IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	APPELLEE'S ANSWER TO APPELLANT'S SUPPLEMENT TO PETITION FOR GRANT OF REVIEW
v.	)	
Kyle A. SHELBY, Sergeant (E-5) U.S. Marine Corps Appellant	)	Crim.App. Dkt. No. 202200213 USCA Dkt. No. 24-0186/MC

LAN T. NGUYEN
Lieutenant, JAGC, U.S. Navy
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
Bar no. 37929

BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714

CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 36701

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Issue Presented

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

Statement of Statutory Jurisdiction

This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 62(a)(1)(A), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862(a)(1)(A), because the United States timely appealed the Military Judge's Ruling dismissing Charge II and terminating the proceedings as to that Charge.

Statement of the Case

A Second Convening Authority referred five Charges against Appellant to a general court-martial, alleging false official statement, abusive sexual contact, indecent exposure, assault consummated by a battery, and indecent conduct, in violation of Articles 107, 120, 120c, 128, and 134, UCMJ, 10 U.S.C. §§ 907, 920, 920c, 928, and 934, respectively. (Charge Sheet, June 27, 2023.) On November 8, 2023, at 2158, Japan Standard Time (JST), the Military Judge issued a Ruling dismissing Charge II and its sole Specification with prejudice. (Appellate Ex. XVII.) After the United States timely appealed, the Navy-Marine Corps Court of Criminal Appeals vacated the Military Judge's Ruling, and remanded for further

proceedings before the Military Judge. *United States v. Shelby*, No. 202200213, 2024 CCA LEXIS 146 (N-M. Ct. Crim. App. Apr. 24, 2024).

Appellant petitioned this Court for review and filed a Supplement to his Petition. (Pet., June 23, 2024; Supp. Pet., July 15, 2024.)

Statement of Facts

A. The United States charged Appellant with offenses surrounding a sexual assault.

The United States charged Appellant with false official statement, abusive sexual contact, indecent exposure, assault consummated by a battery, and indecent conduct, in violation of Articles 107, 120, 120c, 128, and 134, UCMJ. (Charge Sheet.)

B. In the first court-martial, the Military Judge dismissed the same Charge II and its sole Specification without prejudice due to unlawful command influence and unintentional prosecutorial misconduct.

In Appellant's first court-martial, the Military Judge ruled that Appellant raised the appearance of unlawful command influence, and the Government failed to disprove the influence would not affect the trial proceedings. (Appellate Exs. LXXXIII at 10; XVII at 16; R. 5.) The Military Judge also found unintentional prosecutorial misconduct. (Appellate Exs. LXXXIII at 10; XVII at 16; R. 5.)

The unlawful command influence and unintentional prosecutorial misconduct stemmed from Trial Counsel's misleading language in documents to the First Convening Authority to support Charge II, abusive sexual contact.

(Appellate Ex. XVII at 15.) The Military Judge dismissed Charge II and its sole Specification without prejudice. (*Id*. at 17; R. 5.) The Military Judge disqualified both the First Convening Authority from further action on that Charge, and the offending Trial Counsel from the case. (Appellate Ex. XVII at 16–17; R. 5.)

C. A Second Convening Authority took control of Appellant's case after the unlawful command influence Ruling.

The First Convening Authority withdrew and dismissed all Charges and forwarded the Charges to a new convening authority. (Appellate Ex. XIII at 81.) A Second Convening Authority, in a different command, referred the same Charges under a new Convening Order. (Charge Sheet.)

D. Appellant requested Individual Military Counsel, Captain Adcock, for his second court-martial. The Second Convening Authority denied his request and found Captain Adcock was not reasonably available. The Military Judge later granted his request for Captain Adcock before the trial.

1. After the Government re-preferred Charges against Appellant, Captain Adcock provided Appellant a termination of representation letter.

The Government re-preferred Charges against Appellant on April 7, 2023, and the Second Convening Authority directed an Article 32 hearing on April 19, 2023. (Appellate Ex. III at 7; Charge Sheet.)

On April 24, 2023, Captain Adcock provided Appellant a "Termination of Representation" letter stating that since Appellant "no longer [has] charges pending at this court-martial, this completes my representation of you. I will close

your file and take no further action on your behalf." (Appellate Ex. IX(a) at 2.) Referencing the First Convening Authority's withdrawal letter, Captain Adcock now considered Appellant "a former client" because his case was "now closed." (*Id.*)

2. The Defense Services Organization did not detail Captain Adcock to Appellant's second court-martial.

Captain Adcock was not present or detailed to represent Appellant at his second court-martial arraignment. (R. at 3–6.)

3. In his Individual Military Counsel request, Appellant claimed he had no existing attorney-client relationship with Captain Adcock.

In his request to the Second Convening Authority, Appellant stated: "An attorney-client relationship does not currently exist with the requested Individual Military Counsel." (Appellate Ex. III at 3.) In justifying his request for Captain Adcock, Appellant explained that Captain Adcock served as Individual Military Counsel at Appellant's first court-martial before the Charges were dismissed and re-preferred. (*Id*. at 4.) Appellant argued Captain Adcock "became intimately familiar with the case, factually and procedurally" through involvement in the first court-martial, which is "factually equivalent" to the current second court-martial. (*Id*.)

Appellant notified the Article 32 Preliminary Hearing Officer that Captain Adcock was "no longer his attorney." (Appellate Ex. XV, Encl. 10 at 2.)

4. The Second Convening Authority denied Appellant's request for Captain Adcock, finding him not reasonably available.

The Second Convening Authority found Captain Adcock "not reasonably available" under JAGINST 5800.7G as he was "detached from his previous command" and would depart Hawaii fifteen days after Appellant submitted his request. (Appellate Ex. III at 7.) The Second Convening Authority explained that Captain Adcock's "imminent unavailability" due to his need "to prepare for a [permanent change of station] to the east coast," his orders to the Naval Academy as an instructor, "and the possibility that this case could extend for at least several more months" were grounds to deny the request under the regulations. (*Id*.)

5. Appellant moved to compel Captain Adcock as Individual Military Counsel. In the Motion, Appellant stated he never released Captain Adcock after the first court-martial.

Appellant moved to compel Captain Adcock as Individual Military Counsel for his second court-martial. (Appellate Ex. VIII; R. 22.) Appellant now claimed Captain Adcock "represented [Appellant] to the current [Second] Convening Authority after the withdrawal and dismissal of the original charges" and had a continuing attorney client-relationship from the first court-martial. (Appellate Ex. VIII at 2; R. 28–29.)

Appellant claimed that he never consented to severing the attorney-client relationship with Captain Adcock, and, as the court never allowed him to withdraw, any severance was improper. (Appellate Ex. VIII at 2; R. 27–30.)

