IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee/Cross-Appellant

v.

Paul E. COOPER
Yeoman Second Class (E-5)
U.S. Navy,

Appellant/Cross-Appellee

BRIEF ON BEHALF OF APPELLANT/CROSS-APPELLEE

Crim. App. Dkt. No. 201500039

USCA Dkt. No. 21-0149/NA

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

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Index of Brief

Table of Cases, Statutes, and Other Authorities vi

Issues Presented 1

Statement of Statutory Jurisdiction 2

Statement of the Case 2

Statement of Facts 3

A. The complaining witness, whom the Government described as a person wanting to "come closer to God," drove Appellant to his barracks after meeting him at a church event, got into his bed with the lights off to watch a movie, and said she completely froze as Appellant had sex with her 3

B. Testifying in his own defense, Appellant described a consensual sexual encounter and said the two later agreed to have dinner after an "all hands" event—consistent with what he said in a recorded call days later 7

C. At trial, RP2 Owens stated that HM2 J.P. came to the chapel stating that she "may" have been assaulted but also that the sexual encounter with Appellant was "consensual." 8

D. During closing argument, trial counsel claimed HM2 J.P. would have had no motive to exaggerate or lie about what happened because nobody knew about the incident before she reported it 9

E. After deliberating for an hour, the members submitted a list of twelve questions, including whether HM2 J.P. had spoken with anyone before making her report and whether she had ever previously experienced tonic immobility 10

F. Outside the members' presence, HM2 J.P. testified she had indeed spoken with a Hospitalman Beard, who noticed she left the chapel with Appellant and urged her to report him, warning her what would happen if she did not.....10

G. HM2 J.P. also explained that she had indeed experienced tonic immobility during a traumatic incident in her past 11

H. Before HM2 J.P. testified in front of the members, the defense requested additional closing argument based on the new testimony; the military judge summarily denied this request 12

I. Before the members, HM2 J.P. testified that she told HN Beard about the allegation since she did "not [know] how this may affect" her; began to testify that he warned her about what would happen if she did not report it; and said she asked him "whether" she should report it 14

J. The military judge allowed the members to ask other questions, including whether HM2 J.P.'s roommate heard "rumors" about the incident 15

K. After asking two additional questions, the members found Appellant guilty of all allegations involving HM2 J.P.....16

L. The NMCCA described the evidence in this case as "not overwhelming." 17

M. In Appellant's first appeal before the NMCCA, his counsel did not challenge the military judge's denial of additional closing argument even though this Court decided *United States v. Bess* over a month before briefs were due 18

N. Undersigned counsel brought the military judge's denial of closing argument to the NMCCA's attention in an unopposed motion to consider a supplemental error after the case was remanded to the NMCCA.....19

O. Without explanation, the NMCCA denied the motions and denied motions to consider the issue through ineffective assistance of appellate counsel.....21

P. Months later, the NMCCA issued its second decision in the case, indicating it did not consider the denial of closing argument 22

Q. The Government now agrees the military judge's denial of closing argument is an issue worthy of the NMCCA's consideration.....22

Argument.....23

I. The military judge constitutionally erred when he allowed new evidence after deliberations had begun, but denied the defense request for additional closing argument. Since the NMCCA's judgment may be affirmed on this basis, this Court should apply the cross-appeal doctrine and affirm.....23

A. The Supreme Court in *Herring v. New York* explained that the right to present a closing argument under the Sixth Amendment assumes effect "only after all the evidence is in" before the trier of fact.....23

B. In *United States v. Bess*, this Court applied *Herring* in concluding it was constitutional error for a military judge to allow the members to request new evidence after deliberations but not allow the defense to challenge the new evidence, including through additional closing argument 24

C. This Court's decision in *Bess* was consistent with *United States v. Bayer*, where the Supreme Court warned that allowing new evidence after jury deliberations had begun creates a risk of infusing "distorted importance" on it and prejudices an appellant who lacks the opportunity to comment on it 27

D. Applying *Bayer*, federal courts have similarly concluded it is reversible error to allow the jury to receive new evidence after deliberations without allowing a renewed summation—with the Second Circuit so concluding even where the judge afforded cross-examination 28

E. Here, like in *Bess*, the military judge erred by allowing new testimony on a variety of matters probative of HM2 J.P.'s allegations but also in summarily rejecting the defense request for summation based on the new testimony.....30

F. This error was not harmless beyond a reasonable doubt: (1) the evidence of Appellant's guilt was not strong; and (2) the defense was prevented from explaining how the evidence was helpful to the defense case, which it could have done in several ways.....32

G. If this Court answers the certified question in the affirmative, it should nevertheless apply the "cross-appeal doctrine" and affirm.....37

H. If this Court does not apply the cross-appeal doctrine, it should remand this issue for the CCA's consideration given the Government's concession on this course of action and because the CCA's blanket refusals to consider this issue leave doubt as to whether Appellant received adequate review.....39

1. Though in *United States v. Chaffin*, the NMCCA stated it would apply the cause-and-prejudice standard where an appellant raises an issue in a later proceeding that could have been raised earlier, this standard is inconsistent with appellate review under Articles 66 and 67, UCMJ.....42

2. Regardless, even the cause-and-prejudice standard states that "cause" can be established by constitutionally ineffective representation, which Appellant alleges occurred in his case.....45

II. Appellant received ineffective assistance of appellate counsel when his counsel failed to assign as error the military judge's denial of closing argument in his initial appeal.....46

A. A defense counsel representing a servicemember before the CCA is required to assign all arguable issues, and this Court will look to ensure counsel "has not overlooked any viable option" in providing assistance on appeal.....46

B. Ineffective assistance of counsel on appeal occurs where: (1) counsel failed to raise an issue before the CCA and the failure to do so was objectively unreasonable; and (2) there is a reasonable likelihood the result of the appeal would have been "different."....48

C. Here, counsel's failure to raise the denial-of-closing-argument issue was objectively unreasonable since: (1) counsel objected at trial; (2) this Court had decided a similar issue in *Bess* over a month before counsel filed a brief before the CCA—the court before which counsel practiced; and (3) the issue was stronger than the issues counsel raised....50

D. This Court may conclude Appellant was prejudiced since: (1) unlike in *United States v. Adams*, there is no indication the CCA considered the issue; and (2) there is a reasonable likelihood the result of the CCA proceeding would be different if it had....53

Conclusion 54

Certificate of Compliance....55

Certificate of Filing and Service....55

Table of Cases, Statutes, and Other Authorities

UNITED STATES SUPREME COURT

Anders v. California, 386 U.S. 738 (1967) 46-47
Engle v. Isaac, 456 U.S. 107 (1982) 43
Heckler v. Campbell, 461 U.S. 458 (1983) 39
Herring v. New York, 422 U.S. 853 (1975) 23, 26, 34
McCleskey v. Zant, 499 U.S. 467 (1991) 43
Murray v. Carrier, 477 U.S. 478 (1986) 45
Smith v. Robbins, 528 U.S. 259 (2000) 52
Strickland v. Washington, 466 U.S. 668 (1984) 49
Thigpen v. Roberts, 468 U.S. 27 (1984) 38
United States v. Bayer, 331 U.S. 532 (1947) 27, 32
United States v. New York Tel. Co., 434 U.S. 159 (1977) 38
Wainwright v. Sykes, 433 U.S. 72 (1977) 44
Washington v. Confederated Bonds & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) 38

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

United States v. Adams, 59 M.J. 367 (C.A.A.F. 2004) ..... *passim*
United States v. Baker, 28 M.J. 121 (C.M.A. 1989) 48, 52
United States v. Bess, 75 M.J. 70 (C.A.A.F. 2016) ..... *passim*
United States v. Cooper, 78 M.J. 283 (C.A.A.F. 2019) 2, 19, 52
United States v. Davis, 60 M.J. 469 (C.A.A.F. 2005) 49, 51
United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982) 42-43, 46
United States v. Johnson, 42 M.J. 443 (C.A.A.F. 1995) 41, 45
United States v. May, 47 M.J. 478 (C.A.A.F. 1998) 43, 48
United States v. Mitchell, 20 M.J. 350 (C.M.A. 1985) 40
United States v. Riley, 8 M.J. 221 (C.M.A. 1980) 44
United States v. Roach, 66 M.J. 410 (C.A.A.F. 2008) 50
United States v. Steen, No. 20-0206, 2021 CAAF LEXIS 548 (C.A.A.F. June 14, 2021) 37
United States v. Wall, 79 M.J. 456 (C.A.A.F. 2020) 39

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

United States v. Chaffin, No. 200500513, 2008 CCA LEXIS 94 (N-M. Ct. Crim. App. Mar. 20, 2008) 42
United States v. Cooper, 80 M.J. 664 (N-M. Ct. Crim. App. 2020) 23
United States v. Cooper, No. 201500039, 2018 CCA LEXIS 114 (N-M. Ct. Crim. App. Mar. 7, 2018). 2, 17, 19, 33, 52
United States v. Hoffman, No. 201400067, 2020 CCA LEXIS 198 (N-M. Ct. Crim. App. June 8, 2020) 42
United States v. Simpson, No. 201800268, 2020 CCA LEXIS 67 (N-M. Ct. Crim. App. Mar. 11, 2020) 42

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

United States v. Shavrnoch, 47 M.J. 564 (A.F. Ct. Crim. App. 1997) 43

UNITED STATES FEDERAL CIRCUIT COURTS OF APPEALS

Ardoin v. Arnold, No. 13-15854, 2016 U.S. App. LEXIS 11740 (9th Cir. 2016) ... 30
Gray v. Greer, 800 F.2d 644 (7th Cir. 1986) 52
Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987) 51
United States v. Crawford, 533 F.3d 133 (2d Cir. 2008) 29
United States v. Nunez, 432 F.3d 573 (4th Cir. 2005) 29
United States v. Santana, 175 F.3d 57 (1st Cir. 1999) 30

UNIFORM CODE OF MILITARY JUSTICE (UCMJ), 10 U.S.C. §§ 801-946:

Article 66 ..... 2, 22, 38
Article 67 ..... 2, 41, 44
Article 120 2

NMCCA RULE OF PROCEDURE AND PRACTICE (2019)

Rule 18 41

OTHER SOURCES

Eugene R. Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99 (1980) 34

Issues Presented

I.

