-structural right.

As in *Hutchins*, the court's recognition that the deprivation here involves a statutory deprivation necessarily means that it is required to test for material prejudice before granting relief. Article 59(a). Eschewing the requirement to assess prejudice in light of the actual impact on the trial elevates the statutory right to individual military counsel to the status of "the complete deprivation of counsel"—an error which affects the very framework and reliability of the adversarial process. *See, e.g.*, *United States v. Cronic*, 466 U.S. 648, 656, 662 (1984); *Gideon v. Wainwright*, 372 U.S. 445 (1963).

In doing so, it becomes "simply an *ipse dixit* recasting of the error found," as an individual military counsel deprivation would always be found prejudicial under the standards by which the lower court relied upon. *See Puckett v. United States*, 556 U.S. 129, 142 (2009). Indeed, it would "hollow out" the requirement to show prejudice under Article 59(a). *Cf. Cooper*, 2018 CCA LEXIS at *20 (lower court concerned that assessing for *Strickland* prejudice would "hollow out" right to individual military counsel).

By avoiding the mandates of *Strickland*, and merely paying lip service to Article 59(a) without "opin[ing] on the effectiveness of [Trial Defense Counsel]," or the impact on the trial process itself, the lower court erred. *See* Article 59(a); *see also United States v. Vazquez*, 72 M.J. 13 (2013).

4. The deprivation of a right to individual military counsel is not "error incapable of assessment." Even structural rights may be properly evaluated for prejudice under *Strickland*.

Negating the *Strickland* requirement—that an appellant prove prejudice to gain relief from unpreserved errors stemming from trial defense counsel action—is only appropriate in limited circumstances and, even then, only where the error is the type of structural error that always leads to "fundamental unfairness." *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017) (discussing differences in raising structural error via ineffective assistance of counsel). The lower court cites no authority for the proposition that it is appropriate to deviate from the Supreme Court's well-established precedent that counsel performance should be evaluated under the Sixth Amendment's effective assistance of counsel test—particularly where a party alleges only *statutory* error, not caused by the government.

Quite the contrary. In *Weaver v. Massachusetts*, the Supreme Court held that even structural errors, normally not susceptible to a prejudice analysis, may be evaluated under the more stringent *Strickland* standard when raised for the first time on appeal as ineffective assistance of counsel claims:

> The reason for placing the burden on the petitioner in this case, however, derives both from the nature of the error . . . and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim. . . . When a defendant first raises the closure in an ineffective-assistance claim, . . . the trial court is deprived of the chance to cure the violation . . . . Furthermore, when state or federal courts adjudicate errors objected to during trial and then raised on direct review, the systemic costs of remedying the error are diminished to some extent.

137 S. Ct. 1899 at 1912.

So too here. *Strickland*'s applicability in this context is limited to situations in which the either (1) trial defense counsel fails to make the request to the convening authority contrary to an appellant's wishes, as alleged here; or, (2) when, after denial of a requested counsel, trial defense counsel fails to raise the issue to the military judge under R.C.M. 906, thus waiving the issue on appeal.

When the issue is preserved by a properly routed request and a denial contested in front of a military judge, appellate courts will have the opportunity to evaluate whether the individual military counsel's denial constituted an abuse of discretion.

5. <u>To the extent the lower court relies on *Beatty* and other cases as a justification to decline to apply *Strickland*, those cases violate the Code and this Court's more recent case law and should be set aside</u>.

Structural errors are "a very limited class of errors that affect the framework within which the trial proceeds, . . . such that it is often difficult to assess the effect

of the error." *United States v. Marcus*, 560 U.S. 258, 261 (2010) (internal quotations and citations omitted); *see Rose v. Clark*, 478 U.S. 570, 577-78 (1986). A violation of the right to counsel becomes structural only in situations entirely absent here.

Here, Appellant was represented by two detailed military defense counsel, satisfying his rights under Article 38, UCMJ. His first Detailed Defense Counsel represented him throughout his Article 32 hearing all the way through his trial and sentencing. The second, the Assistant Defense Counsel, was senior to her, joining the defense team prior to his contested case. Nothing about any deprivation of statutory rights to individual military counsel rendered the "criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Puckett*, 129 S. Ct. at 1432 (2009) (citations omitted).

