No. _____

In the Supreme Court of the United States

PAUL E. COOPER,
YEOMAN SECOND CLASS,
UNITED STATES NAVY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Armed Forces exceeded its statutory authority under 10 U.S.C. § 867(c) when it took action with respect to a matter of fact.

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PETITION FOR A WRIT OF CERTIORARI

Yeoman Second Class Paul Cooper, United States Navy, respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Armed Forces (CAAF).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 2a-21a) is reported at 78 M.J. 283. The unpublished opinion of the United States Navy-Marine Corps Court of Criminal Appeals (Pet. App. 22a-70a) is available at 2018 CCA LEXIS 114.

JURISDICTION

The United States Court of Appeals for the Armed Forces issued its decision on February 12, 2019. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1259(2).

CONSTITUTIONAL PROVISION INVOLVED

Article I, Section 8, Clause 14 of the United States Constitution provides: Congress shall have the power "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States[.]" U.S. Const. art. I, §8, cl. 14.

STATUTORY PROVISION INVOLVED

Pertinent statutory provisions from the Uniform Code of Military Justice, 10 U.S.C. §§ 801-941 (2012), are reprinted in the appendix (Pet. App. 1a).

STATEMENT OF THE CASE

A. Requests for Individual Military Counsel.

In 2013, Yeoman Second Class Paul Cooper, U.S. Navy, was deployed to Guantanamo Bay Cuba when agents from the Naval Criminal Investigative Service investigated him for the alleged sexual assault of Hospital Corpsman Second Class J.P., U.S. Navy. (Pet. App. 4a.) Cooper immediately requested counsel. (Pet. App. 4a.) Five months after Cooper's request, Lieutenant Buyske, U.S. Navy, was detailed as defense counsel. (Pet. App. 41a-43a.) At first, Cooper wanted Buyske to represent him at his Article 32 preliminary hearing. (Pet. App. 43a-44a.) But after the preliminary hearing, Cooper exercised his right to request individual military counsel (IMC).[1] (*Id.*)

Cooper made three IMC requests for different counsel. (Pet. App. 44a-47a.) His first choice was Commander Massucco, U.S. Navy. (Pet. App. 44a.) Buyske discussed the request with her Officer-in-Charge (CAAF J.A. 343, 539), and Massucco (*id.* at 657).

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[1]Congress provides all military defendants, regardless of financial need, the right to choose a "reasonably available" IMC to represent them. 10 U.S.C. § 838 (2012). Congress delegated the authority to define "reasonably available" to the Service Secretaries. *Id.* Military appellate courts have not addressed the nature of this right. Whether Congress' provision of the right to choose puts service members on the same Sixth Amendment footing as those defendants who can afford the right to select counsel of choice has not been resolved. *Cf. United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006).

Determining for herself that Massucco was not reasonably available, Buyske sent Cooper an email clearly and directly stating, "…the convening authority must disapprove your request for individual military counsel (IMC). What this means for you is that CDR Massuco [sic] will not be able to act as your counsel in the case." (CAAF J.A. 660.) In response to appellate claims of ineffective assistance of counsel for failing to forward Cooper's requests, Buyske submitted a sworn affidavit contradicting the definitive answer contained in her email. Her affidavit states she telephonically told Cooper she "would submit the request [for Massucco] on his behalf, but we may have a better chance if he knew someone else…[Cooper] did not want me to submit a request for CDR Massucco." (CAAF J.A. 718-19.)

Cooper's second choice for IMC was Captain Neumann, U.S. Army. (Pet. App. 45a.) Buyske denied that Cooper ever requested Neumann as his IMC. (Pet. App. 45a.) The conflict was settled when the *DuBay* judge and three Navy-Marine Corps Court of Criminal Appeals judges found that Cooper did request Neumann. (Pet. App. 45a-47a.)