AN ACCUSED HAS A CONSTITUTIONAL RIGHT TO HAVE HIS COUNSEL MAKE A PROPER ARGUMENT ON THE EVIDENCE AND APPLICABLE LAW IN HIS FAVOR. DID THE MILITARY JUDGE ABUSE HIS DISCRETION WHEN HE ALLOWED THE MEMBERS TO RECALL THE COMPLAINING WITNESS AFTER DELIBERATIONS BUT REFUSED THE DEFENSE REQUEST TO PRESENT A RENEWED CLOSING SUMMATION ON HER NEW TESTIMONY? DID THE LOWER COURT ERR BY REFUSING TO CONSIDER THIS ISSUE?

II.

AN APPELLANT HAS THE RIGHT TO THE EFFECTIVE REPRESENTATION BY APPELLATE COUNSEL. WERE APPELLATE COUNSEL INEFFECTIVE WHERE: (1) COUNSEL FAILED TO ASSIGN AS ERROR THE MILITARY JUDGE'S DENIAL OF A RENEWED CLOSING ARGUMENT DESPITE DEFENSE COUNSEL'S OBJECTION AT TRIAL; (2) THIS COURT DECIDED *UNITED STATES v. BESS*, 75 M.J. 70 (C.A.A.F. 2016), ONE MONTH BEFORE COUNSEL FILED A SUPPLEMENTAL BRIEF RAISING ASSIGNMENTS OF ERROR BEFORE THE LOWER COURT; AND (3) THE LOWER COURT REFUSED TO CONSIDER THE ISSUE WHEN IT WAS RAISED DURING A LATER REMAND TO THAT COURT?

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) reviewed this case under Article 66(b), Uniform Code of Military Justice (UCMJ). This Court granted review of Appellant's timely petition under Article 67(a)(3), UCMJ.

Statement of the Case

At a general court-martial in 2014, Appellant was found guilty, contrary to his pleas, of three specifications of sexual assault and one specification of abusive sexual contact in violation of Article 120, UCMJ.[1] The members sentenced him to a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to E-1.[2] The convening authority approved the sentence as adjudged.[3] In 2018, the NMCCA reviewed the case and set aside the findings and sentence.[4] In 2019, this Court reversed that decision and returned the case "for further review under Article 66(c), UCMJ, 10 U.S.C. § 866(c) (2012)."[5] Upon further review in December 2020, the NMCCA again set aside the findings and sentence.[6] The Judge Advocate General of the Navy certified one question to this

[1] J.A. 577.
[2] J.A. 578.
[3] J.A. 327.
[4] *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114, at *3 (N-M. Ct. Crim. App. Mar. 7, 2018).
[5] *United States v. Cooper*, 78 M.J. 283, 287 (C.A.A.F. 2019).
[6] *United States v. Cooper*, 80 M.J. 664, 666 (N-M. Ct. Crim. App. 2020).

Court on February 8, 2021.[7] The same day, Appellant asked this Court to review the two issues in this brief.[8] This Court granted such review on June 8, 2021.[9]

Statement of Facts

A. The complaining witness, whom the Government described as a person wanting to "come closer to God," drove Appellant to his barracks after meeting him at a church event, got into his bed with the lights off to watch a movie, and said she completely froze as Appellant had sex with her.

Appellant and the complaining witness were second class petty officers deployed to Joint Base Guantanamo Bay Cuba.[10] They met one evening at a base church service where both were playing in the chapel "praise team."[11] During opening statement, trial counsel claimed that HM2 J.P. went to church services because she wanted to "come closer to God" during her deployment.[12]

After the service, a Sailor working in the chapel, Religious Programs

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[7] *United States v. Paul E. Cooper*, No. 21-0150/NA, Daily Journal, United States Court of Appeals for the Armed Forces (Feb. 8, 2021), https://www.armfor.uscourts.gov/journal/2021Jrnl/2021Feb.htm (last visited July 5, 2021).
[8] *United States v. Paul E. Cooper*, No. 21-0149/NA, Daily Journal, United States Court of Appeals for the Armed Forces (Feb. 8, 2021), https://www.armfor.uscourts.gov/journal/2021Jrnl/2021Feb.htm (last visited July 5, 2021).
[9] *United States v. Paul E. Cooper*, No. 21-0149/NA, Daily Journal, United States Court of Appeals for the Armed Forces (June 8, 2021), https://www.armfor.uscourts.gov/journal/2021Jrnl/2021Jun.htm (last visited July 5, 2021).
[10] J.A. 377-78, 475.
[11] J.A. 459.
[12] J.A. 338.

Specialist Second Class Timothy Owens, saw HM2 J.P. and Appellant playing music together for about fifteen to twenty minutes.[13] He specifically recalled Appellant showing HM2 J.P. how to play drums.[14] Though RP2 Owens had driven Appellant to the church event, Appellant told RP2 Owens that HM2 J.P. would be giving him a ride back to his barracks.[15]

HM2 J.P. later testified that while she thought it made "no sense" to give Appellant a ride, she did so because Appellant had offered to play music there, and HM2 J.P. wanted to "continue praising the Lord."[16]

The ride to Appellant's room was pleasant. The two discussed their hobbies and what movies they liked.[17] HM2 J.P. told Appellant she was single and jokingly asked him if he had any children he was unaware of.[18]

When they arrived at Appellant's room—a small trailer barracks with barely enough room for a bed and desk[19]—Appellant realized he had forgotten the keys to his room in RP2 Owens' car.[20] He called a maintenance worker to let him in.[21]

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[13] J.A. 460-61.
[14] J.A. 461.
[15] J.A. 162.
[16] J.A. 385.
[17] J.A. 405-06.
[18] J.A. 406.
[19] J.A. 384-86.
[20] J.A. 463.
[21] J.A. 384-86.

After the maintenance worker unlocked the door, HM2 J.P. waited outside for five to ten minutes as Appellant cleaned up his room.[22]

Appellant and HM2 J.P. played music for about a half hour until she asked him if he had any video games.[23] Instead of playing video games, the two agreed to watch a Batman movie that HM2 J.P. had already seen.[24] Appellant turned the lights off as HM2 J.P. was on his bed.[25] During the movie, the two sat close to each other on the bed; a blanket covered both of their legs.[26]

At trial, HM2 J.P. testified that as the movie played, Appellant began touching her thigh with his hand, which prompted her to straighten her legs so that he could not touch her further.[27] She said that when he continued trying to touch her legs, she moved his hand away.[28]

HM2 J.P. then testified that Appellant abruptly pulled her to the head of the bed, laid her down, and held her waist down with his right hand.[29] She claimed she tried pushing him away but that his strong grip prevented her from doing so.[30] She

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[22] J.A. 384.
[23] J.A. 387.
[24] J.A. 388.
[25] J.A. 409-10.
[26] J.A. 389, 413.
[27] J.A. 389, 413.
[28] J.A. 389.
[29] J.A. 390.
[30] J.A. 390.

said she wanted to run out of the room, but did not think she could do so.[31]

She then said she completely froze. She described her condition as being "as if [her] body was not reacting to what [her] mind was telling it to do."[32] An expert later said this behavior was "largely" consistent with "tonic immobility," a freezing strategy a person may use if fighting or fleeing would be futile.[33]

HM2 J.P. then said Appellant touched her breasts, pulled her pants down, performed oral sex on her, and had sexual intercourse with her over a period she described as lasting around twenty minutes.[34] She said she never resisted or said "no" but gave "facial expressions [that] indicated that [she] was not showing any desires."[35]

HM2 J.P. said she suddenly got up "as if all [her] senses came back" moments later.[36] She said this occurred after Appellant returned after leaving the room momentarily when RP2 Owens returned with his keys.[37] HM2 J.P. claimed she went straight to her car and told Appellant she did not want to see him again.[38]

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[31] J.A. 391.
[32] J.A. 391.
[33] J.A. 447-48, 451.
[34] J.A. 392-96.
[35] J.A. 423.
[36] J.A. 399.
[37] J.A. 423.
[38] J.A. 399.

B. Testifying in his own defense, Appellant described a consensual sexual encounter and said the two later agreed to have dinner after an "all hands" event—consistent with what he said in a recorded call days later.

Appellant testified in his own defense.[39] He described a consensual encounter involving mutual foreplay culminating in sexual intercourse.[40] He stated that after the sexual intercourse, RP2 Owens called him telling him he would be dropping off the key at Appellant's room.[41]

On cross-examination, the Government admitted a statement Appellant typed for his own records once he learned HM2 J.P. was accusing him of sexual assault.[42] In the letter, Appellant stated he and HM2 J.P. kissed goodbye following the sexual encounter.[43] Appellant also wrote that the two "made plans to have dinner the next day (Monday) after the all-hands meeting at 1900."[44]

A few days after the sexual encounter, HM2 J.P. called Appellant with the help of the Naval Criminal Investigative Service, which was secretly recording the call.[45] In the recording, Appellant told HM2 J.P. that he thought the two were

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[39] J.A. 474.
[40] J.A. 483-90.
[41] J.A. 489 (explaining that "[RP2 Owens] called and stated that he was on the way to drop off the key because when I first got in the room, I had called him to get the key").
[42] J.A. 505. This written statement was seized by NCIS just over a week after the sexual encounter. *See* App. Ex. IV at 11.
[43] Pros. Ex. 1 at 2.
[44] *Id.*
[45] App. Ex. IV at 9. The recording was not admitted at trial.

going to the "all hands" event and going to eat.[46] When HM2 J.P. turned the conversation toward the sexual encounter and accused Appellant of assaulting her, Appellant adamantly denied her suggestion that she told him not to contact her and that he took advantage of her.[47]

C. At trial, RP2 Owens stated that HM2 J.P. came to the chapel stating that she "may" have been assaulted but also that the sexual encounter with Appellant was "consensual."