The lower court's reliance on cases like *United States v. Beatty*, 25 M.J. 311, 315 (C.M.A. 1987), which held that the "deprivation of a statutory right to request counsel . . . mandates automatic reversal," conflicts with the Supreme Court's structural error precedent, and with later opinions by this Court. *Hutchins*, 69 M.J. at 291-92. Each factor in the stare decisis analysis favors overturning that older case law. *See United States v. Quick*, 74 M.J. 332, 335 (C.A.A.F. 2015). First, the holding is badly reasoned, as discussed *supra*. The statutory right to request individual military counsel is not absolute and any erroneous deprivation does not

automatically render the proceedings unfair. Second, the Supreme Court and this Court's later opinions on structural error, the right to counsel, and fidelity to the plain language of the Code are all intervening events that support overruling this precedent. *See Vazquez*, 72 M.J. 13; *Hutchins*, 69 M.J. at 291-92; *United States v. Lindsey*, 48 M.J. 93, 98 (C.A.A.F. 1998). Finally, evaluating this purported error under the standard Article 59(a), UCMJ, prejudice test, as this Court did in *Hutchins*, would not affect the expectations of servicemembers or undermine the public's confidence.

6. Errors in statutory rights to counsel not created by improper government or judicial action are properly tested under *Strickland*.

In *Hutchins*, this Court declined to test for a violation of the Sixth Amendment right to counsel where the mid-trial severance of an attorney-client relationship with one of three detailed counsel "resulted from a request initiated by the assistance defense counsel, not by the prosecution or the command." 69 M.J. at 291 (citations omitted). This Court did not apply the *Strickland* test only because the military judge should have ensured the record reflected the reason for counsel's absence. *Id.*

Here, unlike *Hutchins*, there was no such error by the Military Judge. Appellant's answers were not vague and uncertain and his counsel clearly told the Military Judge no requests for individual military counsel had been made. Any

purported error here lay directly with defense counsel. And for the same reasons as *Weaver*, *supra*, the burden for that error should remain with Appellant under the *Strickland* test.

In *Gonzalez-Lopez*, the government conceded "that the *District Court* here erred when it denied respondent his choice of counsel" in violation of the Sixth Amendment. 548 U.S. at 152 (emphasis added). The District Court denied repeated motions for admission by the appellant's retained counsel, primarily because the attorney had allegedly violated state ethical rules in a separate case. *Id*. at 142. Here, the lower court erred finding it "relevant and persuasive" in not applying *Strickland* to Appellant's claim. The defense counsel's actions, or inactions, were not at issue in *Gonzalez-Lopez*. Here, they were the source of any alleged error.

Furthermore, in every case the lower court cites, the United States or the military judge likewise deprived the appellant of the right. In *United States v. Beatty*, the military judge deprived the appellant of his statutory right to individual military counsel. 25 M.J. at 315. In *United States v. Hartfield*, the convening authority's staff deprived the appellant of his statutory right to individual military counsel. 17 C.M.A. 269, 270 (C.M.A. 1967). In *United States v. Allred*, the IMC's Commander deprived the appellant of his statutory right to individual military counsel. 50 M.J. 795, 801 (N-M. Ct. Crim. App. 1999).

The lower court erred by declining to apply *Strickland*. If his statutory right to request individual military counsel was deprived at all, it was by the inaction of his defense counsel—not the Military Judge or any other government actor. Thus, any alleged error should be evaluated under *Strickland*. *See United States v. Wallace*, 753 F.3d 671, 675 (7th Cir. 2014) (no error in refusing to appoint new counsel after "breakdown in communication" with counsel and tested under ineffective assistance of counsel).

C. Standard of review for ineffective assistance of counsel.

Ineffective assistance of counsel claims is a mixed question 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.*

D. Appellant failed to meet his burden to establish either deficiency or prejudice resulting from the absence of CPT TN.

To prevail on an ineffective assistance of counsel claim, an appellant "must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2000) (citing *Strickland*, 466 U.S. at 687). An appellant has the burden of demonstrating both parts of the *Strickland* test. *United States v. Denedo*, 66 M.J. 114, 119 (C.A.A.F. 2008). Mere "second-guessing, sweeping generalizations,

and hindsight will not suffice." *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005).

1. Even if Appellant had requested individual military counsel, Appellant fails to carry his burden of showing *Strickland* prejudice.

To succeed under the second *Strickland* prong requires a "'reasonable probability that, but for counsel's [deficient performance] the result of the proceeding would have been different. . . . [T]he question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *See United States v. Datavs*, 71 M.J. 420, 424 (C.A.A.F. 2012) (quoting *Strickland*, 466 U.S. at 694-95). The prejudice component of *Strickland* reflects the purpose of the Sixth Amendment guarantee of counsel, which is to ensure that the defendant has the assistance of counsel necessary to justify reliance on the proceeding. *See Strickland*, 466 U.S. at 693.