6. In a written statement, Captain Adcock stated his attorney-client relationship with Appellant was severed at the end of the first court-martial.

As part of his Motion, Appellant included a written statement from Captain Adcock stating his attorney-client relationship with Appellant ended on "10 February 2023, when trial counsel withdrew and dismissed all pending charges and specifications" against Appellant to terminate the first court-martial. (Appellate Ex. XIII at 84; R. 27.)

7. Appellant requested another individual military counsel and the Second Convening Authority granted his request.

After Captain Adcock was denied, Appellant submitted another individual military counsel request to the Second Convening Authority for Lieutenant Harris. (Appellate Exs. III at 8; III(a) at 1.) The Second Convening Authority found Lieutenant Harris reasonably available and granted the request. (Appellate Exs. III at 8; III(a) at 1.)

8. The Military Judge granted Appellant's Motion to compel Captain Adcock as Individual Military Counsel and made Findings on the Record. The Military Judge gave Appellant a continuance and the opportunity to supplement all pleadings to incorporate Captain Adcock into his Defense team.

The Military Judge granted Appellant's Motion to compel Captain Adcock as Individual Military Counsel. (R. 60.) The Military Judge found that (1) Appellant's Individual Military Counsel request for Captain Adcock was improperly denied; (2) Captain Adcock has an existing attorney-client relationship

with Appellant; and (3) "good cause has not been shown to sever that attorney-client relationship." (Appellate Ex. XVII at 13; R. 60, 67, 70.)

The Military Judge permitted Appellant to (1) supplement his pleadings and (2) modify the trial dates to best enable Captain Adcock's incorporation into the Defense team. (Appellate Ex. XVII at 15; R. 73, 75.)

E. The Military Judge dismissed Charge II and its sole Specification with prejudice. He did this under a "cumulative error" theory after finding the Government made errors in pretrial litigation in both this second court-martial and the previously withdrawn and dismissed first court-martial.

Appellant alleged speedy trial violations and moved to dismiss the Charges. (Appellate Ex. XII.) In a written Ruling, the Military Judge dismissed Charge II and its sole Specification with prejudice under a "cumulative error" theory. (Appellate Ex. XVII.)

1. The Military Judge reconsidered the remedy from the first court-martial and combined it with the purportedly improper denial of the Individual Military Counsel request for the second court-martial to decide to dismiss Charge II with prejudice.

The Military Judge explained that by dismissing Charge II without prejudice in the first court-martial he intended that Appellant "would be able to appropriately challenge this evidence prior to referral and engage in pretrial negotiations" and be "appropriately represented by counsel." (*Id.* at 2.) But he found Appellant "was denied representation from his lead defense counsel through an improper termination of the attorney-client relationship and a subsequent [Individual

Military Counsel] denial." (*Id.*) The Military Judge deferred "ruling on whether speedy trial violations occurred" until Captain Adcock could supplement Appellant's pleadings. (*Id.* at 15–16.)

The Military Judge then held that "cumulative error" required dismissal with prejudice of Charge II "due to prior [unlawful command influence] and prosecutorial misconduct" combined with the impact of improper denial of Captain Adcock as Appellant's Individual Military Counsel. (*Id*. at 16.)

2. The Military Judge held that the Government's actions in both the first court-martial and second court-martial constituted "cumulative error."

The Military Judge held that "the totality of the circumstances, combined with the prejudice to [Appellant]" warranted the "drastic remedy" of dismissal with prejudice. (*Id.* at 17.)

The Military Judge cited seven Government actions he believed required dismissal with prejudice: (1) actions by a previous disqualified trial counsel that misled the First Convening Authority's charging decision; (2) "the delayed and ultimately compelled disclosure of required discovery" surrounding the Victim's statements; (3) "the nonresponsive, confrontational, and accusatory answers submitted by the disqualified Trial Counsel to the Defense pursuant to Court-ordered discovery;" (4) "the initial improper denial of the Accused's [Individual Military Counsel] request for [Captain Adcock];" (5) "the decision to proceed with

the Article 32 Preliminary Hearing over Defense objection regarding [Captain Adcock]'s absence based on the convening authority's improper denial;" (6) "the continued denial of [Captain Adcock] to serve [as Individual Military Counsel] from the Article 32 hearing through the filing of pleadings and the 11 October 2023 Article 39(a) session;" and, (7) "the resulting delay in [Captain Adcock] being produced to assist the Accused in defending against Charge II from the denial of the [Individual Military Counsel] request to the present date." (*Id.* at 18.)

3. The Military Judge ruled Captain Adcock had an existing attorney-client relationship with Appellant and no severance occurred. He held the Second Convening Authority's initial denial of the Individual Military Counsel request, and the Government's continued denial, were erroneous.

The Military Judge found that Appellant never released Captain Adcock as his Counsel for the pending charges. (*Id.* at 4.) The Military Judge relied on *United States v. Allred*, 50 M.J. 795 (N-M. Ct. Crim. App. 1999), to hold that the Government's denial was erroneous. (Appellate Ex. XVII at 14–15.) The Military Judge held that the Government's litigation position opposing Appellant's request was unsupported and undermined "the sanctity of the attorney-client relationship." (*Id.* at 17.)

4. The Military Judge found the Defense Services Organization leadership partly responsible for the denial of Captain Adcock.

The Military Judge held that Defense Services Organization leadership "bears some responsibility for the improper denial of [Captain Adcock as

Individual Military Counsel]" as the request was routed to the Regional Defense Counsel whom, along with the Senior Defense Counsel, were copied on all correspondence regarding the request. (*Id.* at 16.) The Military Judge presumed "that the leadership from the [Defense Services Organization] was involved in the improper determination that an attorney-client relationship did not exist between [Captain Adcock] and the Accused for the charges now before the Court." (*Id.*)

5. The Military Judge held the denial tainted the Article 32 process.

The Military Judge noted that another Counsel, Captain Wilson, from Appellant's first court-martial, continued to represent him at the Article 32 Hearing. (*Id.* at 5–6.) Captain Wilson had objected to conducting the Hearing without Captain Adcock and the Hearing Officer overruled his objection. (*Id.* at 16–17.) The Hearing Officer reviewed and cited the court's previous "[unlawful command influence] ruling in assessing the potential evidentiary challenges regarding Charge II . . . ." (*Id.* at 17.)

The Military Judge held that by "proceeding through the Article 32 process" without Captain Adcock "the Government has again tainted the processing of Charge II." (*Id.*)

6. The Military Judge found no violation of Constitutional or statutory rights. Nonetheless the Military Judge found prejudice from Appellant's "personal and professional" experience awaiting trial.