The day after the encounter, HM2 J.P. went to the base chapel with Hospitalman (HN) Ian Beard and asked RP2 Owens if she could speak to him in private.[48] RP2 Owens took her to another room, where she told him she "may have been assaulted and wanted to file a complaint."[49] When RP2 Owens asked her what happened, she replied that she "thinks she made a mistake."[50] When RP2 Owens asked her whether the encounter was "consensual," she replied "Yes."[51]

Nevertheless, at some point during the exchange, RP2 Owens stated that HM2 J.P. told him that Appellant sexually assaulted her.[52] He then took her to

[46] App. Ex. IV at 9-10 ("No, you did not. You talked to me about picking me up to go to the meeting and about going to eat with me.").
[47] *Id*.
[48] J.A. 465, 468.
[49] J.A. 465.
[50] J.A. 468.
[51] J.A. 465.
[52] J.A. 469.

Fleet and Family Services on base to make a complaint against Appellant.[53]

D. During closing argument, trial counsel claimed HM2 J.P. would have had no motive to exaggerate or lie about what happened because nobody knew about the incident before she reported it.

During closing argument, the parties disputed whether HM2 J.P. fabricated the allegation. Trial counsel made the following argument:

> What's her motive to lie about this? If she's the aggressor, if she's humping on him, she's grinding on him, she wants to do all this with him, what reason is there to fabricate this? *Who knew about it?* There was no testimony that ooh, the rumors were flying, somebody confronted her; none of that, none of that. She went to the chaplain's office to say she'd been assaulted.[54]

Trial counsel then argued that in order to find Appellant not guilty, the members would have to believe that HM2 J.P. was "lying, and [she] had a reason to go after him, the guy that [HM2 J.P.] had just met the evening before."[55] Trial counsel also downplayed RP2 Owens' testimony that HM2 J.P. told him the encounter was "consensual" by stating that RP2 Owens was not correctly remembering what occurred.[56]

Following this, the defense argued that HM2 J.P. was indeed misrepresenting what happened. It argued that the "case [was] about two people

[53] J.A. 470-71.
[54] J.A. 522 (emphasis added).
[55] J.A. 523.
[56] J.A. 520.

who had consensual sex, and afterwards, one of them claims to have suffered from this tonic immobility."[57]

E. After deliberating for an hour, the members submitted a list of twelve questions, including whether HM2 J.P. had spoken with anyone before making her report and whether she had ever previously experienced tonic immobility.

Just over an hour into deliberations, the members submitted twelve questions for additional evidence.[58] The military judge stated: "I've—I've never had a panel come back with this many questions—requests for evidence before, ever."[59]

One question asked: "Did [HM2 J.P.] talk to anyone else after the incident but before she went to the chapel to talk to RP2 Owens? If so, who, and what did they talk about?"[60] A member also asked whether she had ever experienced tonic immobility before and whether she had heard of tonic immobility before.[61]

F. Outside the members' presence, HM2 J.P. testified she had indeed spoken with a Hospitalman Beard, who noticed she left the chapel with Appellant and urged her to report him, warning her what would happen if she did not.

Before HM2 J.P. testified, the defense objected to the question on hearsay grounds, but the military judge wanted to hear what HM2 J.P.'s answer to the

[57] J.A. 525.
[58] J.A. 533, 538-43.
[59] J.A. 538.
[60] J.A. 540.
[61] J.A. 550.

question would be.[62]

The military judge recalled HM2 J.P. to provide testimony outside the presence of the members.[63] When the military judge asked her the question, she testified that she had indeed spoken with HN Beard before going to the chapel to report the incident.[64] She stated that HN Beard "noticed that [she] had left the night before with someone and had arrived late; therefore, [she] advised him of the incident" before asking him whether she should first report the incident to her chain of command or to the chaplain.[65]

On cross-examination, she added that when she told HN Beard about the incident, HM2 J.P. "did not want to speak to anyone" about the allegation.[66] But HM2 J.P. stated that in response, HN Beard warned her that if she did not report the incident, Appellant "will continue . . . to act in such a way to other females[.]"[67] She stated that she then went to the chaplain's office.[68]

G. HM2 J.P. also explained that she had indeed experienced tonic immobility during a traumatic incident in her past.

In response to the question about HM2 J.P.'s familiarity with tonic

[62] J.A. 540-41.
[63] J.A. 546.
[64] J.A. 546.
[65] J.A. 547.
[66] J.A. 548.
[67] J.A. 548.
[68] J.A. 548.

immobility, she replied that she had indeed experienced a "freezing" incident in the past. She explained that she "experienced the freezing aspect before" during a "traumatic event" unrelated to this case.[69] She also stated that she had not heard of the term "tonic immobility before becoming involved in this case.[70]

H. Before HM2 J.P. testified in front of the members, the defense requested additional closing argument based on the new testimony; the military judge summarily denied this request.

Before the military judge recalled the members to receive the new testimony, the defense objected to the question involving whether HM2 J.P. spoke to anyone before reporting the incident.[71] The military judge indicated that he would allow the question, and then placed the court in recess.[72]

When the parties got back on the record, the military judge summarized an R.C.M. 802 conference in which he told the parties that he would control the questioning.[73] He stated that he had told both trial counsel and defense counsel that he would question the complaining witness, ask the members if they had any questions, and then move the members back into deliberations.[74]

After this, the defense requested "reopening argument to the members on

[69] J.A. 550.
[70] J.A. 550.
[71] J.A. 552.
[72] J.A. 552.
[73] J.A. 554.
[74] J.A. 554.

certain points of evidence that will be brought out based on these questions."[75] The defense asked that the military judge "allow arguments to be reopened to the members following the evidence being presented to them."[76] Trial counsel opposed the request stating that the "government doesn't feel it's necessary."[77]

When the military judge said he was not yet "persuaded" by the defense request, the defense counsel replied:

> Sir, the defense believes that in—in the closing argument the government provided to the members, they indicated that there was—that no one was aware of the event that took place with [the complaining witness] and she had no motive to—to lie. I mean he asked why would she lie, no one else knew about this, and the way that the testimony is going to be elicited, the defense believes that it warrants an argument that there was a motive to fabricate the accusation of sexual assault, sir.[78]

In response, trial counsel stated: "Well, Your Honor, the—they can hold that against the government. I mean we've made our argument, and if they find the facts show otherwise, they can hold that against us."[79]

The military judge denied the defense request by simply stating: "I'm not going to reopen argument."[80]

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[75] J.A. 555.
[76] J.A. 555.
[77] J.A. 555.
[78] J.A. 555.
[79] J.A. 556.
[80] J.A. 556.

I. Before the members, HM2 J.P. testified that she told HN Beard about the allegation since she did "not [know] how this may affect" her; began to testify that he warned her about what would happen if she did not report it; and said she asked him "whether" she should report it.

Over defense objection, the military judge allowed HM2 J.P. to testify to the question regarding whether she approached anyone before reporting Appellant.[81] HM2 J.P. testified as follows:

> Yes, Your Honor. I have spoken to HN Beard, Ian, before going to the chaplain's office, and initially out of just not knowing how this may affect me, I had just told him, 'Hey, I can trust you, and I can tell you this, so I'm going to disclose it to you,' and when I had spoke to him (sic), he had mentioned how if I do not --.[82]

At this point, the military judge sustained the defense's objection—likely based on its earlier hearsay concern—and told HM2 J.P. "Don't—don't tell us what—what the other petty officer (sic) said, but what—what—what did you tell him?"[83] In response, HM2 J.P. testified:

> I—after I had the conversation with him, I also asked him whether I should go to the chain of command or to chaplain's office to share this.[84]

[81] J.A. 552.
[82] J.A. 559.
[83] J.A. 559.
[84] J.A. 560.

J. The military judge allowed the members to ask other questions, including whether HM2 J.P.'s roommate heard "rumors" about the incident.

In addition to giving the members a diagram of Appellant's room,[85] the military judge also allowed them to ask a number of additional questions to HM2 J.P. including the questions of whether HM2 J.P. had ever experienced tonic immobility prior to her encounter with Appellant and whether she had heard of the term before trial.[86] The military judge also allowed HM2 J.P. to testify regarding whether Appellant called RP2 Owens about losing his keys while he and HM2 J.P. watched the Batman movie and whether Appellant received a call from RP2 Owens before he came to Appellant's door with his keys.[87]

In response, HM2 J.P. testified she had indeed experienced tonic immobility due to a "traumatic event" in her past but never heard of the term "tonic immobility" before the events in this court-martial; Appellant made the phone call to RP2 Owens before the movie began, and that Appellant did not receive a phone call before RP2 Owens came to the door with his keys—contrary to what Appellant explained occurred.[88]

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[85] J.A. 557.
[86] J.A. 558-59.
[87] J.A. 560.
[88] *Compare* J.A. 559-60 *with* J.A. 489 (explaining that "[RP2 Owens] called and stated that he was on the way to drop off the key because when I first got in the room, I had called him to get the key").