Thus, Appellant has the burden to establish that the results of his proceeding would have been different had CPT TN been approved as an individual military counsel. *See Weaver*, 137 S. Ct. at 1912.

First, Appellant cannot show that a request for CPT TN would have been successful. *See infra* Part III.

Second, Appellant alleges nothing that CPT TN could have done that would have made any difference in the Members' verdict. The Record establishes

nothing in terms of strategic ideas the two discussed beyond the fact that Appellant had long wanted to testify. (J.A. 466.) Consistent with this desire, he did testify, and admitted that he engaged in sexual intercourse with the Victim, even though while doing so he "thought that she was a lesbian." (J.A. 256.)

Trial Defense Counsel argued a theory consistent with Appellant's insistence that the sexual activity between he and the Victim was a fully consensual encounter. (J.A. 257-61.) Yet, as the lower court noted, the Victim had no discernable motive to fabricate. The Members thus, having the opportunity to fully evaluate both the Victim's and Appellant's testimonies found her to be the "more credible party." *See Cooper*, 2018 CCA LEXS 114, at *47-48.

None of the evidence ascertained during the appellate process suggests what different strategies CPT TN would have been able to employ that would have countered Appellant's devastating testimony, which was riddled with inconsistencies and admissions. (J.A. 240-56.) This is true even though CPT TN had the unique position as an investigator after Appellant's trial to review the Record. (J.A. 192, 484.)

Thus, Appellant cannot show that even if CPT TN represented him at trial, "the result of the proceeding would have been different.," and the lower court's decision cannot be affirmed. *See Strickland*, 466 U.S. at 694.

2. Appellant cannot show deficiency. The lower court's adoption of the *DuBay* Judge's findings was clear error.

The first prong of the *Strickland* test requires an appellant to show that counsel's performance was so deficient that the counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Denedo*, 66 M.J. at 127. Counsel are strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment; to show ineffective assistance an appellant must surmount a very high hurdle. *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997); *United States v. Scott*, 24 M.J. 186, 192 (C.M.A. 1987).

Because a claim of ineffective assistance '"can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial,'" courts apply *Strickland* with '"scrupulous care."' *Weaver*, 137 S. Ct. at 1912 (quoting *Harrington v. Richter*, 562 U.S. 86, 105 (2011)); *Premo v. Moore*, 562 U.S. 115, 122 (2011). Appellate courts "make every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate conduct from counsel's perspective at the time." *United States v. Akbar*, 74 M.J. 364, 379 (C.A.A.F. 2015) (citing *Strickland*, 466 U.S. at 489); *see also United States v. Ingham*, 42 M.J. 218, 229 (C.A.A.F. 1995) ("The

test of counsel's performance is not that he lost; and it is not that some number of options were not pursued or could have been pursed differently.").

3. The *DuBay* evidence does not support Appellant's claims of deficiency. The *DuBay* Judge's Findings that credited Appellant's story over that of LT JB's are clearly erroneous.

This Court reviews *Dubay* findings of fact under a "clearly erroneous" standard. *United States v. Wean*, 45 M.J. 461, 463 (C.A.A.F. 1997).

A mere "possibility that a factual finding could be wrong is insufficient to find it clearly erroneous." *United States v. Leedy*, 65 M.J. 208, 213 (C.A.A.F. 2007); *see also United States v. Martin*, 56 M.J. 97, 105-06 (C.A.A.F. 2001). Rather, "[a] finding is 'clearly erroneous' when a reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

And while appellate courts must "necessarily defer to the *DuBay* judge's determinations of credibility," *Wean*, 45 M.J. at 463 (citing *United States v. Williams*, 37 M.J. 352, 35 (C.M.A. 1993); *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)), that discretion is not unfettered. This Court "may well find clear error even in a finding purportedly based on a credibility determination" when "[d]ocuments or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable

factfinder would not credit it." *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985); *United States v. Solomon*, 72 M.J. 176 (C.A.A.F. 2012). A "trial judge may [not] insulate his findings from review by denominating them [with] credibility determinations" when other evidence contradicts it. *Anderson*, 470 U.S. at 529.

