IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/Cross-Appellant	)	REPLY BRIEF ON BEHALF OF APPELLEE/CROSS-APPELLANT
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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Index of Brief

Page

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES CIRCUIT COURTS OF APPEALS

A. The statutory right to request individual military counsel is not a fundamental right.

1. *Gonzales-Lopez* is inapplicable to individual military counsel. It imparts no constitutional status to the wholly statutory right to request individual military counsel.

The Sixth Amendment right to choice of counsel "does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006) (citations omitted).

Gonzalez-Lopez does not require this Court extend the constitutional right to choice of counsel to encompass the statutory right to request individual military counsel. First, the right to request an individual military counsel stems from a statute, Article 38, UCMJ, and not from the Constitution. Article 38, UCMJ, provides protections above what the Sixth Amendment right to counsel demands. *United States v. Spriggs*, 52 M.J. 235, 237 (C.A.A.F. 2007); *see also United States v. Weichmann*, 67 M.J 456, 466 (C.A.A.F. 2009) (Ryan, M., concurring) (broader military right to counsel "are the creations of statute and regulation, not the Constitution").

Second, individual military counsel are appointed by the Government and their appointment or approval are subject to limitations. In Article 38, UCMJ, Congress provides an express limitation on the approval of an individual military counsel: they must be "reasonably available" as defined by the Secretary concerned. 10 U.S.C. § 838(b)(3), (7). The President, pursuant to Article 36,

UCMJ, further limits this statutory right by designating certain persons as *per se* unavailable. R.C.M. 506(b)(1). The President also places the decision to approve that request within the sole discretion of "the commander or head of the organization, activity, or agency to which the requested person is assigned." R.C.M. 506(b)(2). The decision to approve the individual military counsel "is a matter within the sole discretion of that authority." *Id*. Any costs associated with the appointment of individual military counsel are borne by the government. *See* R.C.M. 506(b).

An Appellant's statutory and regulatory right to request a specific individual military counsel does not, however, impact that individual military counsel's status as Government-appointed counsel. The Rules provide that the original detailed defense counsel "shall be excused" when individual military counsel is approved, and an accused "is not entitled to be represented by more than one military counsel." 10 U.S.C. § 838(b)(5). Nothing in the Rules or Code do, and perhaps nothing in the Rules or Code could, elevate Government-provided defense counsel into the constitutionally-protected "counsel of choice" discussed in *Gonzales-Lopez*.

Congress does not "put service members on the same constitutional footing as those defendants contemplated in *Gonzales-Lopez* . . . ." by creating a statutory right to request individual military counsel. (*See* Appellant Br. at 24.) Congress's

statutory grant to request individual military counsel does not replace the right to retain civilian defense counsel. Rather, it provides an additional statutory right to request a specific counsel be *appointed*—not unlike the ability of civilian defendants to request a specific public defender—which, similarly, would not morph that public defender from an appointed public defender into a *Gonzales-Lopez* counsel of choice. An accused in the military justice system also has the right to retain civilian counsel at his or her own expense. And in contrast to the appointment of individual military counsel, retention of civilian counsel *may* raise a Sixth Amendment right to choice of counsel issue because, unlike an individual military counsel, the accused bears the cost of representation. *See* 10 U.S.C. § 838(b)(2).

This Court should decline Appellant's invitation to broaden either the scope of the constitutional right to choice of counsel, or the statutory right to request individual military counsel under Article 38, UCMJ. Each is distinct. To do otherwise would contradict *Gonzales-Lopez*'s express limitation of the Sixth Amendment right to choice of counsel to non-appointed counsel, as well as longstanding precedent distinguishing statutory from constitutional rights.

2. The statutory right to individual military counsel is not constitutional, does not implicate the Sixth Amendment right to choice of counsel, and is thus not structural.

Structural errors are those "errors in the trial mechanism so serious that 'a

criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.'" *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008). "There is a strong presumption that an error is not structural." *Id*. (citing *Rose v. Clark*, 478 U.S. 570, 579 (1986)). Outside the presence of structural errors, the showing of error alone is insufficient to show prejudice to a substantial right—that is, prejudice must be demonstrated under Article 59(a). *See United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012) (citing *United States v. Puckett*, 556 U.S. 129, 142 (2009) (rejecting what it described as "an *ipse dixit* recasting the . . . error . . . as the effect on substantial rights").