The Military Judge held that over the past two years since the offenses were reported, Appellant "experienced professional and personal prejudice, to include missed educational and advancement opportunities and extended separation from family and friends." (*Id.* at 18; Appellate Ex. XIII at 108–09.) "Delaying the prosecution any further to allow the Government to properly process Charge II after two failed attempts would be improper, unfair, [and] against the interests of justice." (Appellate Ex. XVII at 18.)

The Military Judge applied the cumulative error doctrine, citing *United States v. Padilla-Galarza*, 990 F.3d 60 (1st Cir. 2021), and *United States v. Badders*, No. 20200735, 2021 CCA LEXIS 510 (A. Ct. Crim. App. Sept. 30, 2021). He found the number of pretrial errors, "their interrelationship and combined effect, the failure of this Court's prior remedial efforts, and the strength of the Government's case regarding Charge II have resulted in the denial of a fair trial for Charge II." (Appellate Ex. XVII at 18.)

F. On appeal under Article 62, the lower court vacated the Ruling and remanded for further proceedings.

The lower court vacated and remanded the Ruling because "the cumulative error doctrine does not apply in a *pretrial* context [where] . . . a military judge is

able to ensure a fair trial by addressing each error—as he did here—with a tailored remedy." *Shelby*, 2024 CCA LEXIS 146, at *22. The lower court noted that the Military Judge misrelied on First Circuit and Army caselaw, neither of which supported application of the cumulative error doctrine to the pretrial context. *Id.* (citing *Padilla-Galarza*, 990 F.3d at 85; *Badders*, 2021 CCA LEXIS 510).

G. Appellant petitioned this Court for review of one issue.

Appellant petitioned this Court for review of whether the Military Judge erred dismissing Charge II with prejudice for cumulative error. (Supp. Pet. at 1.)

Argument

THE MILITARY JUDGE CLEARLY ERRED DISMISSING CHARGE II WITH PREJUDICE FOR CUMULATIVE ERROR. DENIAL OF INDIVIDUAL MILITARY COUNSEL WAS PROPER UNDER THE JAGMAN WHERE APPELLANT NEVER ASSERTED AN ATTORNEY CLIENT RELATIONSHIP AND COUNSEL WAS UNAVILABLE, CUMULATIVE ERROR APPLIES ONLY POST-TRIAL, AND THE JUDGE REMEDIED ANY UNLAWFUL INFLUENCE.

A. For this Court to grant review, Appellant must show good cause and state with particularity the prejudicial errors.

"Review on petition for grant of review requires a showing of good cause." C.A.A.F. R. 21(a); *see also* Art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3). A petitioner needs a "direct and concise argument showing why there is good cause to grant the petition, demonstrating with particularity why the errors assigned are materially prejudicial to [his] substantial rights." C.A.A.F. R. 21(b)(5). Examples

of good cause include when the lower court: (1) addressed unsettled law; (2) ruled in conflict with precedent; (3) adopted a law materially differently than civilian courts; (4) addressed a military custom, regulation, or statute; (5) ruled en banc or non-unanimously; (6) deviated from the accepted course of judicial proceedings; or (7) inadequately addressed an issue on remand. *See* C.A.A.F. R. 21(b)(5)(A)–(G).

B. Appellant fails to show good cause to grant review. The lower court's decision is consistent with other appellate precedent and similar to the rule in Article III courts.

1. No statute, rule, or precedent permits the use of the cumulative error doctrine to dismiss charges for alleged errors pretrial.

a. The Supreme Court and federal circuit courts only apply the cumulative error doctrine when errors implicating the appellant's "substantial rights" affect the outcome of a trial.

"The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (citation omitted).

"A non-constitutional error is harmless unless it had a substantial influence on the outcome or leaves one in grave doubt as to whether it had such effect." *Id.* (quotation omitted). Constitutional error can be harmless if the court finds it

"harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

Cumulative error analysis in federal circuit courts "is an extension of the harmless-error rule" established through Supreme Court precedent and enshrined in the Federal Rules of Criminal Procedure. *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (cumulative error implicated when errors affect outcome of trial); *see also United States v. Runyon*, 707 F.3d 475, 520 (4th Cir. 2013) (rejecting cumulative error claim when no claims concerned appellant's "basic ability to present his case to the jury in an effective manner").

In federal criminal procedure, "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. Pro. 52.

b. <u>The military system established the same limited scope for the cumulative error doctrine as federal civilian courts. The cumulative error doctrine only applies when errors violate an appellant's substantial rights and deny him a fair trial</u>.

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59, UCMJ, 10 U.S.C. § 859.

Military appellate courts reverse a conviction under the cumulative error doctrine only if "a number of errors, no one perhaps sufficient to merit reversal, in combination necessitate the disapproval of a finding." *United States v. Pope*, 69

M.J. 328, 335 (C.A.A.F. 2011) (citing *United States v. Banks*, 36 M.J. 150, 170–71 (C.A.A.F. 1992) (reversing conviction for cumulative error when judge improperly admitted evidence at trial and erroneously denied admission of defense evidence)). To determine if errors denied an appellant a fair trial the errors must have "materially prejudiced [an appellant's] substantial rights." *Pope*, 69 M.J. at 335.

"'[M]aterial prejudice' for purposes of Article 59, UCMJ, must be understood by reference to the nature of the violated right." *United States v. Tovarchavez*, 78 M.J. 458, 460 (C.A.A.F. 2019) (citation omitted). Material prejudice is assessed for harmless error for non-constitutional errors and harmless beyond a reasonable doubt for constitutional errors. *Id.* at 460, 462 n.5 (citing *Molina-Martinez v. United States*, 578 U.S. 189, 194 (2016) (applying Fed. R. Crim. Pro. 52(a)); *see also Chapman*, 386 U.S. at 24.

In *Pope*, the court found an appellant's cumulative error claim meritless by considering "there was overwhelming evidence of [the appellant's] guilt" and that "neither of the errors related to the demonstrative evidence materially prejudiced [the appellant's] substantial rights." 69 M.J. at 335. The two errors concerned evidence admitted at trial, namely admission of certain physical evidence and alleged instructional error regarding an illustrative exhibit. *Id.* at 330.

While the *Pope* court found the trial judge erred in those evidentiary rulings, the court assessed each error for prejudice and, after finding neither error

prejudiced the appellant's substantial rights, determined that the cumulative effect of the errors also did not prejudice the appellant. *Id.* at 330–31.

c. Military judges have limited authority to dismiss charges and specifications pretrial. They have no authority to confer rights beyond those prescribed by the Constitution, statute, or the Manual for Courts-Martial.

Military judges have limited authority under the Rules for Courts-Martial to dismiss charges and specifications pretrial. *See* R.C.M. 907 (grounds for dismissal include lack of jurisdiction, speedy trial violation, statute of limitations, double jeopardy, pardon or immunity, failure to state an offense, defective specifications, and multiplicious specifications).