Though a military judge's factual finding in the face of contradictory evidence may still rate deference, he must reconcile the contradictions that underlay his finding. In *United States v. Solomon*, this Court found clear error in the military judge's findings underlying his decision to admit Mil. R. Evid. 413 evidence, and determined that he abused his discretion admitting the evidence. 72 M.J. at 181. This Court noted that his error came because he "failed to reconcile, or even mention, the fact that an uncontroverted military police report" gave the appellant a possible alibi. *Id*.

a. <u>The *DuBay* Judge ignored direct evidence contradicting Appellant's claim that he requested CPT TN</u>.

The *DuBay* Judge acknowledged the "contradictory testimony" from Appellant and LT JB. However, rather than first consulting the direct evidence to resolve the conflict, the *DuBay* Judge looked at "circumstantial evidence" to resolve the contradiction in favor of Appellant.

The *DuBay* Judge ignored Appellant's original sworn Declaration where he stated that he agreed not to request CPT TN. (J.A. 696.) He likewise ignores that twice Appellant was present in court hearings and heard his counsel affirmatively state that no individual military counsel had been requested without question from Appellant. (J.A. 77, 88.) Appellant had discussed his case with three attorneys, at least one of whom discussed his rights to individual military counsel with him, his failure to voice concerns over his Counsel's affirmations contradicts his later assertion that he requested CPT TN.

In light of these objective contradictions to Appellant's *Dubay* testimony that he requested and never withdrew his request for CPT TN, the *Dubay* Judge's finding in favor of Appellant's testimony, and the lower court's adoption of the finding, is clear error. *See Anderson*, 470 U.S. at 475; *Solomon*, 72 M.J. at 180-81.

b. <u>The lower court ignored circumstantial evidence contradicting the *DuBay* Judge's finding that both Appellant and CPT TN were credible</u>.

Further, the *DuBay* judge's finding that Appellant and CPT TN were credible witnesses, which underlay his determination that an individual military counsel request was made, ignores their contradictory testimony.

First, the Military Judge ignored that CPT TN and Appellant gave conflicting statements. In his Declaration, CPT TN stated that when he spoke with LT JB on July 31, they discussed the fact that CDR Massucco and Capt Neely had

already been requested as individual military counsel. (J.A. 708.) This statement directly contradicts Appellant's testimony, along with the supporting documentary evidence, that Capt Neely was first contacted by LT JB and Appellant after LT JB spoke and exchanged emails with CPT TN. (J.A. 348. 677, 747.)

Second, Appellant's testimony about LCDR NG's reason for detailing himself to the case is contradicted by LCDR NG. Appellant claimed that LCDR NG told Appellant that LCDR NG detailed himself to Appellant's case because LT JB was "overwhelmed and stressed," an assertion directly contradicted by LCDR NG. (J.A. 697, 732.)

Third, CPT TN's Declaration contradicts his own testimony. At the *DuBay* hearing, CPT TN testified that his post-trial representation of Appellant was limited to his actions as a private investigator, not an attorney. Yet in his Declaration, he claimed that he was retained "as a private investigator and attorney." (J.A. 711-12.) He further claimed that he informed LT JB and LCDR NG that he had an "attorney-client relationship" with Appellant and that delay in disclosure of Appellant's case file would hinder his ability to "assist in the preparation of [Appellant's] clemency request." (J.A. 711-12.)

c. The *DuBay* Judge's findings ignore the implausibility of Appellant's version of events.

Third, the Court's adoption of the *DuBay* Judge's findings ignores the improbability of Appellant's story.

First, the *DuBay* Judge's finding that LT JB disregarded Appellant's request concerning CPT TN ignores the fact that LT JB affirmatively reached out to two other counsel promptly after Appellant's request to seek their assistance. (J.A. 657, 659.) Only after taking the time to confirm their unavailability under R.C.M. 506 did she inform Appellant and point him to the applicable Rule. (J.A. 658, 660.) Further, LT JB's assertion that Appellant only mentioned CPT TN as a possible character witness is corroborated by her case log, created contemporaneously with her representation of Appellant. (J.A. 749.) The log specifically memorialized her contact with Capt Neely and CDR Massucco to discuss their availability as individual military counsel, and her later discussions with Appellant. (J.A. 749.) However, the only reference to CPT TN is her contacting him as a possible witness. (J.A. 749.)

To find that in between LT JB's competent and documented efforts to determine whether two attorneys were available as individual military counsel, LT JB would, without explanation, simply reject Appellant's request to pursue CPT

TN's availability based upon an unsupported theory of unavailability is simply implausible under the circumstances.