The list of possible structural errors requiring reversal is thus confined to a "very limited class of cases" that are also all constitutional errors. *Neder v. United States*, 527 U.S. 1, 8 (1999); *see Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (citing *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (denial of public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (defective reasonable-doubt instruction)).

Mere statutory errors are not included in this narrow class of structural errors, and this Court has firmly rejected the notion that the Code's statutory rights

give rise to a right to relief absent a showing of prejudice under Article 59, UCMJ. *See United States v. Vazquez*, 72 M.J. 13, 16-17 (C.A.A.F. 2013) (overturning the concept of "military due process"—which presumed rights outside those in the Rules, Code, and Constitution—which had appeared explicitly or implicitly in several cases in this Court's first half-century, and stressing that violations of statutory provisions of Code require prejudice analysis); *see also United States v. Hutchins*, 69 M.J. 291 (C.A.A.F. 2011).

Appellant relies on *Hartfield* and *Beatty* to support his claim that the right to individual military counsel is structural, which rely on concepts rejected by *Vazquez* and other recent precedent. (*See* Appellant Br. at 34.) In doing so he ignores this Court's clear recent precedent that limits its analysis to the Rules, Code, and Constitution, and other explicit sources of rights[1]—rather than equitable

[1] *See, e.g., United States v. LaBella*, 75 M.J. 52 (C.A.A.F. 2015) (reading Article 71 literally to mean that a "final judgment" occurs when neither a petition for review is filed at this Court within sixty days, nor a petition for reconsideration is filed at the lower court); *United States v. Simmermacher*, 74 M.J. 196 (C.A.A.F. 2015) (overturning extra-textual reading of older precedent giving judges discretion to fashion "appropriate" remedies, and reverting to plain text reading of R.C.M. 703(f)(2) that mandates abatement of proceedings); *United States v. Moss*, 73 M.J. 64 (C.A.A.F. 2014) (reading Article 67(a)(3) for the first time literally and requiring that an appellant to personally authorize an appeal); *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011) (R.CM. 307(c)(3) must be read literally to require the pleading of all elements, including Article 134's terminal element); *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011) (Article 59(a) literally requires prejudice analysis for all non-structural errors—lower court overturned where it refused to test for prejudice under Article 59 for a merely statutory error);

concepts such as "military due process" that obscure the boundaries between those sources of rights.

In *United States v. Hartfield*, a pre-*Strickland* case, the Court of Military Appeals presumed the right to individual military counsel was a "fundamental" right. In presuming prejudice for denial of individual military counsel, the *Hartfeld* court relied not upon the right to choice of counsel, but rather the Sixth Amendment right to "assistance of counsel." 17 C.M.A. 269, 270 (C.M.A. 1967). It cited *Glasser v. United States*, 315 U.S. 60 (1942), which involved the Sixth Amendment right to "assistance of counsel," not the right to counsel of choice. In *Glasser*, the Court established that "unconstitutional multiple representation is never harmless error" and constituted a denial of the Sixth Amendment right to *effective assistance of counsel*. *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (citing *United States v. Glasser*, 315 U.S. 60, 76)). As Appellant concedes, where "effective assistance of counsel" is involved, as in *Hartfield*, *Strickland* now applies. (*See* Appellant Br. at 32.) Thus, *Hartfield* does not support his claim. *Cf. United States v. Hansen*, 24 M.J. 377 (C.M.A. 1987) (applying *Strickland* after military judge "chilled" defense counsel's ability to effectively represent client).

Later, the Court of Military Appeals in *United States v. Beatty* recognized

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United States v. Rodriguez, 67 M.J. 110 (C.A.A.F. 2009) (overturning older precedent that permitted petitioners to ignore Congress' statutory sixty-day filing deadline).

first that the right to individual military counsel was a statutory right, rather than a constitutional one. 25 M.J. 311, 315 (C.M.A. 1987). Invoking a Sixth Circuit case evaluating the constitutional right to counsel of choice, the *Beatty* court found that the denial of the statutory right to individual military counsel cannot be "analyzed in terms of specific prejudice." *Id*. at 316 (citing *Wilson v. Mintzes*, 761 F.2d. 275 (6th Cir. 1985)). Yet *Beatty* predated developments in this Court's jurisprudence in cases like *United States v. Vasquez*, 72 M.J. 13 and *United States v. Hutchins*, 69 M.J. 291 (C.A.A.F. 2011), which that hold that service members' rights are adequately protected by the plain language of Congress' Code and the President's Rules, and deprivations of statutory and regulatory rights to counsel can and should be tested for prejudice under Article 59(a). Additionally, the *Hutchins*' prejudice requirement was neither new nor novel, instead reflecting that interference with statutory rights to counsel can, and should, should be tested under Article 59(a). *See Hutchins*, 69 M.J. at 292 (citing *Weichmann*, 67 M.J. 456 and *United States v. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004))