Appellate courts have recognized other limited grounds where a military judge may dismiss charges and specifications pretrial. *See United States v. Salyer*, 72 M.J. 415, 427–28 (C.A.A.F. 2013) (uncured, unrebutted allegations of unlawful command influence resulting in dismissal); *but see United States v. Craven*, 82 M.J. 728, 735 (N-M. Ct. Crim. App. 2022) (military judge erred dismissing charge as remedy for non-disclosure of government information under Mil. R. Evid. 506 and 507).

In *United States v. Redding*, 11 M.J. 100, (C.M.A. 1981), the court held that even if the military judge finds the command improperly denied a request for individual military counsel, he "has no authority to dismiss charges referred to trial, or otherwise prevent further proceedings in the case." *Id*. at 112. The court

explained, "As the right is not absolute and an improper denial of it can be disregarded because of absence of prejudice to the accused, dismissal of the charges is an ill-suited remedy for the injury." *Id*. (citing *United States v. Morrison*, 449 U.S. 361, 364 (1981) (dismissal for violation of constitutional right to counsel "plainly inappropriate")).

In *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013), the Court of Appeals for the Armed Forces found that the lower court erred holding that an appellant's rights were violated under a "military due process" theory that had no basis in statute or authority. *Id.* at 17. The Service Court erred when it gave the appellant rights beyond "the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]." *Id.* at 19.

The United States is unaware of military precedent applying the appellate cumulative error doctrine to cases in an interlocutory posture. This Court should decline Appellant's invitation to expand cumulative error beyond its application to cases on direct appellate review.

C. Appellant fails to establish good cause: the Military Judge clearly erred applying cumulative error pretrial as no prejudice could be assessed where no trial had occurred. The lower court's holding follows settled precedent requiring a demonstration of prejudice.

1. The Military Judge exceeded his authority under the Constitution, the Code, and the Manual for Courts-Martial by applying cumulative error pretrial to dismiss Charge II.

As in *Vazquez*, the Military Judge erred by acting outside his authority by extending cumulative error to the pretrial context where no substantive rights were violated. The Military Judge ignored Article 59 and acted contrary to binding precedent in *Pope*. While he cited several errors, he failed to show how they materially prejudiced Appellant's substantial rights where all the errors occurred—and were remedied—pretrial.

The Military Judge failed to cite any authority in the Constitution, the Code, or Manual for Courts-Martial for his actions. (Appellate Ex. XVII.) He only cited opinions from a federal circuit court and the Army Court of Criminal Appeals that, as explained below, grant him no authority to use the cumulative error doctrine pretrial to dismiss a charge with prejudice. (*Id*. at 18.)

Notably, denial of individual military counsel or defects in a preliminary hearing are not enumerated in R.C.M. 907 as grounds for dismissal. Rather, concerns with denial of individual military counsel or defects in preliminary hearings are addressed in R.C.M. 906, which mentions a continuance as appropriate relief. *See* R.C.M. 906(b)(2) ("The military judge *may not dismiss the*

charges or otherwise effectively prevent further proceedings based on this issue. However, the military judge may grant reasonable continuances until the requested military counsel can be made available if the unavailability results from temporary conditions or if the decision of unavailability is in the process of review in administrative channels." (emphasis added)). *See also* R.C.M. 906(b)(3) (if motion granted to correct defects in preliminary hearing, "the military judge should ordinarily grant a continuance so the defect may be corrected").

Likewise, whether any of these errors prejudiced Appellant's substantial rights cannot be determined under Article 59, because the result of his trial could be an acquittal—among many other facts that might inform the prejudice analysis. Without a trial or a verdict, the cumulative error doctrine cannot be applied. Indeed, the Military Judge's application of cumulative error to only one Charge out of five demonstrates that the alleged errors did not impact Appellant's substantial rights. The Military Judge clearly erred.

2. Neither *Padilla-Galarza* nor *Badders* support the Military Judge's position that cumulative error can be applied pretrial.

Consideration of cumulative error claims "must proceed with an awareness that 'the Constitution entitles a criminal defendant to a fair trial, not a perfect one.'" *Padilla-Galarza*, 990 F.3d at 85 (quoting *Van Arsdall*, 475 U.S. at 681). "Cumulative error claims are necessarily sui generis, and such claims are typically raised—as here—for the first time on appeal." *Padilla-Galarza*, 990 F.3d at 85.

In *Padilla-Galarza*, the court dispensed with the appellant's post-conviction cumulative error claim as "fanciful" because the trial judge's failure to give limiting instructions did not "warrant vacation of the jury's verdict." *Id.* at 86. The court only considered "trial errors" and whether they affected the outcome of a guilty verdict. *Id.* at 85–86. The court did not consider the use of the cumulative error doctrine when no trial had occurred. *Id.*

In *Badders*, the court held the trial judge erred by using the cumulative error doctrine to declare a mistrial when in a post-trial hearing he found the appellant showed a member had implied bias. 2021 CCA LEXIS 510 at *26. There, the Army court held that cumulative error was improper legal grounds for granting a mistrial because implied bias is a structural error. *Id.* at *27, 43. The court never held that cumulative error could be considered pretrial, but found it only applied in "'rare instances, [when] justice requires the vacation of a defendant's conviction even though the same compendium of errors, considered one by one, would not justify such relief.'" *Id.* at *26 (quoting *Padilla-Galarza*, 990 F.3d at 85).

Here, the Military Judge rested his pretrial use of cumulative error to dismiss Charge II with prejudice on these two cases: he cited no other authority. (Appellate Ex. XVII at 18.) However, neither opinion supports his theory that cumulative error can be used before trial occurs. Both of these cases addressed claims of cumulative error that occurred during trial resulting in a conviction.

Both discuss how cumulative error remedies errors by allowing for reversal of a conviction where insufficient substantial prejudice exists under the standard error-prejudice tests, but an accused has been denied a fair trial. But trial has yet to occur in Appellant's case.

Unlike federal civilian courts, military courts follow Article 59 and evaluate the cumulative effect of errors prejudicing an appellant's substantial rights—this could be done on appeal or by a military judge at a post-trial hearing. *See Pope*, 69 M.J. at 335. This Military Judge had no authority to expand the cumulative error doctrine beyond Article 59, UCMJ, and the harmless error rule. *See Banks*, 36 M.J. at 171 (citing Art. 59, UCMJ, to reverse conviction due to cumulative errors); *Tovarchavez*, 78 M.J. at 460 (requiring application of harmless error rules to determine prejudice to substantial rights); *Molina-Martinez*, 578 U.S. at 194 (same); *Chapman*, 386 U.S. at 24 (same). Indeed, in a pretrial context prior to a trial and conviction, the Military Judge can address each error with an appropriate remedy to ensure a fair trial—as he did here with the remaining Charges.