Second, Appellant's Affidavit and testimony assert that LT JB asked him about CPT TN's time left at Guantanamo Bay and her concern that he would not be able to "get up to speed" and that a continuance would be denied because the "Government was ready to move forward." (J.A. 696.) If this is true, then CPT TN's Affidavit that he informed LT JB that he would be leaving Guantanamo Bay prior to trial and that no continuance would be necessary likewise cannot be reconciled, especially in light of the *DuBay* Judge's finding that all three witnesses were credible. (J.A. 709.) Further, this conversation with Appellant would have taken place prior to arraignment, which likewise makes it implausible that Trial Defense Counsel would advise her client that a continuance would not be possible simply because the Government "was ready to move forward." (*See* J.A. 75.)

d. The *DuBay* Judge's failure to reconcile the inconsistent evidence in light of his credibility determinations constitutes clear error.

Finally, the *DuBay* Judge's failure to reconcile contradictory evidence is compounded by his findings that Appellant, CPT TN, and LT JB were "credible witnesses." The *DuBay* Judge also specifically found that LT JB did not intend to mislead the court. (J.A. 771.) This finding does not reconcile the fact that the Record indicates that both Appellant's and LT JB were adamant in their testimony

regarding the very contradiction that the *Dubay* Judge was appointed to resolve—namely, whether Appellant asked LT JB to request CPT TN as individual military counsel. Under those circumstances, the finding that both Appellant and LT JB were credible, is clear error.

e. As the findings that Appellant requested CPT TN constitutes clear error, so does the lower court's adoption of those findings.

Thus, the *DuBay* Judge's "unexplained and unreconciled leaps" in finding that Appellant requested CPT TN as individual military counsel constitutes clear error. *See Solomon*, 72 M.J. at 181. Thus, the lower court's adoption of that finding, after review of all the evidence, is likewise clear error. *See United States Gypsum Co*., 333 U.S. at 395.

Because the findings upon which Appellant claims constitutes deficiency are clearly erroneous, Appellant has not met his burden to show the truth of the underlying facts supporting his claim. *See United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). He has thus not met his burden to establish deficient performance by LT JB.

4. Regardless, Appellant does not meet his burden to show that LT JB was deficient in failing to forward any purported request for individual military counsel.

Even if the lower court's finding that Appellant initially told his counsel he wanted CPT TN to represent him, *see Cooper*, 2018 CCA LEXIS 114, at *22, he

later agreed not to request CPT TN. (J.A. 696.) At trial, the Military Judge advised Appellant of his right to request individual military counsel and Appellant stated his desire to be represented by LT JB and LCDR NG. (R. 79, 88.) Appellant was also present when Trial Defense Counsel twice told the Military Judge that no other counsel had been requested. (R. 77, 88.)

Under these circumstances, Appellant cannot show that failing to forward a request for individual military counsel was deficient—rather, it was the product of informed consent based on presumptively reasonable professional judgement. *See Moulton*, 47 M.J. at 229. In light of his own sworn Affidavit that he agreed not to request counsel, and his later affirmations at trial that no individual military counsel was requested, the evidence does not surmount that very high presumption of competence. *See id*.

III.

EVEN DISREGARDING *STRICKLAND*, APPELLANT WAS NOT DEPRIVED OF HIS STATUTORY AND REGULATORY INDIVIDUAL MILITARY COUNSEL RIGHTS. HE MADE NO REQUEST FOR COUNSEL, AND DID NOT ALERT THE MILITARY JUDGE ABOUT HIS DESIRE TO MAKE SUCH A REQUEST. FURTHER, CPT TN WAS UNAVAILABLE.

A. Absent forfeiture, the standard of review for an unpreserved error is plain error.

"[Forfeiture] is the failure to make the timely assertion of a right . . . ."

Olano, 507 U.S. at 733 (internal citations and quotations omitted); *cf. Gladue*, 67 M.J. 311 (distinguishing waiver and forfeiture of multiplicity and unreasonable multiplication of charges). This Court reviews forfeited issues for plain error. *Ahern*, 76 MJ at 197. Plain error occurs when "(1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Andrews*, No. 17-0480, 2018 CAAF LEXIS 294, at *15 (C.A.A.F. May 22, 2018) (internal quotations and citations omitted) (applying forfeiture to unobjected-to prosecutorial misconduct).

An appellant has the burden of persuading the court that all three prongs have been met. *Olano*, 507 U.S. at 734-45 (1993) (finding defendant bears the burden of establishing prejudice in plain error, a factor that distinguishes plain error from preserved error); *United States v. Jones*, 68 M.J. 465, 473 n.11 (C.A.A.F. 2010).