Thus, Appellant's argument that Congress's grant of a limited right to request individual military counsel elevates that statutory grant to a fundamental and constitutional right relies on case law that predates this Court's increased fidelity to the plain language of the Code and rejection of the unsupported expansion of service members protections outside the Code, and contradicts

Supreme Court precedent. *See e.g., Vasquez*, 72 M.J. at 13; *Hutchins*, 69 M.J. at 291; (*see also* Appellant Br. 36-38).

As Appellant fails to establish that the right to request individual military counsel is constitutional, he likewise fails to establish that it is structural.

B. Appellant's claim that his waiver was invalid ignores the plain language of the Rules for Courts-Martial. Regardless, his claim fails because he was correctly informed of and understood his right to request individual military counsel and understood that right.

The cases Appellant cites to in support of his claim that his waiver of the right to be represented by individual military counsel invalid are distinguishable from the circumstances here. In *Rosenthal*, this Court did not apply waiver because the appellant was never informed that he had the *right* to submit clemency after his case was remanded. 62 M.J. 261, 262-63 (C.A.A.F. 2005). Likewise, in *United States v. Von Bergen*, this Court found no valid waiver where the military judge erroneously advised the appellant's that his previous waiver of his *right* to an Article 32 was still binding. 67 M.J. 290, 294 (C.A.A.F. 2009). In those cases, the appellant's waiver was not knowing and voluntary because the record did not show that he understood his *right* to assert certain protections under the Code.

In contrast, the Record clearly establishes that Appellant both knew the right to request individual military counsel existed and that could request individual military counsel. *Cooper*, 2018 CCA LEXIS 114, at *35-36. He failed to assert that right to the Military Judge and twice elected to be represented by detailed

counsel. (J.A. 77, 87-88.) Even if these actions were predicated on a misunderstanding of the factual circumstances surrounding individual military counsel availability due his Trial Defense Counsel's advice, Appellant's waiver was knowing and voluntary. *See Iowa v. Tolar*, 541 U.S. 77, 86, 92 (2004) (holding defendant's lack of "full and complete appreciation of consequences flowing from waiver" did not render waiver unintelligent); *United States v. Gray*, 51 M.J. 1, 54 (C.A.A.F. 1999); (*see* Appellee Br. at 26-30).

Even assuming erroneous advice was provided, erroneous advice by a defense counsel should not negate a valid trial waiver of a statutory right. Appellant's citation to *Fairchild v. Lehman*, 814 F.2d 1555 (Fed. Cir. 1987) and *United States v. Crank*, 2012 U.S. Dist. LEXIS 36147 (E.D. Va. Mar. 16, 2012) are unpersuasive for several reasons. First, those cases dealt with a different right, the right to a court-martial, which all parties agreed was a "constitutional right" as it related to waiver. Second, those cases conflict with other federal circuits holding that erroneous advice from defense counsel does not pierce a valid waiver—but instead should be handled as an ineffective assistance of counsel claim. *See Barrow v. Uchtman*, 398 F.3d 597, 608 (7th Cir. 2005) (requiring a showing of *Strickland* prejudice for appellant's claim that fundamental right to testify not properly waived due to erroneous legal advice); *Jones v. United States*, 167 F.3d

1142, 1144-47 (7th Cir. 1999) (a valid appellate waiver can be pierced with an ineffective assistance of counsel claim).

That rule is supported by well-established federal precedent applying the *Strickland* test to pierce an intentional and voluntary guilty plea. *See Broce v. United States*, 488 U.S. 563, 573-74 (1989); *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985); *United States v. Jeronimo*, 398 F.3d 1149, 1155 (9th Cir. 2005).

C. Appellant incorrectly asserts that the United States asks this Court to "establish a test" in determining whether a defense counsel's failure to request an individual military counsel entitles an appellant to relief.