Believing that Neumann was not reasonably available, (Pet. App. 19a), Cooper requested Captain Neely, U.S. Marine Corps. (Pet. App. 46a). Buyske's sworn affidavit declares that on August 5, 2014, she spoke with Cooper about the Neely request. (CAAF J.A. 720.) Her affidavit states she told him the request was going to be denied but that she would be "happy to continue to draft and submit the request to see what happened." (*Id.*) Buyske claimed Cooper withdrew his request during their conversation on the 5th. (*Id.*)

An email she sent Cooper on the 8th contradicts the version of events contained in her affidavit. *Compare* (CAAF J.A. 658) *with* (CAAF J.A. 720). The email states, "I was looking at the rules in order to draft your request…because CAPT Neely is currently in a [prosecution] shop, he cannot act as IMC in your case. I am sorry." (CAAF J.A. 658.) While her affidavit unequivocally states Cooper voluntarily chose not to pursue the request, the email indicates she advised him he had no say in the matter. (CAAF J.A. 658, 720.) Also, if Cooper really withdrew his request on the 5th, why would Buyske tell Cooper on the 8th she was doing research in order to file his IMC request?

B. The Court-Martial.

During Cooper's arraignment, the judge asked: Buyske "[h]as any other defense counsel been detailed or individual military counsel been requested in this case?" (CAAF J.A. 77.) Buyske responded, "No, Sir." (*Id.*) Next, the judge instructed Cooper to talk to Buyske if he had questions about what was happening in the courtroom. (*Id.*) After telling Cooper he had the right to request representation by a **"reasonably available"** IMC of his choice, (*id.* at 78) (emphasis added), the judge asked "[a]nd by whom do you wish to be represented?" (*Id.* at 79). Cooper answered, "Lieutenant Buyske, sir." (*Id.*) The judge's next question was, "[d]o you wish to be represented by any other counsel, either civilian or military?" (*Id.*) Cooper said, "[n]o, sir, I do not." (*Id.*)

After arraignment, but before members were empaneled, Buyske's supervisor joined the defense team. (App. Pet. 5a, 53a.) The judge asked

supervisory counsel whether any IMC had been requested in this case, and he said no. (App. Pet. 5a, 53a.) At this point, Cooper had already been instructed to speak to his counsel if he had any questions about the proceedings. (CAAF J.A. 77.)

After a three-day trial, the jury announced its findings: Cooper was guilty of committing three specifications of sexual assault and one specification of abusive sexual contact. (Pet. App. 6a.) Cooper voluntarily absented himself during sentence deliberations. (Pet. App. 6a.) He was sentenced in absentia to five years' confinement, forfeiture of all pay and allowances, reduction to the rank of E-1, and a dishonorable discharge. (*Id.*)

C. The *DuBay* Hearing.

Ten issues were raised on appeal. (Pet. App. 6a.) Two of them involved Cooper's requests for IMC. The first was whether he was deprived of his statutory and Sixth Amendment constitutional right to select individual military counsel of choice, and the second was whether his detailed counsel provided ineffective assistance by failing to submit his IMC requests. (Pet. App. 6a.)

The Navy-Marine Corps Court of Criminal Appeals (NMCCA) ordered a *DuBay*[2] hearing to assist in addressing these issues and resolve Cooper's and Buyske's conflicting affidavits. (Pet. App. 7a-8a, 27a.) The narrow scope of the *DuBay* order was whether Neumann was requested as IMC, and, if so, was he

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[2] A *DuBay* hearing is a limited scope remand ordered by a military appellate court to gather evidence necessary for the resolution of an appellate issue. *See United States v. DuBay*, 17 C.M.A 147, 149, 37 C.M.R. 411, 413 (1967).

reasonably available to act in that capacity. (Pet. App. 27a). The *DuBay* judge found that Neuman was requested and would have been reasonably available. (Pet. App. 9a-10a, 27a.) In response to the results of the *DuBay* hearing, the government filed a supplemental brief before the NMCCA. *See* Supplemental Answer on Behalf of Appellee, *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114 (N-M. Ct. Crim. App. Mar. 7, 2018). The government did not argue waiver, instead it cited to the colloquy between the military judge and Cooper to support its argument that the *DuBay* judge's findings of fact were clearly erroneous. *Id.* at 16, 20-23.

The first time the word waiver appears in this case is in Cooper's reply brief responding to the government's post-*DuBay* supplemental brief. *See* Appellant's Reply to Appellee's Supplemental Answer, *United States v. Cooper*, No. 201500039, 2018 CCA LEXIS 114 (N-M. Ct. Crim. App. Mar. 7, 2018). Cooper's appellate counsel, not the government, labeled the government's factual insufficiency of the *DuBay* findings argument as waiver. *Id.* at 3.