B. Under Article 38(b), UCMJ, an accused may be entitled to an individual military counsel if the approving authority determines he is "reasonably available" or if he has an active attorney-client relationship with respect to the charged offenses.

An accused "may be represented . . . by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed [by the Secretary concerned])." 10 U.S.C. § 838(b). When requested counsel is from a different branch of service, counsel is available "to the same extent as that

person is available to serve as an individual military counsel for an accused in the same force as the person requested." R.C.M. 506(b)(1)(H). Thus when a Navy servicemember requests an Army individual military counsel, Army regulations control.

The Secretary of the Army established regulations governing the reasonable availability of Army counsel. (J.A. 55-56.). For counsel not *per se* unavailable under R.C.M. 506(b), and where no active attorney-client relationship exists, 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." (J.A. 55-56); *see also* R.C.M. 506(b)(2).

C. No error exists under the Army Secretary's rule. Appellant cannot demonstrate that CPT TN, who was assigned to the Staff Judge Advocate's Office in Guantanamo Bay, would have been found "reasonably available" by Commander, Joint Task Force Guantanamo Bay.

Appellant never submitted a request for individual military counsel to the commander or head of the organization CPT TN was assigned to at Guantanamo Bay, nor did he tell the Military Judge he wished to do so. Instead, he assured the Military Judge repeatedly he was happy with his Detailed and Assistant Defense Counsel. But even had Appellant made a request, the Record does not establish that CPT TN would have been found "reasonably available" had anyone made such a request.

1. The lower court erred in adopting the *DuBay* Judge's findings that the approval authority for purposes of individual military counsel was CPT TN's National Guard Company Commander.

Here, the *DuBay* Judge found that LTC Clements, National Guard Headquarters Company Commander with which CPT TN deployed with to Joint Task Force Guantanamo Bay, was the approval authority. First, this finding misapplies the law that governs CPT TN's federal service assignment. Second, this Finding fails to reconcile that the Office of the Staff Judge Advocate would not have recommended approval by Commander, Joint Task Force Guantanamo Bay.

The character of a Guardsman's service "depends solely on whether command of the Guardsman has been taken away from a state's governor" and called to federal service. *United States v. Hutchings*, 127 F.3d 1255, 1258-59 (10th Cir. 1997); *see also* 10 U.S.C. § 12405 (2012) ("Members of the National Guard called into Federal service are, from the time when they are required to respond to the call, subject to the laws and regulations governing the Army or the Air Force . . . .") Once ordered to active duty, members of the National Guard operate pursuant to the chain of command mandated by the Department of Defense and Department of the Army. (J.A. 58-59.)

Army Regulation 10-87, consistent with Department of Defense Directive 5100, mandates that a combatant commander assumes both administrative and

operational control of a soldier attached to his command, regardless of the unit from which he deployed. (J.A. 59-60.) While there may be limitations in the delegation of that authority, such limitations should be explicitly authorized by "regulation, policy, delegation, or other issuance." (J.A. 60.)

CPT TN's Title 10 orders activated him "to Guantanamo Bay" and "in support of Operation Enduring Freedom Guantanamo Bay." (J.A. 753.) The orders identified the "gaining/deployed unit commander"—Joint Task Force Guantanamo Bay—as the commander with responsibility for "personnel and legal administrations." (J.A. 761-62.) The only explicit administrative control limitation specified was "Reserve Component promotional authority." (J.A. 761.) Under these orders, it was the Commander, Joint Task Force Guantanamo Bay who was responsible for CPT TN's operational and administrative needs. (J.A. 753, 759-63, 767.) The *DuBay* Military Judge's rejection of this evidence of personnel designations and superior commander responsibilities at Joint Task Force in favor of limiting his analysis to LTC Clements' Affidavit while attached to the Joint Task Force was clear error.

Second, even if the *DuBay* Military Judge's deference to LTC Clements' Affidavit was correct, and he retained some command authority over CPT TN, (*see* 59-60, 656), the Army National Guard Company assigned to the Joint Task Force was, like CPT TN, assigned to different offices throughout the Joint Task Force

and fell under the command umbrella of the Joint Task Force Guantanamo Bay. (J.A. 58-60, 455, 656, 753, 759, 761-62.) To find that LTC Clements' administrative opinion would override CPT TN's operational chain of command, (*see* J.A. 763-768), the Staff Judge Advocate to Commander, Joint Task Force Guantanamo Bay, recommendation is simply implausible under the circumstances.