Contrary to Appellant's claim, the United States encourages this Court not to establish a new standard by which to evaluate a defense counsel's failure to submit an individual military counsel request, but rather to abide by long-standing precedent involving errors caused by inaction or incorrect action by defense counsel. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911 (2017); (Appellee Br. at 35-36). Even if the deprivation of individual military counsel were a constitutional error, Appellant provides no support for the proposition that it, like most other constitutional errors, cannot be tested for prejudice under *Strickland* when raised for the first time on appeal.

Contrary to Appellant's assertion, the denial of a "substantial right" does not always negate an appellant's burden to prove prejudice by showing that the results of the proceeding would be different. (*See* Appellant Br. at 38.) Rather, the cases

Appellant cites are limited to cases involving the deprivation of "the entire judicial proceeding . . . to which he had a right." *See Lee v. United States*, 137 S. Ct. 1958, 1965 (2017) (guilty plea); *Lafler v. Cooper*, 566 U.S. 156 (2012) (rejecting plea deal); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (appeal); *Lockhart*, 474 U.S. 52 (guilty plea); *Rodriguez v. United States*, 395 U.S. 327 (1969) (appeal). The Court distinguishes these cases from other claims of attorney error because it cannot "accord . . . [a presumption of reliability] to judicial proceedings that never took place." *Lee*, 137 S. Ct. at 1965 (quoting *Flores-Ortega*, 528 U.S. at 482-83) (internal quotations omitted).

And while the Court in those cases did not demand an appellant show that the results of the waived proceeding would be different but for the advice, they still demand that Appellant show that the results of the proceeding appellant endured would have been different. For example, in *Hill v. Lockhart*, 474 U.S. 52, and *Lee v. United States*, 137 S. Ct. 1958 (2017), the petitioners entered guilty pleas and waived their rights to a contested trial based upon incorrect advice by defense counsel. In determining what type of prejudice the petitioners had to show under *Strickland*, the Court found that when a counsel error involves in the waiver of an *entire proceeding*, vice an error committed "during the course of a legal proceeding," an appellant need only show that he would have insisted on availing

himself of the waived proceeding. *See Lee*, 137 S. Ct. at 1965; *cf. Roe v. Flores-Ortega*, 528 U.S. at 484 (applying same standard to waiver of appellate review).

Here, if Trial Defense Counsel erred in not forwarding Appellant's request individual military counsel, it did not result in the waiver of an entire proceeding. Rather, it was error committed "during the course of a legal proceeding" and the traditional *Strickland* prejudice analysis applies. *See Flores-Ortega*, 520 U.S. at 481. Appellant has the burden to show that absent the error, "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).

D. Appellant's assertion of material prejudice shows that deprivation of this statutory right is measurable for prejudice under *Strickland* and Article 59(a).

Appellant asserts numerous ways in which his Trial Defense Counsel erred in the conduct of his case. (*See* Appellant Br. at 51-52.) He articulates a specific list in which his counsel's choices impacted the fair examination of the evidence at trial. (*Id*.) While the United States does not concede that error occurred or that prejudice resulted from any of the Appellant's claimed trial errors, Appellant's ability to tangibly argue how the deprivation of this statutory right harmed him shows why violations of this statutory right are measurable for prejudice both under Article 59(a) and *Strickland*. *Strickland* should apply.

E. Appellant misstates the lower court's reasoning when determining the Appellant's conviction was factually sufficient.

The lower court found Appellant's conviction factually sufficient. *Cooper*, 2018 CCA LEXIS 114, at *45-48. In doing so, it notes that the Record is devoid of evidence that the Victim had a motive to fabricate. *Id*. at *47. Contrary to Appellant's assertion, it does not "place the burden on [Appellant] to provide extra-record evidence." (Appellant Br. at 54.) Rather, it notes that Appellant, in arguing that his conviction was not factually sufficient, could not point to any evidence before the Members that the Victim had a motive to fabricate. Far from challenging Appellant to bring forth additional evidence, the Court simply underscores why they are convinced beyond a reasonable doubt Appellant was guilty. *See Cooper*, 2018 CCA LEXIS 114, at *47.

Conclusion

WHEREFORE, the United States requests this Court reverse the lower court's decision.

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1. This brief complies with the type-volume limitation of Rule 24(c): it contains fewer than 7,000 words excluding signature blocks and certificates of service.

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I certify that a copy of the foregoing was delivered electronically to the Court and Appellate Defense Counsel, Major Maryann MCGUIRE, USMC, on September 17, 2018.

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