D. The NMCCA Decision.

The government saw the waiver issue as a factual issue. It argued Cooper's "acknowledgment of his right to IMC, expression of his desire that [Buyske] represent him, and failure to contradict counsel's statement that no other counsel had been requested in the case render the *DuBay* judge's finding of fact clearly erroneous." (Pet. App. 54a.) Looking at the facts presented, the NMCCA found that Cooper's words at trial were driven by Buyske's erroneous representations regarding Neumann's availability

and do not form the basis of a knowing and intelligent waiver. (Pet. App. 55a.) More specifically, the NMCCA found that Cooper's answers to the judge's questions were the result of his belief—created by Buyske's erroneous representations—that Neumann was not reasonably available to act as IMC and consequently his request had been denied. (Pet. App. 55a.)

Finding material prejudice to Cooper's substantial right to IMC, the NMCCA set aside and remanded. (Pet. App. 62a, 70a.) The government appealed. (Pet. App. 3a.)

E. The CAAF Decision.

Before the CAAF, the government dropped the argument that the colloquy between Cooper and the military judge indicated the *DuBay* judge's findings of fact were clearly erroneous. Instead, for the first time in this case, the government argued waiver on two fronts. (Pet. App. 11a.) The first was waiver by virtue of law, and the second was waiver by virtue of fact. Brief On Behalf Of Appellee/Cross-Appellant, Errata Corrected at 23-32, *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019); *see also* (Pet. App. 11a) ("The Government argues that Appellee waived the IMC issue under two theories: ...(2) he affirmatively waived the issue in his response to the military judge's IMC inquiry."). Not addressing the first—waiver by virtue of law—the CAAF held in the government's favor on the second. (Pet. App. 11a.)

Without concluding the NMCCA and *DuBay* judge's findings of fact were clearly erroneous, the CAAF came to its own factual determinations about what Cooper understood when he answered the

judge's questions about his counsel choices. (Pet. App. at 15a-16a.) Substituting its version of the historical facts for that of the lower court, the CAAF emphasized Cooper's silence when his trial defense counsel told the judge he never made any requests for IMC. (Pet. App. 15a-16a n.8.) But the NMCCA considered Cooper's silence and responses to the judge's question when it found Cooper's understanding of Neumann's availability underpinned his responses to the judge's questions and silence in the face of counsels' denials. (Pet. App. 54a.)

REASONS FOR GRANTING THE PETITION

I. The Reach Of The Court of Appeals For The Armed Forces Article I Authority Is An Important Question That Has Not Been, But Should Be Settled By This Court.

Unlike Article III courts, military courts are Article I courts whose "jurisdiction is precisely limited at every turn" by congressional constraints. *United States v. Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., dissenting). The CAAF has disregarded those constraints.

When Congress expressly limits the CAAF's jurisdictional reach, it acts pursuant to its constitutional authority over national defense and military affairs. U.S. Const. art. I, § 8, cl. 14. This Court's deference to Congress is at its apex when Congress acts in this capacity. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("[P]erhaps in no other area has the Court accorded Congress greater deference.").

By extending its authority beyond what Congress provides for, the CAAF disregarded the solemnity accorded to powers granted by Congress pursuant to Article I, Section 8, Clause 14. Careful limits imposed by Congress on the CAAF's jurisdiction, "cannot be overridden by judicial extension of statutory jurisdiction." *Denedo*, 556 U.S. at 918 (Roberts, C.J., dissenting) (internal quotation marks omitted). This Court must "step in," *Ortiz v. United States*, 138 S. Ct. 2165, 2171 (2018), and address the systematic impact CAAF's extension of its power has on Congress' delegation of authorities within the carefully crafted military appellate review structure.

A. Military Appellate Review Structure. Congress' Grant of Authority to CAAF Extends Only To Matters Of Law.

Trial by court-martial predates the Constitution, and its continued existence has been authorized since the first Congress. *Ortiz*, 138 S. Ct. at 2175. In the form currently established by Congress, court-martial convictions are subject to a triple-tiered appellate process. 10 U.S.C. §§ 866-867a; 28 U.S.C. § 1259.