Additionally, the military judge allowed the members to ask a question to Ms. J.J., who worked in the same psychiatric hospital unit on base as HM2 J.P., but on separate shifts;[89] was roommates with HM2 J.P. "after the incident;" and who separately accused Appellant of improperly asking her out on dates.[90] At trial, Ms. J.J. admitted that she and HM2 J.P. had discussed the allegations against Appellant before trial.[91]

The question addressed whether Ms. J.J. had heard of "rumors" about the alleged sexual assault of HM2 J.P. in the days following HM2 J.P.'s encounter with Appellant.[92]

In front of the members, Ms. J.J. testified that she had not heard any such rumors.[93]

K. After asking two additional questions, the members found Appellant guilty of all allegations involving HM2 J.P.

Just over an hour later, the members submitted two more questions. The first asked whether Appellant or HM2 J.P. received sexual harassment or sexual assault

[89] J.A. 355-57.
[90] J.A. 561. Appellant was acquitted of the specification of improperly asking Ms. J.J. on dates. *See* J.A. 326-27.
[91] J.A. 357.
[92] J.A. 561 ("All right, here's the question: did you hear any rumors about the alleged sexual assault between 28 October and 1 November 2013?").
[93] J.A. 561.

training before arriving at Guantanamo Bay.[94] The second question asked whether the members could review HM2 J.P.'s prior statements to NCIS as well as her testimony before the Article 32, UCMJ, hearing.[95]

The military judge sustained the objection to the first question and instructed the members the Government need not prove that the accused knew of the general order or regulation.[96] As to the second question, the military judge clarified the members had received this statement through the defense cross-examination of HM2 J.P; he did not give any new evidence to the members.[97]

After deliberating for a half hour, the members found Appellant guilty of all HM2 J.P.'s allegations against Appellant: three specifications of sexual assault and one specification of abusive sexual contact.[98]

L. The NMCCA described the evidence in this case as "not overwhelming."

In its first review of this case, the NMCCA described the evidence as "not overwhelming."[99] It noted that the complaining witness told RP2 Owens the sexual encounter "was consensual" before observing:

> [The complaining witness] was in the appellant's quarters voluntarily, and neither she nor the appellant had consumed any alcohol. She

[94] J.A. 566, 568, App. Ex. XL.
[95] J.A. 573, App. Ex. XLI.
[96] J.A. 572-73.
[97] J.A. 573-74.
[98] J.A. 577.
[99] *Cooper*, 2018 CCA LEXIS 114, at *46.

> offered no reason for remaining in the appellant's bed, despite ample opportunity to flee, other than tonic immobility. The expert witness' testimony about tonic immobility was more informational and theoretical. There was no forensic evidence suggesting lack of consent, and the appellant's own statements implied his perception of a consensual encounter.[100]

Similarly, in its second review of the case, the NMCCA described this as "'he said-she said' sexual assault case where the difference between conviction and acquittal often lies in the margin."[101]

M. In Appellant's first appeal before the NMCCA, his counsel did not challenge the military judge's denial of additional closing argument even though this Court decided *United States v. Bess* over a month before briefs were due.

The following is a timeline of the major appellate events in this case:

- September 2015: Appellant's military appellate counsel files a brief with seven assignments of error before the NMCCA.[102]

- January 2016: This Court decides *United States v. Bess* and finds reversible constitutional error where the military judge reopened the trial to allow admission of new evidence but prevented defense counsel from challenging the evidence, including through a renewed closing argument.[103]

- February 2016: The NMCCA permits appellate defense counsel to file three additional assignments of error.[104] Counsel does not assign as error the military judge's denial of closing argument.[105]

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[100] *Id*. at *47.
[101] *Cooper*, 80 M.J. at 676.
[102] Appellant's Br. and Assignments of Error (Sept. 17, 2015) at 1-2.
[103] 75 M.J. 70, 77 (C.A.A.F. 2016).
[104] Appellant's Mot. for Leave to File Supplemental Assignments of Error and to Attach Documents (Feb. 24, 2016) at 2-9.
[105] *Id*.

- April 2016: The NMCCA orders a *DuBay* hearing to resolve a factual dispute among the parties as to whether Appellant's requested individual military counsel was reasonably available.[106]

- March 2018: The NMCCA decides Appellant's case, setting aside the findings and sentence on the grounds that he was denied the right of individual military counsel.[107]

- February 2019: This Court reverses the NMCCA decision and remands to have the NMCCA decide unaddressed assigned errors.[108]

N. Undersigned counsel brought the military judge's denial of closing argument to the NMCCA's attention in an unopposed motion to consider a supplemental error after the case was remanded to the NMCCA.

Undersigned counsel was assigned to the case after the case was re-docketed at the NMCCA in the summer of 2019 following this Court's reversal.[109]

In March 2020, undersigned counsel filed a supplemental brief raising issues that focused on the posture of the appeal starting with the NMCCA's decision moving forward rather than raising issues based on the trial that could have been raised by Appellant's original appellate counsel. For example, undersigned counsel asserted that the original NMCCA factual sufficiency was defective since, in its

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[106] J.A. 92-93.
[107] *Cooper*, 2018 CCA LEXIS 114, at *3.
[108] *Cooper*, 78 M.J. at 287 ("That leaves unanswered other issues the CCA determined were mooted by its decision that Appellee was denied his statutory right to IMC. We leave those issues for the CCA to resolve on remand.") (citation omitted).
[109] *See* Appellant's Mot. for First Enlargement of Time (Sept. 12, 2019) at 3.

opinion, the NMCCA improperly shifted the burden on Appellant.[110] Likewise, Appellant personally raised an issue relating to the delay in resolving his appeal and also asked the NMCCA to find that, despite this Court's reversal, his trial counsel were ineffective since the NMCCA wrote in its first decision trial defense counsel incorrectly represented Appellant's wishes on IMC to the military judge.[111]

But three months later, when reading *Bess* while assisting on a separate appeal, undersigned counsel recalled that, like in *Bess*, the military judge in Appellant's trial similarly denied additional closing argument despite reopening the trial after deliberations had begun. Undersigned counsel also reviewed the original pleadings submitted to the NMCCA and noted that Appellant's original appellate defense counsel had not briefed this issue to the NMCCA.

Undersigned counsel then discussed the matter with Appellant, who personally raised this matter in a supplemental assignment of error.[112] Appellant also filed a motion to attach a declaration in which Appellant explained that his counsel had never apprised him that denying his trial defense's counsel's request for additional closing argument was legal error.[113]

The Government filed no opposition to these motions.

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[110] *Cooper*, 80 M.J. at 668 n.9; J.A. 118-135.
[111] J.A. 136-40.
[112] J.A. 163-83.
[113] J.A. 184-85.

O. Without explanation, the NMCCA denied the motions and denied motions to consider the issue through ineffective assistance of appellate counsel.

Without explanation, the NMCCA denied both the motion to consider the supplemental assigned error as well as to attach Appellant's declaration.[114]

Appellant thereafter filed a motion to file a supplement assignment of error asserting that he received ineffective assistance of appellate counsel based on counsel's failure to timely raise the issue.[115] Counsel again filed a motion to attach the same declaration Appellant previously filed.[116]

This time, the Government opposed, generally arguing that Appellant failed to show good cause for the filing.[117] Without explanation, the NMCCA denied both motions.[118] Thereafter, Appellant filed a motion suggesting *en banc* consideration of this issue.[119] Again, the Government opposed this motion.[120] The NMCCA later denied this without explanation.[121]

[114] J.A. 163, 181.
[115] J.A. 186-206.
[116] J.A. 207-211.
[117] J.A. 212-23.
[118] J.A. 186, 207.
[119] J.A. 295-309.
[120] J.A. 310.
[121] J.A. 295.

P. Months later, the NMCCA issued its second decision in the case, indicating it did not consider the denial of closing argument.

The NMCCA issued a second opinion in this case in December 2020.[122] The court set aside the findings and sentence after ruling that it would use its authority under Article 66(c) to disregard Appellant's waiver of his right to individual military counsel (IMC) before concluding that his trial defense counsel was ineffective for failing to properly route Appellant's IMC request.[123]

In the opinion, the court identified the issues that it considered.[124] The military judge's denial of additional closing argument was not one of them.[125]

Q. The Government now agrees the military judge's denial of closing argument is an issue worthy of the NMCCA's consideration.

In its Reply to Appellant's Answer on the certified issue, the Government states that it "does not oppose" the CCA's consideration of the denial-of-closing-argument issue.[126]

[122] *Cooper*, 80 M.J. at 664.
[123] *Id*. at 666.
[124] *Id*. at 668 n.9-10.
[125] *Id*.
[126] *See* Reply on Behalf of Appellee/Cross-Appellant (May 17, 2021) at 12.

Argument

I.

THE MILITARY JUDGE CONSTITUTIONALLY ERRED WHEN HE ALLOWED NEW EVIDENCE AFTER DELIBERATIONS HAD BEGUN, BUT DENIED THE DEFENSE REQUEST FOR ADDITIONAL CLOSING ARGUMENT. SINCE THE NMCCA'S JUDGMENT MAY BE AFFIRMED ON THIS BASIS, THIS COURT SHOULD APPLY THE CROSS-APPEAL DOCTRINE AND AFFIRM.

Standard of Review

A military judge's decision to allow the members to receive new evidence after deliberations have begun is reviewed for an abuse of discretion.[127]

A. The Supreme Court in *Herring v. New York* explained that the right to present a closing argument under the Sixth Amendment assumes effect "only after all the evidence is in" before the trier of fact.

In *Herring v. New York*, the Supreme Court stated that "[i]t can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case."[128] The Court wrote:

> For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries' positions. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the

[127] *Bess*, 75 M.J. at 75.
[128] 422 U.S. 853, 862 (1975).

defendant's guilt.[129]

The Supreme Court further underscored the importance of closing argument by explaining that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."[130] It added that "no such aspect of advocacy could be more important than the opportunity finally to marshal the evidence for each side before submission of the case to judgment."[131]

In *Herring*, the Supreme Court concluded that a statute allowing a trial judge to deny closing argument—even in a bench trial—violated the appellant's Sixth Amendment right to the assistance of counsel as incorporated through the Fourteenth Amendment.[132]

B. In *United States v. Bess*, this Court applied *Herring* in concluding it was constitutional error for a military judge to allow the members to request new evidence after deliberations but not allow the defense to challenge the new evidence, including through additional closing argument.