The Military Judge cannot assess whether Appellant's rights were violated where no trial has occurred. Appellant could still go to trial and be acquitted. The Military Judge exceeded his authority and clearly erred by using an inapplicable legal doctrine to dismiss Charge II with prejudice. The lower court properly corrected the Military Judge's erroneous Ruling.

D. Appellant fails to establish good cause: the Air Force Court of Criminal Appeals *Arma* decision, consistent with appellate precedent, rejected an Air Force trial judge's application of cumulative error to trial because "the weight of evidence had yet to be tested."

In *United States v. Arma*, No. 2014-09, 2014 CCA LEXIS 802 (A.F. Ct. Crim. App. Oct. 22, 2014), the court held the judge erred in applying a "cumulative effect doctrine" based on "the totality of the circumstances" in a pre-trial ruling to dismiss a charge. *Id.* at *22–23. The *Arma* court relied on *United States v. Dollente*, 45 M.J. 234, 242 (C.A.A.F. 1996), to hold the judge erred in applying cumulative error because the judge (1) "provided no analysis of how lesser remedies were rendered ineffective" because of the alleged errors and (2) "the ultimate weight of the evidence had yet to be tested." *Id.* at *23.

Here, like *Arma*, the Judge erred in applying the cumulative error doctrine where there had been no trial and prejudice could not be fully assessed. He failed to show how "lesser remedies were ineffective" when his previous dismissal (1) reset the case with a new Convening Authority and Trial Counsel; (2) compelled Captain Adcock; (3) reset the trial dates to suit Appellant; and (4) reopened all previous motions allowing Appellant to supplement all pleadings. (Appellate Exs. LXXXIII at 10; XVII at 15–17.)

As in *Arma*, by applying cumulative error pretrial, the Military Judge here runs afoul of *Dollente*'s express requirement that a court must weigh the strength

of the government's case in assessing prejudice under the doctrine. *Dollente*, 45 M.J. at 242. Appellant's reliance on *Arma* is misplaced. (Appellant Br. at 16.)

E. Regardless, the Military Judge erred finding a violation of an established attorney-client relationship.

1. The standard of review is de novo.

In appeals under Article 62, Courts of Criminal Appeals are limited to correcting errors of law. 10 U.S.C. § 862(b). They consider those errors de novo. *United States v. Crotchett*, 67 M.J. 713, 713 (N-M. Ct. Crim. App. 2009). The Court of Appeals for the Armed Forces, too, "shall take action only with respect to matters of law." Art. 67 (c)(4), UCMJ, 10 U.S.C. § 867(c)(4).

Appellate courts review de novo whether the "cumulative effect of all plain errors and preserved errors" "denied [an accused] a fair trial." *Pope*, 69 M.J. at 335.

2. There was no error denying the Individual Military Counsel request under JAGMAN para. 0131(c)(2)(B) and (b)(4)(B) where the request did "not claim an attorney-client relationship" and the requested attorney was about to start work as an instructor at the Naval Academy.

Under the JAGMAN rule governing request for individual military counsel: "If the requested counsel is on active duty, the request does not claim an attorney-client relationship regarding any charge pending before the proceedings, and the requested counsel is not 'reasonably available' . . . the convening authority shall

promptly deny the request and so inform the accused, in writing, citing this provision." JAGMAN para. 0131(c)(2)(B).

Here, the Second Convening Authority followed the plain language of the regulation. First, Captain Adcock was on active duty. Second, Appellant's request did not claim an attorney-client relationship regarding any charge pending before the proceedings. Indeed, Appellant's request explicitly asserted that an "attorney-client relationship does not currently exist with the requested Individual Military Counsel [Captain Adcock]." (Appellate Ex. III. at 3.) The Convening Authority reasonably relied on what the request *claimed* as required by the regulation, given that Appellant and his Counsel were in the best position to assess the existence of any attorney-client relationship. Third, Captain Adcock had detached from his previous command and was preparing to depart Hawaii for the east coast with orders to serve as an instructor at the Naval Academy, making him not reasonably available under the regulation. (*Id*. at 7); *see* JAGMAN para. (b)(4)(B).

The Second Convening Authority followed the applicable regulation and did not err in denying the Individual Military Counsel request. Captain Adcock and Appellant were the parties best positioned to comment on the existence of their relationship—and they both denied one then existed.

Further, at other stages in the court-martial, the Government reasonably relied on the assertions of Appellant, Captain Wilson, Captain Adcock, and

Defense Service Organization leadership. During the Article 32 Preliminary Hearing, Appellant again indicated that Captain Adcock "is no longer his attorney." (Appellate Ex. XV, Encl. 10 at 2.) At the arraignment, Defense Service Organization leadership had not detailed Captain Adcock as Appellant's Counsel. (R. at 3–6.) Even when Appellant contended that Captain Adcock's termination of representation was improper, Captain Adcock continued to maintain that his attorney-client relationship with Appellant had ended, until the Military Judge found otherwise and ordered that he serve as Appellant's Counsel. (Appellate Ex. XIII at 84; R. 27.)

Government reliance on the assertions of Appellant, Captain Adcock, and Defense Service Organization leadership does not represent an attempt to undermine the sanctity of the attorney-client relationship. The Military Judge clearly erred when he found otherwise.

3. The Military Judge erred relying on *Allred*: apart from Defense Service Organization leadership, Appellant and Captain Adcock explicitly disclaimed that they had an existing attorney-client relationship.

In *Allred*, an appellant appealed his conviction on grounds the government improperly severed his attorney-client relationship and the court set aside his conviction, but permitted a rehearing. 50 M.J. at 796, 800. There, the defense counsel had an attorney-client relationship with the appellant for an initial court-martial, but the charges were dismissed and later re-preferred due to delays caused

by the appellant's medical condition. *Id.* at 796. Defense Service Organization leadership did not detail the defense counsel to the second court-martial because he was pending transfer. *Id.* The appellant claimed he had not given his counsel permission to withdraw. *Id.* The court held the military judge erred by denying the appellant's request for individual military counsel and severing their attorney-client relationship. *Id.* at 800–01.

Unlike *Allred*, where the convening authority and military judge relied exclusively on the senior defense counsel's assessment of a lack of an attorney-client relationship, here, the Second Convening Authority relied on Appellant and Captain Adcock—the two parties of the relationship—who explicitly denied the existence of an attorney-client relationship. (Appellate Ex. III.) Whereas the appellant in *Allred* consistently claimed he had an existing attorney-client relationship, here, Appellant explicitly stated to the Second Convening Authority that "an attorney-client relationship *does not currently exist* with the requested Individual Military Counsel [Captain Adcock]." (Appellate Ex. III. at 3 (emphasis added).)

Allred is distinguishable because Appellant's Individual Military Counsel request never claimed that an attorney-client relationship with Captain Adcock existed. The Government reasonably relied on Appellant's assertions.