For those cases that meet the jurisdictional threshold for appellate review, the first stop is one of four Courts of Criminal Appeals: the Court of Criminal Appeals for the Army, Navy-Marine Corps (NMCCA), Air Force, or Coast Guard. 10 U.S.C. § 866; *Ortiz*, 138 S. Ct. at 2171. Congress authorized the military courts of criminal appeals to review and take action on matters of fact and law. *See* 10 U.S.C. § 866(c) (stating the Court of Criminal Appeals may affirm findings and sentences it "finds correct in law and fact and determines, on the basis of the entire

record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.").

The second stop is the CAAF. The CAAF must review cases, such as this one, that are certified by one of the judge advocate generals of the Navy, Army, Air Force, or Coast Guard, and may, in its discretion grant petitions for review in other cases. 10 U.S.C. § 867(a). The CAAF "may act only with respect to the findings and sentence…as set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. § 867(c); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). While the NMCCA can take action on matters of fact, 10 U.S.C. § 866(c), the CAAF "shall take action only with respect to matters of law," 10 U.S.C. § 867(c).

The final stop—and only judicial check on the CAAF's judicial extension of its power in individual cases—is this Court. 10 U.S.C. § 867a; 28 U.S.C. § 1259.

B. CAAF Took Action on a Matter Of Fact Reserved By Congress To The Navy-Marine Corps Court Of Criminal Appeals.

Determining that the NMCCA took action on a matter of law is a jurisdictional prerequisite to the exercise of the CAAF's authority to reverse a decision from that court. 10 U.S.C. §§ 866(c), 867(c); *see also Ctr. for Constitutional Rights v. United States*, 72 M.J. 126, 128 (C.A.A.F. 2013); *United States v. Moore*, 32 M.J. 170, 173 (C.A.A.F. 1991). The issue certified by the Judge Advocate General of the Navy and acted on

by the CAAF was whether the lower court erred "where [Cooper] was advised of his rights to request [IMC], agreed he understood the right but wanted instead to be represented by trial defense counsel, and made no motion for individual military counsel." Certificate For Review, *United States v. Cooper*, 78 M.J. 283 (C.A.A.F. 2019). The government made two arguments under this certified issue. (Pet. App. 11a.) The first was waiver as a matter of law: whether the failure to raise the issue prior to arraignment constituted waiver under Rule for Courts-Martial 905. *Id.* The CAAF passed on this question. (Pet. App. 11a.) Instead it decided the case solely by addressing the government's second argument—that the facts indicate a knowing and intelligent waiver. (Pet. App. 11a.)

As this Court stated in *Moran v. Burbine*, 475 U.S. 412, 421 (1986), the waiver inquiry "has two dimensions." *See also Schneckloth v. Bustamante*, 412 U.S. 218, 238 n.25 (1973). The first dimension examines whether a waiver is voluntary, meaning "the product of the free and deliberate choice rather than intimidation, coercion, or deception." *Id.* In addressing the first dimension, courts must decide whether the waiver was involuntary as a matter of law. *Henderson v. DeTella*, 97 F.3d 942, 946 (7th. Cir. 1996). The second dimension examines whether the waiver was knowingly and intelligently made with eyes wide open about the nature of the right and consequences of waiver. *Moran*, 475 U.S. at 421. Whether a waiver is knowingly and intelligently made is a fact-dependent issue that is best left to the lower courts to resolve. *Henderson*, 97 F.3d at 946 (addressing a state court habeas petition).

The CAAF reversed the lower court because it found Cooper knowingly and intelligently waived his right to IMC. (Pet. App. 4a, 16a.) But what a defendant knew or understood at any given moment in time is a historical fact: making a state of mind determination calls for a "recital of external events and the credibility of their narrators." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (internal quotations omitted).

The CAAF took action on a matter of fact—an authority specifically withheld from CAAF and provided to the NMCCA. *Compare* 10 U.S.C. § 866(c) *with* 10 U.S.C. § 867(c). In exercising its authority under 10 U.S.C. § 866(c), the NMCCA found, as fact, that Cooper did not make a knowing and intelligent waiver of his right to IMC. Without so much as a declaration that this finding was clear error, the CAAF disagreed.