During deliberations in *United States v. Bess*, the members submitted questions requesting to view muster reports that had been mentioned during cross-examination and closing arguments but not admitted into evidence.[133] Outside the

[129] *Id*.
[130] *Id*. at 861.
[131] *Id*.
[132] *Id*. at 857, 865.
[133] 75 M.J. at 72-73.

presence of the members, the military judge allowed trial counsel to call a witness to lay a foundation for the records, and allowed the defense to cross-examine the witness.[134] The military judge also allowed the defense to call a witness to establish that the reports did not conclusively show the people who were actually present.[135] Over defense objection, the military judge admitted the reports.[136]

When defense counsel asked to question the witnesses in front of the members, the military judge denied the request, handed the reports to the members, and simply stated the reports had "been admitted into evidence."[137] The military judge did not allow either side to present additional closing argument.[138]

This Court concluded that while it was permissible for the judge to allow the members to request additional evidence, this question was "distinct, however, from the question of whether Appellant should have been allowed to attack the reliability of the evidence before the factfinder."[139]

The Court cited Supreme Court precedent recognizing the components of the right to present a defense.[140] Of note, this Court cited *Herring*'s recognition that

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[134] *Id*. at 73.
[135] *Id*. at 74.
[136] *Id*.
[137] *Id*.
[138] *Id*. at 77.
[139] *Id*. at 74.
[140] *Id*. at 75 (citations omitted).

"[t]he Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor."[141]

Turning to Bess's case, this Court noted:

> While the military judge has broad latitude to control cross-examination, giving controverted evidence to the factfinder with no opportunity for the accused to examine or cross-examine witnesses or in any way to rebut that evidence in front of the members is unprecedented in our legal system, and cannot be reconciled with due process.[142]

This Court found that the appellant's constitutional right to present a defense was violated when the judge admitted the reports "without affording Appellant an opportunity to (a) cross-examine [the business records custodian]; (b) call . . . a rebuttal witness; or (c) have his counsel comment on the new evidence in front of the members[.]"[143] This Court concluded:

> While R.C.M. 921(b) permits a military judge to grant the members' request to introduce new evidence after they have begun deliberations, this case demonstrates that the military judge should review and weigh such requests with great caution. Procedures should be employed to ensure that no unfair prejudice is afforded to either party.[144]

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[141] *Id*. (citing 422 U.S. at 860).
[142] *Id*.
[143] *Id*.
[144] *Id*. at 77.

C. This Court's decision in *Bess* was consistent with *United States v. Bayer*, where the Supreme Court warned that allowing new evidence after jury deliberations had begun creates a risk of infusing "distorted importance" on it and prejudices an appellant who lacks the opportunity to comment on it.

Before *Herring*, the Supreme Court in *United States v. Bayer* warned against the prejudicial nature of giving new evidence to the jury after deliberations had begun but not allowing counsel to comment on the new evidence.[145] In that case, Bayer's counsel asked the trial judge "to reopen the case" four hours after deliberations to allow evidence of a "long distance call slip" from a telephone company.[146]

Writing for the majority, Justice Jackson assumed *arguendo* that the evidence was highly relevant and that if Bayer had moved for its submission during his case-in-chief, "its exclusion would have been prejudicial error."[147] Nevertheless, the Supreme Court reversed the lower court and held that the evidence's exclusion by the trial judge was proper.[148] The Court noted that the opposing parties disputed the evidence and that Bayer had no means of authenticating it.[149] The Court noted that this would also mean the Government

[145] 331 U.S. 532, 538 (1947) (explaining that admission of such evidence "would have been prejudicial to the Government, for the District Attorney would then have had no chance to comment on it, summation having been closed").
[146] *Id*.
[147] *Id*.
[148] *Id*.
[149] *Id*.

could not challenge the evidence through cross-examination.[150] The Court further observed that the admission of this evidence four hours after deliberations would likely imbue the evidence with "distorted importance."[151]

Separately, the Court noted that prejudice would be compounded by the opposing parties' inability to provide closing argument on the new evidence. As Justice Jackson explained:

> It surely would have been prejudicial to the Government, for the District Attorney would then have had no chance to comment on it, summation having been closed. It also would have been prejudicial to the other defendant, Radovich, who, with no chance to cross-examine or comment, would be confronted with a new item of evidence against him.[152]

D. Applying *Bayer*, federal courts have similarly concluded it is reversible error to allow the jury to receive new evidence after deliberations without allowing a renewed summation—with the Second Circuit so concluding even where the judge afforded cross-examination.

Federal circuit courts have applied *Bayer* and found reversible error where a trial judge admitted evidence after deliberations, but did not allow the opposing party to comment on the new evidence.

For example, in *United States v. Crawford*, the Second Circuit reversed after the trial judge, over defense objection, allowed the Government to call a witness

[150] *Id*.
[151] *Id*.
[152] *Id*.

after deliberations in response to the jury's question about why a gun had not been traced to its original owner.[153] The Court reached this conclusion even though the defense was allowed to cross-examine the witness.[154] The Court cited *Bayer* in concluding that the defense was not given an opportunity for additional closing argument.[155] The Court also noted that the late nature of the testimony gave it "distorted importance" and that it was prejudicial for the witness to testify that the defense had been given the trace report before trial since the defense had emphasized in closing argument the Government's failure to admit the report.[156]

Similarly, in *United States v. Nunez*, over defense objection, the trial judge admitted a report with incriminating evidence upon the jury's request after deliberations had begun.[157] The Fourth Circuit reversed.[158] It noted that the appellant had not been given an opportunity to cross-examine the agents on the report, nor were they given an opportunity to "argue its relevance and weight to the jury during summation."[159] Citing *Bayer*, the Court also explained that the report "gained distorted importance" by virtue of its late admission and noted that the

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[153] 533 F.3d 133, 143 (2d Cir. 2008).
[154] *Id*.
[155] *Id*.
[156] *Id*. at 141-42.
[157] 432 F.3d 573, 577 (4th Cir. 2005).
[158] *Id*. at 582.
[159] *Id*. at 581.

defense had no opportunity to comment on or challenge it.[160]

Both the First and Ninth Circuits have reached similar conclusions when the trial court allowed the jury to receive new evidence or an evidentiary instruction but refused to allow the defense a renewed summation.[161]

E. Here, like in *Bess*, the military judge erred by allowing new testimony on a variety of matters probative of HM2 J.P.'s allegations but also in summarily rejecting the defense request for summation based on the new testimony.

This case is very similar to *Bess* and the federal circuit cases cited above. Like in *Bess*, the military judge allowed the trial to be reopened for new testimony on an issue the defense told the military judge was key to its case.

In closing argument, trial counsel suggested it was implausible that HM2 J.P. was lying because she had not spoken to anyone about having sex with Appellant and thus there were no "rumors" that a false allegation would quell.[162] By virtue of their questions, the members were not immediately convinced.

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[160] *Id*. at 582.

[161] *United States v. Santana*, 175 F.3d 57, 62-63 (1st Cir. 1999) (reversing after trial judge, upon the jury's request, allowed jurors to return to courtroom and observe the appellant's ears, which had been covered during trial, but where judge did not afford the appellant an opportunity to cross-examine or call witnesses and the "parties were not permitted to make additional arguments to the jury"); *Ardoin v. Arnold*, No. 13-15854, 2016 U.S. App. LEXIS 11740, *3-4, *15 (9th Cir. 2016) (finding reversible error where jury submitted note to judge after deliberations asking if it could convict on a felony murder theory and judge replied in the affirmative and denied the defense request to reopen closing argument).

[162] J.A. 522.

Like in *Bess*, the military judge effectively reopened trial after deliberations had begun and allowed the members to receive new evidence. He allowed HM2 J.P. to testify on a variety of matters, including that she had spoken to a confidant, HN Beard, about "whether" she should report the incident.[163] The members also heard HM2 J.P. begin to explain that HN Beard warned her about the consequences of *not* reporting Appellant.[164] Separately, HM2 J.P. testified that she had experienced a "traumatic event" in her past in which she experienced tonic immobility, but that she had never heard of the term "tonic immobility" before.[165]

The military judge further allowed HM2 J.P. to testify (1) that Appellant called RP2 Owens before Appellant and HM2 J.P. started watching the movie in his room, and (2) that RP2 Owens did not call Appellant before coming to Appellant's room to drop his keys off, contrary to what Appellant explained occurred.[166]

Apart from HM2 J.P., the military judge also allowed another witness to

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[163] J.A. 560.

[164] J.A. 559 ("Yes, Your Honor. I have spoken to HN Beard, Ian, before going to the chaplain's office, and initially out of just not knowing how this may affect me, I had just told him, 'Hey, I can trust you, and I can tell you this, so I'm going to disclose it to you,' *and when I had spoke to him (sic), he had mentioned how if I do not* –") (emphasis added).

[165] J.A. 559.

[166] *Compare* J.A. 559-60 *with* J.A. 489 (explaining that "[RP2 Owens] called and stated that he was on the way to drop off the key because when I first got in the room, I had called him to get the key").

testify. He allowed Ms. J.J.—who worked in the same unit as HM2 J.P. and had discussed the allegations with HM2 J.P.—to testify that she had not heard any "rumors" in the days following the alleged incident.[167] This question appeared to reflect the members' desire to investigate trial counsel's statement in closing argument that there were no "rumors" floating around.[168]

As the Supreme Court warned in *Bayer*, new evidence based on questions by the members after deliberations had begun had potential to take on "distorted importance" and required an opportunity for a renewed summation.[169] Thus, the defense stated that it was requesting the military judge "allow arguments to be reopened" and that this was "based on the questions that were asked by the members and the evidence that would be testified to[.]"[170] But as occurred in *Bess*, the military judge erred by not giving the defense such an opportunity.[171]

F. This error was not harmless beyond a reasonable doubt: (1) the evidence of Appellant's guilt was not strong; and (2) the defense was prevented from explaining how the evidence was helpful to the defense case, which it could have done in several ways.