F. The Military Judge erred finding infringement of the right to counsel of choice, and erred finding that unlawful influence tainted the second court-martial.

1. There is a strong presumption that errors are not structural. The Supreme Court has recognized only a limited number of errors qualifying as structural. Not all Sixth Amendment violations are structural.

"Structural errors involve 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." *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991). There is a "strong presumption" that an error is not structural. *Rose v. Clark*, 478 U.S. 570, 579 (1986). Total deprivation of the right to counsel at trial constitutes a structural error and requires reversal. *Johnson v. United States*, 520 U.S. 461, 468–69 (1997); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (right to counsel regardless of indigence).

The Supreme Court has found structural errors only in a very limited class of cases. *See Gideon*, 372 U.S. 335; *Tumey v. Ohio*, 273 U.S. 510 (lack of impartial trial judge); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race); *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984) (right to self-representation at trial); *Waller* v. *Georgia*, 467 U.S. 39 (1984) (right to a public trial); *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993) (erroneous reasonable-doubt instruction to jury).

Not all impingements on the attorney-client relationship constitute per se violations of the Sixth Amendment right to counsel requiring reversal. *United States v. Brooks*, 66 M.J. 221, 223 (C.A.A.F. 2008).

2. The Supreme Court has recognized three categories for structural error: (1) when there is difficulty in assessing the error's effect; (2) when harmlessness is irrelevant; and (3) fundamental unfairness. But the list of structural errors is narrow and has rarely been expanded.

The Supreme Court has recognized three categories for structural error. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006). The first category are those cases in which a court is faced with "the difficulty of assessing the effect of the error." *Id.* (citing *Waller v. Georgia*, 467 U.S. 39, 49 n.9 (violation of public-trial guarantee not subject to harmlessness review because "benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance") and *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (petit jury "selected upon improper criteria or has been exposed to prejudicial publicity" conviction reversal required because "the effect of the violation cannot be ascertained")).

The second category of cases are those in which harmlessness is irrelevant. *Gonzalez-Lopez*, 548 U.S. at 149 n.4 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) ("right to self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to 'harmless error' analysis")).

The third category of structural error involves error that "always results in fundamental unfairness." *Weaver v. Massachusetts*, 582 U.S. 286, 296 (2017); *see Gideon* v. *Wainwright*, 372 U. S. 335, 343–345, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963) (total denial of right to an attorney); *Sullivan* v. *Louisiana*, 508 U. S. 275, 279 (1993) (right to a reasonable-doubt instruction). It therefore would be futile for the government to try to show harmlessness.

3. Here, like *Hutchins*, *Allred*, and *Brooks*, any improper pre-trial severance of the attorney-client relationship was not structural error. Appellant's claims that "prejudice should be presumed" in this case should be rejected.

In *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011), the appellant's detailed defense counsel improperly and unilaterally severed the attorney-client relationship pre-trial through a severance document before leaving the military. *Id.* at 284–85. The appellant proceeded to trial with other counsel, was tried, and convicted. *Id.* at 284.

The court held the lower appellate court erred by presuming prejudice from the improper severance and setting aside the findings and sentence. *Id.* at 293. The court assessed prejudice under Article 59 requiring the appellant "establish that the error produced material prejudice to the substantial rights of the accused." *Id.* at 292. As that appellant only claimed that the severed counsel could have "outperformed" the trial defense team resulting in a better outcome, his claim amounted only to an ineffective assistance of counsel claim. *Id.* at 292.

In finding no prejudice, the court analyzed the remaining counsel and concluded that the severed counsel's knowledge of the case did not amount to "matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remained on the defense team." *Id.*; *See also United States v. Allred*, 50 M.J. 795 (N-M. Ct. Crim. App. 1999) (improper severance of attorney-client relationship by government resulted in dismissal without prejudice); *Acton*, 38 M.J. at 336–37 (defense counsel unilaterally withdrew from convicted appellant during post-trial phase and sentence rehearing; court concluded appellant not prejudiced).

In *Brooks*, the court held the appellant's claims the government denied him assistance of counsel during and after his trial were not structural error. *Id.* at 223. There, the appellant claimed the conduct of brig personnel denied him the right to privately confer with his defense counsel. *Id.* at 222–23. The court found no structural error as the appellant could not identify with specificity what he could not communicate with his counsel. *Id.* at 223. He was required to show substantial prejudice to warrant relief. *Id.* at 224.

Here, like *Hutchins*, *Allred, Acton*, and *Brooks*, the temporary disruption of the attorney-client relationship—caused by Appellant's, Captain Adcock's, and Captain Wilson's own claims—did not amount to structural error, but should instead have been tested for prejudice. Unlike *Gideon*, where that appellant was

totally deprived of his right to counsel, Appellant was only deprived of Captain Adcock during his Article 32 hearing and pre-trial motions. *See United States v. Gonzalez-Lopez*, 548 U.S. at 151 (explaining that right to counsel of choice for hired counsel does not extend to defendants who require counsel to be appointed).

Appellant's demand to presume prejudice—his structural claim—also fails outside the three Supreme Court categories for structural error. This Court does not have difficulty assessing the effect of the error—Appellant never requested a new Article 32 hearing, has the opportunity to resubmit all motions, and can still negotiate a plea agreement. There is no fundamental unfairness when Appellant has not gone to trial and the Judge reset all trial deadlines to favor Appellant.

Likewise, cumulative error was not designed to protect other rights that already have their own protections against erroneous conviction. *Weaver*, 582 U.S. at 295; *Gonzalez-Lopez*, 548 U.S. at 149 n.4. Even if Appellant's rights to counsel of choice were violated, a temporary violation does not amount to structural error.

The Military Judge clearly erred by failing to follow controlling precedent under *Hutchins* and instead created his own standard of presumed prejudice amounting to structural error. (Appellant Supp. at 19–21.) This Court should decline to expand the categories of cases that presume prejudice, and should decline to presume prejudice in Appellant's case.

G. The Military Judge erred finding that unlawful influence tainted the second court-martial.

1. *Gilmet* is inapposite as that court found the improper severance of the attorney-client relationship pre-trial was the result of unlawful command influence that could not be cured. Here, the Judge cured any temporary deprivation of Captain Adcock by compelling him as counsel and resetting the case.

Violations of statutory rights are tested for prejudice to an appellant's substantial rights. Art. 59, UCMJ, 10 U.S.C. § 859; *United States v. Wiechmann*, 67 M.J. 456, 458, 463 (C.A.A.F. 2009).

In *United States v. Gilmet*, 83 M.J. 398 (C.A.A.F. 2023), the court dismissed the charges with prejudice due to uncured unlawful command influence. *Id.* at 401. There, a senior leader's comments directed at the appellant's defense counsel created an "intolerable tension" between counsel and the appellant that caused the appellant to permanently sever the attorney-client relationship. *Id.* at 407.