The lower court's determination that CPT TN's location and duty during the proceeding after redeploying to the United States would "theoretically" make him available is speculative at best. First, the request would be routed to the commander of the approval requested counsel at the time the request is made. *See* R.C.M. 506(b)(2). As the lower court noted, CPT TN's immediate supervisors were hostile to the idea of him being appointed as individual military counsel.

Furthermore, even after CPT TN detached from Guantanamo Bay, as long as he was on active duty in the United States, CPT TN would still not fall under the National Guard for approval purposes. There being no evidence that that mobilization station commander would have been inclined to release him, or extend his orders should the need arise, or that Appellant would have renewed any purported "request," there is no evidence that CPT TN was reasonably available.

D. Even had Appellant made a request for counsel other than his Detailed and Assistant Defense Counsel, Appellant fails his burden to demonstrate an attorney-client relationship with CPT TN.

Under the law governing requests for individual military counsel, an accused

bears "the burden of demonstrating that at the time of the request, [he] had a viable, ongoing attorney-client relationship regarding the substance of the charges at issue." *Spriggs*, 52 M.J. at 244 (citation omitted). To meet this burden, there must exist "both a bilateral understanding as to the nature of the future representation and active engagement by the attorney in the preparation and pretrial strategy of the case." *Id.* at 244. Absent such a relationship, there is no presumption of availability, and the approval chain has a great deal of discretion in making the final determination of availability. *See, e.g. id.* at 238.

In the context of a request for individual military counsel, "[i]f the purpose of representation limited in time or scope has been completed, such prior representation will not demonstrate the existence of an ongoing attorney-client relationship." *Id*. at 240.

The formation of an attorney client relationships "is permissible *only* when authorized by competent authority." "Attorneys providing legal assistance *will not* assist clients on matters outside the scope of the legal assistance program," including military justice matters. (J.A. 39.)

Army regulations explicitly forbade CPT TN from forming an attorney-client relationship with Appellant beyond the scope of legal assistance, and there is no evidence that indicates a competent authority authorized even the establishment of an attorney-client relationship for legal assistance, much less for

military justice. Thus, there was no active attorney-client relationship for purposes of Appellant's court-martial. Nor is there a chance of "a bilateral understanding as to the nature of future representation" that would have included court-martial representation. *See Spriggs*, 52 M.J. at 240. The legal assistance relationship was not viable, ongoing, or about the substance of the charges.

Further, Appellant makes no showing that CPT TN's superficial military justice advice was more than basic procedural and collateral information. To the contrary, CPT TN disavowed providing substantive or active pretrial preparation. He did not contact Appellant's detailed attorney to discuss case progress (even to follow up on the alleged individual military counsel request), interview witnesses, negotiate or file requests with the convening authority, or otherwise take action on Appellant's behalf with respect to the pending proceedings. (J.A. 477, 748.)

As Appellant fails to establish that CPT TN's pretrial discussions with him constituted "active pretrial preparation and strategy" under a "totality of the circumstances," he cannot show an ongoing attorney-client relationship with CPT TN. Thus, even if this Court determines *Strickland* is appropriate when analyzed as an improperly denied request for individual military counsel on its merits, Appellant cannot show he was erroneously deprived his right to counsel: Appellant had no existing attorney-client relationship and thus, his claim fails.

IV.

APPELLANT CANNOT SHOW MATERIAL PREJUDICE. HE WAS ABLY REPRESENTED BY COUNSEL AND HIS TRIAL WAS FAIR.

A. Errors involving the Code's statutory rights to counsel must be reviewed for material prejudice.

Like ineffective assistance of counsel claims, errors under the Code's statutory rights do not violate the Sixth Amendment and are not structural; they are reviewed for prejudice. *See, e.g.*, *Hutchins*, 69 M.J. at 291-92 (reviewing an improper severance of attorney-client relationship for prejudice); *see also* Article 59(a). Errors in advice regarding the Code's statutory rights to military counsel are also reviewed for prejudice. *See, e.g.*, *Lindsey*, 48 M.J. at 98 (concluding that "the military judge's failure to properly advise appellant . . . would not have substantially influenced his counsel-retention decision").