As this Court explained in *Bess*, "[f]or constitutional errors, the Government

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[167] J.A. 561.
[168] J.A. 522 ("There was no testimony that ooh, the rumors were flying, somebody confronted her . . .").
[169] *Bayer*, 331 U.S. at 538.
[170] J.A. 554-55.
[171] J.A. 555-56.

must persuade us that the error was harmless beyond a reasonable doubt."[172] This Court explained that the Government must demonstrate beyond a reasonable doubt that the "error complained of did not contribute to the verdict obtained."[173]

To start, the evidence in this case was not strong. Like in *Bess*, where this Court found the Government's case not overwhelming, in part because of the members' numerous questions for more evidence,[174] here, the members submitted twelve such questions.[175]

Apart from the volume of the members questions, the NMCCA deemed the evidence presented at trial as "not overwhelming."[176] The court noted RP2 Owens' testimony that HM2 J.P. described the encounter as "consensual"; the absence of alcohol or forensic evidence suggesting lack of consent; and HM2 J.P.'s failure to leave Appellant's room despite numerous opportunities to do so under the explanation of "tonic immobility."[177]

In a relatively weak case, the preclusion of additional closing argument prejudiced Appellant. In *Herring* and *Bess*, the Supreme Court and this Court

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[172] *Bess*, 75 M.J. at 75 (citation omitted).
[173] *Id*. (citation omitted).
[174] *Id*. at 77.
[175] J.A. 538-43.
[176] *Cooper*, 2018 CCA LEXIS 114, at *46-47.
[177] *Id*. at *47.

explored different ways the defense could have argued the evidence.[178] Here, summation would have allowed the defense to argue that some of the new evidence supported the *defense* theory.

The defense trial theory was that the complaining witness consented to sex with Appellant but later falsely claimed the opposite.[179] Anticipating this argument, trial counsel argued that HM2 J.P. had no motive to lie, relying on the supposed fact that nobody knew about the allegations[180] But as the defense explained to the military judge, the new testimony not only refuted the claim that nobody knew about the encounter, it also tended to show that she *had* a motive to fabricate.[181]

To illustrate, HM2 J.P. testified that she sought out HN Beard because he was someone she could "trust" and asked him "whether" she should report the

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[178] *Herring*, 422 U.S. at 864 ("At the conclusion of the evidence on the trial's final day, the appellant's lawyer might usefully have pointed to the direct conflict in the trial testimony of the only two prosecution witnesses concerning how and when the appellant was found on the evening of the alleged offense. He might also have stressed the many inconsistencies, elicited on cross-examination, between the trial testimony of the complaining witness and his earlier sworn statements."); *Bess*, 75 M.J. at 76 ("If allowed to make a closing summation, Appellant's counsel would have been able to argue to the factfinder that the muster reports should not carry much weight.").

[179] J.A. 525 ("This case is about two people who had consensual sex, and afterwards, one of them claims to have suffered from this tonic immobility.").

[180] J.A. 522.

[181] J.A. 555.

incident.[182] On this, the defense could have argued that the report was not the product of HM2 J.P.'s sincere belief that she was sexually assaulted, but rather was motivated by HN Beard's influence. After all, HM2 J.P. testified outside the members' presence that she did not want to report the incident right away.[183] She also stated that HN Beard warned her that Appellant would harm other females if HM2 J.P. did not report him, and that this became her "main concern."[184] The members heard HM2 J.P. begin to explain HN Beard's warning to her on the consequences of not reporting.[185]

Next, the defense also could have argued that the new testimony supported RP2 Owens' testimony that the sex was "consensual." As RP2 Owens testified, the complaining witness told him that she "thinks she made a mistake having sex with him";[186] that she "*may* have been assaulted"; and that the encounter was "consensual."[187] In closing argument, the Government predictably downplayed this testimony.[188] But it would have been difficult to downplay it in light of HM2 J.P.'s

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[182] J.A. 559-60.
[183] J.A. 549 (answering "Yes, sir" to defense counsel's question of: "And you initially told [HN Beard] you didn't want to report it").
[184] J.A. 548.
[185] J.A. 559 (". . . *and when I had spoke to him (sic), he had mentioned how if I do not* –") (emphasis added).
[186] J.A. 468.
[187] J.A. 465 (emphasis added).
[188] J.A. 520 ("Well, that's what he thought it was. But it's not. He didn't say those were her exact words.").

new testimony. In a renewed summation, the defense would have been able to bolster RP2 T.O.'s recollection by arguing that HM2 J.P.'s allegations were so unreliable that she had to ask HN Beard "whether" she should report the incident because she was unsure whether it was sexual assault.[189]

Additionally, in view of the Government's portrayal of HM2 J.P. as a deeply religious person, the defense could have argued that she may have become concerned with protecting her reputation once HN Beard learned about the sexual encounter. Again, outside the presence of the members, she explained that HN Beard told her that he saw her and Appellant leave the church event together.[190]

Renewed summation would have allowed the defense to respond to HM2 J.P.'s new testimony that she had experienced tonic immobility in the past.[191] The defense could have argued that this past traumatic event may have distorted HM2 J.P.'s perception of the sexual encounter with Appellant or perhaps that she was experiencing a "flashback" to the incident when she was with Appellant.

Finally, renewed summation would have allowed the defense to respond to Ms. J.J.'s claim that she had not heard of "rumors" involving Appellant and HM2 J.P.[192] The defense could have argued that Ms. J.J. and HM2 J.P. worked in

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[189] J.A. 465.
[190] J.A. 547.
[191] J.A. 559.
[192] J.A. 561.

opposite shifts at the hospital and thus it was understandable that she heard no rumors.[193] Additionally, the defense could have argued that the roommate was biased since she had separately accused Appellant of sexual harassment and admitted to discussing the allegations with HM2 J.P. in the past.[194]

In short, given that closing argument could have significantly aided the defense in a case with weak evidence, this Court "cannot conclude that the denial of Appellant's right to present a complete defense was harmless beyond a reasonable doubt."[195]

G. If this Court answers the certified question in the affirmative, it should nevertheless apply the "cross-appeal doctrine" and affirm.

The Government states that it "does not oppose" a remand allowing the lower court to consider this issue.[196] But this is a case in which it would be more appropriate to apply the "cross-appeal doctrine" and affirm.

As Judge Maggs recently pointed out in *United States v Steen*, the "cross-appeal doctrine" permits a prevailing party to defend the decision of the lower court "on any ground" where the prevailing party is merely seeking affirmance of

[193] J.A. 357.
[194] J.A. 326-27, 357.
[195] *Bess*, 75 M.J. at 77.
[196] *See* Reply on Behalf of Appellee/Cross-Appellant at 12.

the lower court's judgment.[197] Indeed, as the Supreme Court has explained, "'the prevailing party may defend a judgment on any ground which the law and the record permit that would not expand the relief it has been granted.'"[198] This applies regardless of whether "that ground was relied upon, rejected, or even considered by [the lower courts]."[199]

In *Thigpen v. Roberts*, the Supreme Court explained that applying the doctrine is appropriate where "[t]he factual record is adequate, and would not be improved by a remand to the Court of Appeals" and where "the case is decided by a straightforward application of controlling precedent."[200]

This is such a case. First, a remand would not improve the factual record because the issue was adequately developed at trial. And second, resolving the issue would only require a "straightforward application" of *Bess*—indeed, the fact pattern in this case is very similar to what occurred in that case.

It is also worth noting that this issue is purely a question of law and thus does not implicate "the unique responsibilities of the Court of Criminal Appeals

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[197] No 20-0206, 2021 CAAF LEXIS 548, at *22 (C.A.A.F. June 14, 2021) (Maggs, J., dissenting).
[198] *Id*. at 25 (citing *United States v. New York Tel. Co.*, 434 U.S. 159, 166 n.8 (1977)).
[199] *Id*. at 26 (citing *Washington v. Confederated Bonds & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)).
[200] 468 U.S. 27, 32-33 (1984).

under Article 66(c), such as determination of questions of fact or sentence appropriateness."[201] Additionally, judicial economy weighs against a remand: this Court has already remanded the case once, and Appellant has been waiting seven years for a resolution of his appeal.[202]

It is also significant that since Appellant raised this issue in a cross-petition, this Court will have full briefing on the issue.[203] And while the lower court did not address this issue, this is not a situation in which Appellant is raising "an argument that [he] had not pressed before the lower courts."[204] To the contrary, Appellant made three attempts to have the CCA resolve this issue. Its refusal to do so should not be a reason to stop this Court from affirming a correct judgment.

H. If this Court does not apply the cross-appeal doctrine, it should remand this issue for the CCA's consideration given the Government's concession on this course of action and because the CCA's blanket refusals to consider this issue leave doubt as to whether Appellant received adequate review.

If this Court does not wish to apply the cross-appeal doctrine, it should remand the case for consideration of this issue, especially given the Government's

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[201] *United States v. Adams*, 59 M.J. 367, 372 (C.A.A.F. 2004) (opting to address merits of legal issue rather than remanding to the CCA).
[202] *United States v. Wall*, 79 M.J. 456, 460 (C.A.A.F. 2020) (concluding that resolving issue now "promotes, rather than degrades judicial economy—minimizing duplication of effort and avoiding wasting the court's time and resources").
[203] *Cf. Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (declining to apply the cross-appeal doctrine after noting that respondent had not "filed a cross-petition").
[204] *Steen*, 2021 CAAF LEXIS 548, at *26.

statement that it "does not oppose" such a remand.[205]

A remand would also be proper given that this Court has found this course of action appropriate in the past where timeliness was a possible reason for a CCA's refusal to consider an important legal issue.