Here, unlike *Gilmet*, any improper, temporary severance of Appellant's attorney-client relationship with Captain Adcock was cured when the Judge compelled Captain Adcock's presence. No government action regarding Captain Adcock was found to be unlawful command influence, nor did it result in permanent severance of the attorney-client relationship. *Gilmet* is inapposite. The Judge reset the motions timeline and gave Appellant the opportunity to supplement all his pleadings. Unlike the *Gilmet* appellant, Appellant can proceed to trial with the full assistance of counsel.

H. Regardless, dismissal with prejudice is an improper remedy as the Military Judge cured any prejudice from any alleged error. The Military Judge clearly erred.

1. Dismissal with prejudice is a drastic remedy. When errors can be rendered harmless, dismissal is not an appropriate remedy.

Military courts "have long held that dismissal is a drastic remedy and courts must look to see whether alternative remedies are available." *United States v. Gore*, 60 M.J. 178, 187 (C.A.A.F. 2004) (citations omitted). "When an error can be rendered harmless, dismissal is not an appropriate remedy." *Id.* (citing *United States v. Mechanik*, 475 U.S. 66, 89 (1986)).

In *Morrison*, the Supreme Court reversed a circuit court after it overturned a conviction when the government violated an accused's right to counsel. 449 U.S. at 366–67. Agents met with an accused without her attorney present when they knew she had representation. *Id.* at 362–63. The Court recognized that "[c]ases involving Sixth Amendment [right to counsel] deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *Id.*

Since that accused had not alleged any adverse effect from the violation at trial, any dismissal was unwarranted and any remedy was "limited to denying the prosecution the fruits of its transgression." *Id.* at 366; *accord United States v.*

Pinson, 56 M.J. 489, 492–93 (C.A.A.F. 2002) (attorney-client privileged documents improperly seized, but dismissal improper because no prejudice).

In *Gore*, dismissal with prejudice was appropriate when unlawful command influence "prevent[ed] witnesses from testifying on behalf of, and cooperating with" the appellant. 60 M.J. at 187. There, the direct orders from the commanding officer obstructing the trial prejudiced the appellant because they were not curable. *Id.* at 188–89.

Like *Morrison* and unlike *Gore*, less intrusive means were available to this Military Judge in fashioning a remedy to ameliorate any potential for prejudice to Appellant at his pending trial. Dismissal with prejudice was a radical option when he already granted Appellant's motion to compel the previously denied Counsel, provided a continuance, and permitted Appellant to supplement his pleadings. As noted by R.C.M. 906, a continuance was the appropriate remedy for any concerns with the availability of individual military counsel or any perceived defects with the preliminary hearing.

Likewise, for the other identified issues of unlawful command influence or unintentional prosecutorial misconduct, the Military Judge already provided adequate remedies, including compelling discovery, disqualifying offending trial counsel, disqualifying a convening authority, and dismissal without prejudice. (Appellate Ex. XVII at 16–17.) None of these previous cures were shown to be

inadequate as each situation was independently remedied prior to trial. The Military Judge erred in dismissing with prejudice.

2. The Military Judge cured any prejudice by granting Appellant's Individual Military Counsel request and resetting the trial dates to meet Appellant's needs.

a. Regardless of any improper temporary denial of Captain Adcock, *Biagese* and *Hornback* show the Military Judge's pretrial measures cured any potential for prejudice.

In *United States v. Biagase*, 50 M.J. 143 (C.A.A.F. 1999), the court assessed whether unlawful command influence prejudiced the appellant by looking to whether the alleged impropriety affected the findings and sentence. *Id.* at 151. There, the defense alleged unlawful command influence over potential witnesses when the command circulated the appellant's confession. *Id.* at 144–45, 151–52. The court found the appellant was not entitled to any relief by considering that the witnesses subjected to a potential taint all testified or offered valid reasons for not testifying for the appellant. *Id.* at 151–52.

Likewise, the judge "forcefully and effectively discharged his duties as the 'last sentinel' to protect court[s]-martial from unlawful command influence" by "exhaustively examining the facts," taking "the extraordinary steps of chastising the entire chain of command and supervision in open court, . . . requiring justification for any downward movement in the witnesses' ratings, and requiring that any witness who indicated reluctance to testify be produced." *Id.* at 152. The

court found that the best indicator of no prejudice was that all witnesses in his chain of command who knew the appellant testified favorably. *Id.*

In *United States v. Hornback,* 73 M.J. 155 (C.A.A.F. 2014), a prosecutor's "sustained and severe" misconduct at trial did not prejudice the appellant's substantial rights. *Id.* at 160–61. There, the trial counsel attempted to elicit improper testimony from multiple witnesses, defied the judge's orders, and made improper argument. *Id.* at 160. But, the judge "left no stone unturned" and "acted early and often" to cure any potential prejudice by repeatedly instructing the members. *Id.* at 161.

Here, like *Biagese* and *Hornback*, the Military Judge acted swiftly and took remedial measures that cured the situation, leaving no room for prejudice to Appellant's substantial rights. Regardless of any improper denial of Captain Adcock, the Military Judge's curative measures returned Appellant to the status quo ante before any improper denial of his request. The Military Judge: (1) granted Appellant's request for Captain Adcock, (2) allowed Appellant to supplement all pleadings, and (3) promised to adjust the trial dates to Appellant's preferred dates to incorporate Captain Adcock into his defense. (R. 73, 75; Appellate Ex. XVII at 15.) These measures cured Appellant of any prejudice he incurred pretrial. He cannot demonstrate prejudice.

b. Appellant was not prejudiced by not having Captain Adcock at his Article 32 hearing. Regardless, the Military Judge could have ordered another hearing. Dismissal with prejudice was an extreme remedy unwarranted by the circumstances.

"Although the Article 32 investigation is an important element of the military justice process, it is not part of the court-martial." *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007). Errors at an Article 32 hearing are tested for prejudice as statutory violations, not structural error. *Id.*

"The accused has the right to be represented in his defense before a general or special court-martial or at a preliminary hearing under section 832 . . . by military counsel of his own selection if that counsel is reasonably available" under Service regulations. Article 38, 10 U.S.C. § 838; *see also* R.C.M. 506(b) (being an "instructor at a Service school or academy" as "reasonably unavailable").

In *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009), a convening authority erred by denying the appellant his individual military counsel for his Article 32 hearing and pretrial agreement negotiations. *Id.* at 458. To determine prejudice, the court tested the statutory violation of his right to counsel under Article 27 for harmless error. *Id.* at 463. As the judge permitted the individual military counsel to participate in all proceedings and the appellant waived any defect in the Article 32 hearing, there was no prejudice. *Id.* at 463–64.