In *Palmore v. United States*, 411 U.S. 389, 396 (1973), this Court stated, "[j]urisdictional statutes are to be construed with precision and with fidelity to the terms by which Congress has expressed its wishes." (Internal quotations omitted). Statutes authorizing appeals are particularly subject to strict construction. *Id.* Congress expressed its wish that the CAAF provide absolute deference to the NMCCA with respect to matters of fact. *See* 10 U.S.C. §§ 866-867. Substituting its version of the facts for that of the lower court, the CAAF ignored the deference rooted in the statutory structure of the military appellate courts.

C. To The Extent That The CAAF's Exercise Of Its Article I Authority Morphs A Matter Of Fact Into A Matter Of Law, Its Actions Are Contrary To This Court's Decision In *Johnson v. Zerbst*.

The fact versus law distinction is vexing. *Pullman-Standar, Dov. Of Pullman v. Swint*, 456 U.S. 273 (1982). In the context of cases arising under federal courts' 28 U.S.C. § 2254 jurisdiction, "[t]he question of waiver of the right to counsel is not a question of historical fact, but one which requires application of constitutional principles to the facts as found." *Brewer v. Williams*, 430 U.S. 387, 403 (1977). But see *Tacon v. Arizona*, 410 U.S. 351, 352 (1973), for the conclusion that "[w]aiver is primarily a factual issue."

In *Brewer*, the 'facts as found' by the district court did not conflict with those of the state court, *Brewer*, 430 U.S. at 396-97, but what if they had? Unlike a state court habeas proceeding where the level of deference owed to the state court is outlined in 28 U.S.C. § 2254, the CAAF's authority to take action on the government's appeal here was governed by 10 U.S.C § 867. Applying constitutional principles to the question of whether a waiver is knowing and intelligent requires courts to assess the "particular facts and circumstances" of the case and make a decision on those facts. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Here, because the CAAF did not find that the NMCCA erred in taking action on a matter of law, (Pet. App. 11a), the CAAF is statutorily bound by the facts found by the NMCCA. This includes crucial facts that should have been considered under *Johnson*. The 'facts as found' by the NMCCA include

Cooper's knowledge and understanding that Neuman was not reasonably available and that Cooper had run out of options because he thought his requests were denied. (Pet. App. 53a-55a.)

The CAAF did not defer to the facts as found by the NMCCA when it decided that Cooper's waiver was knowing and intelligent. (Pet. App. 11a.) Moreover, whether the facts surmount the threshold of a knowing and intelligent waiver calls for an accounting of "what the accused understood rather than what the court said or understood." *United States v. Kimmel*, 672 F.2d 720, 722 (9th Cir. 1982). The NMCCA and Judge Sparks, the dissenting CAAF judge, focused their inquiry on what Cooper understood. (Pet. App. 20a, 54a-55a.) The CAAF majority focused squarely on the in-court dialogue between Cooper, his defense team and the judge, (Pet. App. 14a-16a.), and whether Cooper was competent to understand the judge's explanation (Pet. App. 13a).

The dispositive nature of the factual inquiry controlling whether there has been an intelligent waiver apropos the right to counsel was settled by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). There, this Court said, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Id.* To be knowing and intelligent, a waiver must be made with "sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970).

This Court has said that "[w]hen an 'issue falls somewhere between a pristine legal standard and a simple historical fact,' the standard of review often reflects which 'judicial actor is better positioned' to make the decision." *U.S. Bank N.A. v. Vill. at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018) (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Here, Congress already made the call, the NMCCA is the judicial actor in the better position. 10 U.S.C. § 866. The right to decide this issue was expressly conferred by statute to the NMCCA, 10 U.S.C. § 866(c), and withheld from the CAAF, 10 U.S.C. § 867(c).

CONCLUSION

Congress determines the subject-matter jurisdiction of federal courts. *Denedo*, at 912. "This rule applies with added force to Article I tribunals, such as the NMCCA and CAAF, which owe their existence to Congress' authority to enact legislation pursuant to Article I, § 8 of the Constitution." *Id.* (citing *Goldsmith*, 526 U.S. at 533-34). The CAAF's self-extension of its Article I power cannot be countenanced. This Court should grant the petition for certiorari.

Respectfully submitted,

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