For example, in *United States v. Mitchell*, the CCA summarily refused to consider an appellant's motion seeking a supplemental assignment of error.[206] On review, this Court explained that "[i]f the denial was because of untimeliness and a motion to file a supplemental assignment of error would have been rejected on that basis if filed at the same time, then appellant may have no cause for complaint."[207] At the same time, this Court observed that "the case still was pending decision by the court when counsel filed his motion, and no published rule of the court imposes time restraints on the filing of such a motion under these circumstances."[208] Of the lower court's failure to explain why it denied the motion, this Court stated: "that shoe pinches our toes"[209] before adding that "[t]he procedures followed here do not produce the type of appellate review contemplated by the Congress."[210] It

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[205] *See* Reply on Behalf of Appellee/Cross-Appellant at 12.
[206] 20 M.J. 350, 350 (C.M.A. 1985).
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*. at 352.

remanded the case to the CCA because the issue addressed factual sufficiency.[211]

Similarly, in *United States v. Johnson*, a newly assigned appellate counsel petitioned this Court raising an issue that had not been raised before the CCA.[212] This Court remanded the case for the CCA's consideration of the legal issue.[213] This Court explained that it was sure the lower court "would not sanction a 'potted plant' role for appellate counsel with regard to new issues."[214] It added:

> The military appellate counsel are nationally known as aggressive, imaginative, and professional advocates who are not shy about raising proper new issues in a case no matter what the level of appeal. It is solely within this Court's discretion under Article 67 to determine whether an issue is properly raised.[215]

Here, like in *Mitchell*, the CCA summarily denied Appellant's supplemental assignment of error even where the CCA would not decide the case for six months,[216] the Government did not oppose the motion and had not yet filed its Answer, and the CCA's rules allowed motions to consider supplemental assignments of error without specified time limits.[217] Indeed, it had granted such

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[211] *Id*.
[212] 42 M.J. 443, 443 (C.A.A.F. 1995).
[213] *Id*.
[214] *Id*.
[215] *Id*. at 446.
[216] *Compare* J.A. 163 (noting the motion was received by the NMCCA on June 26, 2020) *with Cooper*, 80 M.J. at 664 (listing Dec. 10, 2020 as the decision date).
[217] N-M. Ct. Crim. App. R. 18(f) (Jan. 1, 2019) ("Supplemental Assignments of Error may be filed only upon leave of the Court.").

motions in other cases decided around this time.[218] It is difficult to see how the CCA's refusal to even acknowledge the military judge's improper denial of closing argument can be reconciled with its "mandatory responsibility to read the entire record and independently arrive at a decision that the findings and sentence are correct in law and fact."[219] Given the similarly dismissive nature the CCA took in this case as it did in *Mitchell*, this Court should again conclude that "[t]he procedures followed here do not produce the type of appellate review contemplated by Congress."[220]

1. Though in *United States v. Chaffin*, the NMCCA stated it would apply the cause-and-prejudice standard where an appellant raises an issue in a later proceeding that could have been raised earlier, this standard is inconsistent with appellate review under Articles 66 and 67, UCMJ.

In *United States v. Chaffin*, the NMCCA explained that it would apply the "cause and prejudice standard" when an appellant raises an issue in a later proceeding at the NMCCA that could have been raised earlier.[221] The Air Force

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[218] *See, e.g.*, *United States v. Hoffman*, No. 201400067, 2020 CCA LEXIS 198, at *4 (N-M. Ct. Crim. App. June 8, 2020) (explaining that "Appellant raised a supplemental AOE" and later addressing its merits); *United States v. Simpson*, No. 201800268, 2020 CCA LEXIS 67, at *2 (N-M. Ct. Crim. App. Mar. 11, 2020) ("Appellant now raises numerous assignments[,] summary assignments, and supplemental assignments of error [AOEs], several of which we discuss and resolve below.").
[219] *United States v. Grostefon*, 12 M.J. 431, 435 (C.M.A. 1982).
[220] *Id*. at 352.
[221] *United States v. Chaffin*, No. 200500513, 2008 CCA LEXIS 94, *7 (N-M. Ct. Crim. App. Mar. 20, 2008).

CCA has also adopted this standard.[222] This standard requires an appellant to show 'some objective factor external to the defense impeded counsel's efforts' to raise the claim in a timely manner."[223] Otherwise, the issue is deemed waived.[224]

But the cause-and-prejudice standard cannot be reconciled with the statutory requirement of a CCA to conduct an independent, plenary review of the record and to correct even errors an appellant does not raise.[225] Indeed, especially where, as here, the NMCCA had not yet completed a plenary review of the case, it is difficult to imagine how a meritorious issue could be deemed waived.

Additionally, the cause-and-prejudice standard is based on principles not relevant in the context of exclusively federal appellate litigation. Rather, as the Supreme Court has explained, the standard is based on principles of comity between state and federal courts handling habeas corpus litigation.[226] It is rooted

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[222] *United States v. Shavrnoch*, 47 M.J. 564, 567-68 (A-F. Ct. Crim. App. 1997).
[223] *Id*. (citing *McCleskey v. Zant*, 499 U.S. 467, 493 (1991)).
[224] *Id*. at *5 (concluding that because the appellant had not shown "either good cause for his failure to raise this issue previously, or that manifest injustice would result if we did not now consider the issue, we hold the appellant has waived this issue").
[225] *Grostefon*, 12 M.J. at 435; *United States v. May*, 47 M.J. 478, 481 (C.A.A.F. 1998) (observing that "Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error").
[226] *Engle v. Isaac*, 456 U.S. 107, 135 (1982) ("The terms 'cause' and 'actual prejudice' are not rigid concepts; they take their meaning from the principles of comity and finality discussed above. In appropriate cases those principles must yield to the imperative of correcting a fundamentally unjust incarceration.").

partly on the theory that an appellant should not be allowed to "sandbag" the authority of a state court by waiting until the case reaches a federal court to raise a constitutional claim.[227] Yet because military courts are all federal courts, there is no similar comity concern. Nor is there a sandbagging concern—here, Appellant asked the NMCCA consider the merits of his issue.

Finally, the cause-and-prejudice standard is inapposite with this Court's authority under Article 67 to find "good cause" to consider an issue—even if the appellant did not raise the issue below.[228] This Court's rules explicitly contemplate the authority to "examine the record in any case for the purpose of determining whether there appears to be plain error not assigned by the appellant."[229] As one scholar has noted, this Court's ability to specify issues under Article 67 "grew up early, took root, survived the test of congressional review over an extended period, and has passed the point of being seriously questioned as an exercise of the Court's

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[227] *Wainwright v. Sykes*, 433 U.S. 72, 88-89 (1977) (explaining rationale behind a "contemporaneous-objection rule").

[228] *See, e.g.*, *United States v. Riley*, 8 M.J. 221 (C.M.A. 1980) ("[I]t appears that appellant has now raised for the first time on appeal certain issues concerning the adequacy of his trial defense counsel and the validity of his plea of guilty which were neither raised nor litigated below. We therefore deem it appropriate to return the record to the intermediate appellate court for initial consideration of these new matters raised by appellant.").

[229] C.A.A.F. R. 21(d).

power."[230] And as this Court has said: "We have never hesitated to specify issues when, in our opinion, they are deserving of our attention, whether or not they are assigned by appellate defense counsel."[231]

2. Regardless, even the cause-and-prejudice standard states that "cause" can be established by constitutionally ineffective representation, which Appellant alleges occurred in his case.

Even if the cause-and-prejudice standard applied, as even the NMCCA's decision in *Chaffin* states, "cause" can be satisfied by a showing that the appellant received constitutionally ineffective assistance of counsel on appeal.[232] And Appellant would meet this standard for the reasons demonstrated below.

[230] Eugene R. Fidell, *The Specification of Appellate Issues by the United States Court of Military Appeals*, 31 JAG J. 99, 109 (1980).
[231] *Mitchell*, 42 M.J. at 443.
[232] *Chaffin*, 2008 CCA LEXIS 94, at *8 (citing *Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

II.

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN HIS COUNSEL FAILED TO ASSIGN AS ERROR THE MILITARY JUDGE'S DENIAL OF CLOSING ARGUMENT IN HIS INITIAL APPEAL.

Standard of Review

This Court reviews "an appellate defense counsel's effectiveness de novo as a question of law."[233]

A. A defense counsel representing a servicemember before the CCA is required to assign all arguable issues, and this Court will look to ensure counsel "has not overlooked any viable option" in providing assistance on appeal.

In *United States v. Grostefon*, this Court, among other things, explained why the procedures the Supreme Court found adequate for civilian appellants in *Anders v. California* were not sufficient in the military.[234] In *Anders*, the Supreme Court found it sufficient for counsel to seek permission to withdraw from the case after a couple of prophylactic measures took place: (1) counsel stated that he or she had thoroughly reviewed the record and found the case to be "wholly frivolous"; and (2) counsel nevertheless provided a brief to the court "referring to anything in the record that might arguably support the appeal."[235]

[233] *Adams*, 59 M.J. at 370.
[234] *Grostefon*, 12 M.J. at 434-35.
[235] *Id*. at 434 (citing *Anders*, 386 U.S. 738, 744 (1967)).