In *Davis*, the court determined that the appellant suffered no prejudice to his substantial rights when the hearing officer improperly closed part of the hearing for victim testimony. *Id.* at 447. The appellant was later convicted of some offenses at trial. *Id.* at 446. The court focused on the fact that "there was no evidence that the closure of the Article 32 hearing impeded defense counsel's trial preparation or that the testimony of the witnesses would have changed had there been a second, open Article 32 proceeding" and that counsel effectively represented the appellant at the hearing. *Id.* at 447.

Here, like *Wiechmann* and *Davis*, Appellant was not prejudiced by Captain Adcock's absence at the Article 32 hearing. There was no evidence that had Captain Adcock been present at the Article 32 hearing, the outcome would have been different. In his Ruling, the Military Judge could find no fault with the Hearing. (Appellate Ex. XVII at 16–17.) Captain Wilson continued to represent Appellant from the previous court-martial, and the Hearing officer considered and cited to the Military Judge's identified concerns with the Government's evidence. (*Id.* at 16–17.)

Nothing suggests that having another defense counsel, who was aware of the same facts and law as Captain Wilson, would have changed the outcome. The Government's low burden of having only to meet probable cause further demonstrates that this statutory violation of Article 32 did not prejudice Appellant.

Likewise, Appellant never requested a new Article 32 hearing, claimed he was ineffectively represented, nor claimed any other prejudice at the hearing. Even if the Military Judge could find prejudice, the appropriate remedy would be to order a rehearing—not dismissal with prejudice. *See* R.C.M. 906(b)(3). The Military Judge clearly erred. There was no prejudice to Appellant's substantive rights through Captain Adcock's absence at the Article 32 hearing to merit dismissal with prejudice.

3. The Military Judge erred in assuming prejudice for an improper Government denial of an Individual Military Counsel request.

a. Counsel can only be excused by the military judge with good cause shown or with express consent of the accused.

"[D]efense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." R.C.M. 506(c); *United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F 2011). Defense counsel may be excused over an accused's objection when there is good cause shown. *United States v. Baca*, 27 M.J. 110, 118–19 (C.M.A. 1988). *See also Hutchins*, 69 M.J. at 289; *United States v. Acton*, 38 M.J. 330, 337 (C.A.A.F. 1993).

b. *Hutchins* and *Acton* show that in order to receive relief on an improper severance claim, an appellant must demonstrate prejudice. Appellant cannot do that here as his case is pretrial and the Military Judge compelled the improperly severed counsel. The Military Judge erred in finding prejudice.

In *Hutchins*, that appellant's detailed defense counsel improperly severed the attorney-client relationship when he unilaterally terminated his representation of the appellant pretrial through a severance document and then left the military. 69 M.J. at 284–85. The appellant proceeded to trial with other counsel, was tried, and convicted. *Id.* at 284.

The court looked to "the context of the error" considering that the appellant (1) "had the assistance of multiple counsel throughout the pertinent proceedings"; (2) had replacement defense counsel detailed prior to trial; (3) the judge granted a continuance to facilitate preparation by the new defense counsel and the appellant did not request additional time to prepare for trial; and (4) the defense counsel initiated the severance through his request which was not initiated by the prosecution or command. *Id.* at 291.

The court held the lower appellate court erred by presuming prejudice from the improper severance and setting aside the findings and sentence. *Id.* at 293. The court assessed prejudice under Article 59 requiring the appellant "establish that the error produced material prejudice to the substantial rights of the accused." *Id.* at 292. As that appellant only claimed that the severed counsel could have

"outperformed" the trial defense team resulting in a better outcome, his claim amounted only to an ineffective assistance of counsel claim. *Id.* at 292. In finding no prejudice, the court analyzed the remaining counsel and concluded that the severed counsel's knowledge of the case did not amount to "matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remained on the defense team." *Id. See also Acton*, 38 M.J. at 336–37 (defense counsel unilaterally withdrew from convicted appellant during post-trial phase and sentence rehearing but appellant was not prejudiced).

This Military Judge clearly erred by failing to follow controlling precedent under *Hutchins* and instead created his own standard of presumed prejudice. Further, Appellant cannot be prejudiced because no trial has occurred. The Military Judge restored Appellant's Counsel, maintaining any attorney-client relationship during the pretrial phase. There is no prejudice and the Military Judge clearly erred.

c. *Allred* does not apply here. That appellant was convicted at trial after an improper denial of counsel. There was no prejudice to Appellant as any improper denial has been resolved pretrial.

While *Allred* and this case share factual similarities of improper severance of counsel, that is where the similarity ends. The court presumed prejudice in *Allred*, set aside the findings, and ordered a rehearing because that appellant had been

convicted after being denied his counsel of choice. *But see Hutchins*, 69 M.J. at 292 (superior court not presuming prejudice for trial after improper severance but looked to whether effectively represented).

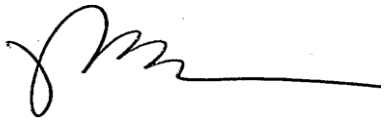
The opposite is true here: this Military Judge granted Appellant's request for Individual Military Counsel. At this stage, Appellant would go to trial with his Counsel of choice: Captain Adcock. With the Military Judge's prescribed remedies, Appellant will have experienced no prejudice and dismissal with prejudice was an inappropriate remedy, especially considering Captain Adcock, Captain Wilson, and Defense Service Organization leadership all represented to the Government and Convening Authority that the attorney-client relationship had been terminated.

Regardless, this Military Judge went further than *Allred* did, by dismissing with prejudice. *Allred* allowed a rehearing. 50 M.J. at 801. A hearing to "decide the factual question of [Appellant's] guilt or innocence" as to Charge II should likewise be allowed here. *See Van Arsdall*, 475 U.S. at 681.

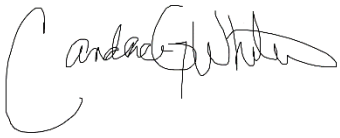
Conclusion

The United States respectfully requests this Court deny Appellant's Petition for Grant of Review.

LAN T. NGUYEN
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7433, fax (202) 685-7687
Bar no. 37929



BRIAN K. KELLER
Deputy Director
Appellate Government
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7682, fax (202) 685-7687
Bar no. 31714



CANDACE G. WHITE
Major, U.S. Marine Corps
Appellate Government Counsel
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374
(202) 685-7295, fax (202) 685-7687
Bar no. 36701

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I certify that I delivered a copy of the foregoing electronically to the Court and opposing Counsel, Lieutenant Commander Leah M. FONTENOT, JAGC, U.S. Navy, on August 2, 2024.

LAN T. NGUYEN
Lieutenant, JAGC, U.S. Navy
Appellate Government Counsel