B. The lower court improperly distinguished *United States v. Hutchins* and failed to meaningfully test for prejudice.

This Court, in *United States v. Hutchins*, finding error in the pretrial severance of an existing attorney-client relationship with detailed assistant defense counsel, tested for prejudice prior to denying relief. 69 M.J. at 292. The *Hutchins* court found that the defense team failed its responsibilities to ensure the accused understood his options with respect to retaining the detailed assistant defense counsel. *Id.* at 291. But the defense on appeal never raised ineffective assistance

of counsel.

Instead, the cognizable error on appeal was the deprivation of appellant's rights under the code to proper severance of detailed assistant defense counsel, as R.C.M. 813(c) requires the military judge to document that a competent detailing authority determined that "good cause" existed for excusing counsel under R.C.M. 505. *Id.* at 290-91. The *Hutchins* court tested for prejudice. *Id.* at 291-92 (citing *United States v. Weichmann*, 67 M.J. 456; *United States v. Rodriguez*, 60 M.J. 239 (2004)).

The *Hutchins* court "decline[d] the defense invitation to measure the potential performance" of the severed counsel "against the actual performance . . . by those experienced counsel who remained on the case." *Id*. at 292-93. Instead the court noted that despite the severance, the appellant was ably represented by multiple counsel, and that the areas for which the severed counsel had been responsible were not so unique that remaining counsel would be unable to prepare. *Id*. at 292. The court rejected that deprivations of statutory rights to appointed counsel are not susceptible to review for prejudice, and rejected the idea that 59(a) prejudice is measured by anything other than an appellant's ability to show an appreciable effect on the trial. *See Hutchins*, 69 M.J. at 292.

Here, similar to *Hutchins*, any statutory deprivation was created by appellant's or defense counsel's inaction—not by the inaction of the military judge

or interference by the government. *Id*. at 234. And while the *Hutchins* Court evaluated the substantive error because the military judge should have inquired into the severance, it emphasized that it was appellant's burden to establish prejudice. Nothing justifies departing from the standard test for prejudice required by Congress in Article 59(a).

Further, as in *Hutchins*, Appellant was represented by two experienced detailed military defense counsel, who, consistent with Appellant's desire to convince the Members that the Victim actively participated in the sexual activity, raised motions, made objections, and vigorously argued their theory. Like *Hutchins*, these circumstances establish a situation in which any statutory error may be assessed in light of its effect on the outcome of the trial. And there is none. While Appellant raised ineffective assistance of counsel at the lower court with regard to the individual military counsel issue, the lower court found that issue mooted by its resolution of the case and Appellant does not appeal that decision today. A close look at the Record shows that it was Appellant's own testimony, not the quality of representation, that resulted in Appellant's conviction. *See supra* Part II.

C. The lower court found Appellant's conviction factually sufficient—highlighting the error in their prejudice analysis.

Article 59(a), UCMJ, states: "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." 10 U.S.C. § 859(a).

In *Rodriguez*, this Court held that an error involving substitute defense counsel representing an appellant at a *DuBay* hearing without first entering into an attorney-client relationship should be tested for prejudice under Article 59(a), UCMJ. 60 M.J. at 254. There, this Court stated: "while it is appropriate to test for prejudice, each case will present different circumstances regarding the relationship with between counsel and client . . . each case must be tested for prejudice on its own merits." *Id*. at 254-55. The Court found no prejudice because substitute counsel "was in fact present and represented Appellant's cause zealously . . . argued articulately . . . [and] also competently discussed applicable Supreme Court precedent." *Id*. at 255. This Court rejected "Appellant's specific claim of prejudice [as] simply a restatement of the facts raising the issue." *Id*.
The lower court here makes the same error: finding prejudice from simply "a restatement of the facts raising the issue." See *Puckett v. United States*, 556 U.S. 129. And their finding of material prejudice directly conflicts with their holding that the evidence was factually sufficient.

Appellant's claim is wholly collateral to the underlying facts of his conviction. Thus, any alleged statutory error did not "materially" prejudice any substantial right. Appellant received a full and fair trial before Members where he

was represented by two detailed counsel and elected to testify on the merits. Even assuming Appellant was deprived of his statutory right to individual military counsel, Appellant fails to establish that the deprivation had an appreciable difference on the findings and sentence. *See Hutchins*, 69 M.J. at 282. Having failed to even attempt to do so, Appellant's claim fails, and the lower court's decision should be overturned.

Conclusion

This Court should reverse the lower court's decision, and remand this case back to the lower court to complete its review under Article 66, UCMJ.

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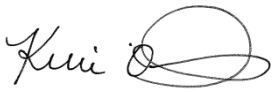

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