This Court found that the relationship between the civilian appellant in *Anders* and the military appellant were "abundantly dissimilar."[236] This Court noted that unlike the appellant in *Anders*, a military appellant's "appeal is mandated by the responsibility of the [CCA] to review the record for errors of law and fact, whether or not errors are asserted for their consideration."[237] This Court also noted that the Supreme Court's concern in *Anders*—the "plight" of an indigent defendant after his counsel was permitted to withdraw—does not exist in the military since the UCMJ guarantees appointed counsel.[238] In short, this Court observed: "The Uniform Code of Military Justice provides many benefits not shared by civilian defendants."[239]

In establishing procedures to safeguard these broader rights, this Court in *Grostefon* explained as a first principle that "[a]ppellate counsel has the obligation to assign all arguable issues."[240] This Court clarified that while counsel is not required to raise "frivolous" issues, counsel should err "on the side of raising the issue."[241] This Court explained there could be "little harm" in this practice, citing the "mandatory responsibility" of the now-CCAs "to read the entire record and

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[236] *Id*. at 435.
[237] *Id*. at 434-35.
[238] *Id*. at 435.
[239] *Id*.
[240] *Id*.
[241] *Id*.

independently arrive at a decision that the findings and sentence are correct in law and fact."[242] This Court then established the well-known procedure of requiring counsel to "at a minimum, invite the attention" of a military appeals court to an issue an appellant specifies.[243]

Seven years later, in *United States v. Baker*, this Court clarified that while appellate counsel should not "file needless or protracted pleadings simply to protect himself against a later charge of ineffective assistance of counsel," this Court would look to ensure "that an appellate defense counsel has not overlooked any viable option available to him in representing his client before the [CCA]."[244]

B. Ineffective assistance of counsel on appeal occurs where: (1) counsel failed to raise an issue before the CCA and the failure to do so was objectively unreasonable; and (2) there is a reasonable likelihood the result of the appeal would have been "different."

In *United States v. Adams*, this Court explained that a military accused "has the right to effective representation by counsel through the entire period of review following trial, including representation before the Court of Criminal Appeals and our Court by appellate counsel appointed under Article 70, UCMJ."[245]

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[242] *Id*. at 434.
[243] *Id*. at 436.
[244] 28 M.J. 121, 122 (C.M.A. 1989).
[245] *Adams*, 59 M.J. at 370; *May*, 47 M.J. at 481 ("Although Courts of Criminal Appeals have a broad mandate to review the record unconstrained by an appellant's assignments of error, that broad mandate does not reduce the importance of adequate representation.").

In *Adams*, this Court noted that the standard for assessing whether appellate counsel was ineffective follows *Strickland v. Washington*.[246] Thus, an appellant must show (1) deficient performance by appellate counsel; and (2) prejudice.[247] An appellant satisfies the "deficient performance" prong "when he demonstrates that his appellate counsel's performance was so deficient that it fell below an objective standard of reasonableness."[248]

In *United States v. Davis*, this Court found this standard met where a trial defense counsel asked the members to sentence the appellant to more confinement instead of a punitive discharge to avoid loss of retirement benefits, but counsel neglected to ascertain that the appellant was no longer eligible for such benefits by law.[249] This Court noted that counsel "did not thoroughly research this critical point of eligibility or even call [Navy Personnel Command] to determine whether Davis would be eligible to seek [retirement benefits]."[250] In reversing, this Court explained: "Familiarity with the facts and applicable law are fundamental responsibilities of defense counsel."[251]

Next, an appellant can satisfy the "prejudice" prong where he shows that

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[246] *Adams*, 59 M.J. at 370 (citing 466 U.S. 668, 688 (1984)).
[247] *Id*. (citations omitted).
[248] *Id*.
[249] 60 M.J. 469, 470-71, 475 (C.A.A.F. 2005).
[250] *Id*. at 474.
[251] *Id*. at 475.

counsel failed to raise an issue before the CCA, and there is a reasonable probability that the result would have been "different" had counsel done so.[252]

In *Adams*, this Court concluded this prong was not satisfied where civilian counsel's brief would have addressed a "single issue" to which the appellant's military counsel had already invited the CCA's attention in a separate pleading.[253] This Court also noted the language in the CCA opinion indicating that it had considered the issue.[254]

C. Here, counsel's failure to raise the denial-of-closing-argument issue was objectively unreasonable since: (1) counsel objected at trial; (2) this Court had decided a similar issue in *Bess* over a month before counsel filed a brief before the NMCCA—the court that initially decided *Bess*; and (3) the issue was stronger than the issues counsel raised.

The denial-of-closing-argument issue should have stood out to Appellant's initial appellate counsel for a number of reasons.

First, trial defense counsel properly preserved the issue at trial and explained why closing argument was necessary.[255] In *Matire v. Wainwright*, the Eleventh

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[252] *Id*. at 372 (finding no prejudice after concluding "the result would have been no different had [appellate counsel]'s brief been properly filed and considered by the Army court."); *United States v. Roach*, 66 M.J. 410, 425 (C.A.A.F. 2008) (Stucky, J., dissenting) ("Appellant failed to demonstrate prejudice – that there was a reasonable probability that but for his counsel's deficient performance his sentence would have been different. Therefore, the decision of the AFCCA should be affirmed.").
[253] 59 M.J. at 371.
[254] *Id*. at 372-73.
[255] J.A. 554-55.

Circuit found the presence of an objection by trial defense counsel significant to evaluating appellate counsel's failure to raise an issue.[256] Here, counsel had a discussion with the military judge and explained why his admission of the new testimony called for additional closing argument.[257] Counsel specified that HM2 J.P.'s statements in particular contradicted an assertion trial counsel made in closing argument and would help demonstrate the defense theory of the case.[258]

Second, over a month before Appellant's counsel filed a supplemental brief before the CCA, this Court addressed a very similar fact pattern in *Bess*, and resolved the issue in the appellant's favor.[259] Further, *Bess* was originally decided by the NMCCA, and Appellant's appellate counsel represented Appellant before that court—making it even more unreasonable for counsel to have overlooked the similar issue in this case. As in *Davis*, counsel's omission suggests counsel failed to familiarize himself with the applicable law.[260] Regardless, even if *Bess* had not been decided, the Supreme Court had decided *Herring* decades before.

Finally, this issue was stronger than the other issues Appellant's counsel

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[256] 811 F.2d 1430, 1438 (11th Cir. 1987) (finding deficient performance after noting that the issue "was expressly objected to in trial counsel's motion for mistrial").
[257] J.A. 554-55.
[258] J.A. 554-55.
[259] *Bess*, 75 M.J. at 77.
[260] 60 M.J. at 475.

raised before the CCA. In *Smith v. Robbins*, the Supreme Court spoke approvingly of the Seventh Circuit's standard of ineffective assistance of counsel on appeal, requiring an appellant to show the "ignored issues are clearly stronger than those presented" to the appellate court.[261] Even if this standard applied in the military context—there is reason to believe it does not[262]—Appellant would satisfy it.

To illustrate, Appellant's counsel raised four issues in addition to the six issues Appellant raised under *Grostefon*.[263] The four issues were: (1) ineffective assistance of counsel for trial defense counsel's failure to submit Appellant's request for individual military counsel[264]—an issue this Court has already rejected;[265] (2) legal and factual insufficiency—issues the CCA has already rejected;[266] (3) the military judge's failure to admit Appellant's out-of-court statement that HM2 J.P. "was not a lesbian" and that he was "frustrated, angry, confused, disgusted" during his pre-textual call with HM2 J.P.;[267] and (4) ineffective assistance of counsel based on trial defense counsel's failure to

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[261] 528 U.S. 259, 288 (2000) (citing *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).
[262] *Baker*, 28 M.J. at 122 (explaining that this Court will "assure that an appellate defense counsel has not overlooked *any viable option available to him* in representing his client before the Court of Military Review") (emphasis added).
[263] *Cooper*, 2018 CCA LEXIS 114 at *2.
[264] *Id*.
[265] *Cooper*, 78 M.J. at 283.
[266] *Cooper*, 2018 CCA LEXIS 114 at *48.
[267] Appellant's Br. and Assignments of Error at 44-51.

suppress a written statement wrongfully seized from Appellant's backpack after Appellant had already taken the stand and testified in his own defense.[268] Issues (3) and (4) have yet to be decided by the NMCCA.[269]

While Appellant does not contend that the undecided issues in his case lack merit, the denial of closing argument was clearly a stronger issue. As this Court and various other courts have concluded, such an error is constitutional in nature and warrants reversal unless the Government can prove beyond a reasonable doubt it did not contribute to the verdict.[270]

D. This Court may conclude Appellant was prejudiced since: (1) unlike in *United States v. Adams*, there is no indication the NMCCA considered the issue; and (2) there is a reasonable likelihood the result of the NMCCA proceeding would be different if it had.

First, unlike in *Adams*, this Court cannot be convinced the NMCCA considered the denial-of-closing-argument issue. The issue was not raised in any of the pleadings Appellant's counsel filed with the NMCCA. The NMCCA rejected undersigned counsel's three attempts to have the NMCCA consider the issue.[271] And when the NMCCA listed the issues under consideration in its most recent

[268] Appellant's Mot. for Leave to File Supplemental Assignments of Error and to Attach Documents at 2-6.
[269] *Cooper*, 80 M.J. at 668 (noting the issues but explaining it would not address them since they were not necessary for resolution of the appeal).
[270] *Bess*, 75 M.J. at 77 (reversing after concluding it was unable to determine "that the error did not contribute to the verdict beyond a reasonable doubt").
[271] J.A. 163, 186, 295.

decision in this case, the denial-of-closing-argument issue was not among them.[272]

Second, the issue warranted reversal for the reasons stated above. Assuming *arguendo* this Court reverses the NMCCA's judgment based on the certified issue, the NMCCA would need to decide the remaining issues. Since the NMCCA would not be considering a reversible error, this Court can conclude there is at least a reasonable probability the result of a further NMCCA review would be "different" had this issue been raised.[273]

Conclusion

If this Court answers the certified question in the affirmative and does not affirm the lower court's judgment under the first granted issue or remand the case with instructions to consider the denial-of-closing argument issue, it should reverse the findings and sentence based on ineffective assistance of appellate counsel.

Respectfully Submitted,

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[272] *Cooper*, 80 M.J. at 668 n.8-9 (listing the issues under consideration).
[273] *Adams*, 59 M.J. at 372.

Certificate of Compliance

1. This brief complies with the type-volume limitations of Rule 24(c) because it contains fewer than 14,000 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in 14-point, Times New Roman font.

Certificate of Filing and Service

I certify that I delivered the foregoing to the Court and served a copy on opposing counsel on July 26, 2021.

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