No. 09-418

In the Supreme Court of the United States

JEFF R. WIECHMANN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the military violated petitioner's right to counsel under the Sixth Amendment by refusing to recognize one of petitioner's two appointed military counsel at various pretrial stages before petitioner entered a guilty plea with the assistance of both counsel to the charges at issue.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-23a) is reported at 67 M.J. 456.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2009. The petition for a writ of certiorari was filed on October 7, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a lieutenant colonel in the United States Marine Corps, pleaded guilty at a general court-martial to failing to obey a lawful order, making a false official statement, conduct unbecoming an officer, adultery, and obstructing justice, in violation of Articles 92, 107, 133

and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892, 907, 933 and 934. Pet. App. 2a. The court-martial, composed of a military judge, sentenced him to dismissal and confinement for 90 days. *Ibid.* Pursuant to a plea agreement, the convening authority suspended all punishment for 12 months from the date of trial. The United States Navy-Marine Corps Court of Military Appeals (N-MCCA) affirmed. No. NMCCA 200700593, 2008 WL 3540244 (N-M. Ct. Crim. App. Aug. 14, 2008). The United States Court of Appeals for the Armed Forces (CAAF) affirmed. Pet. App. 1a-23a.

1. Article 27(a)(1), 10 U.S.C. 827(a)(1), provides that trial and defense counsel will be detailed for each general or special court-martial and that the Secretaries of the military departments will prescribe regulations governing the detailing of counsel for military defendants. Article 38(b), 10 U.S.C. 838(b), provides that a defendant may be represented by military counsel detailed under Article 27, by military counsel of his own selection if that counsel is reasonably available as determined by regulations, or by civilian counsel at his own expense. Article 38(b)(6), 10 U.S.C. 838(b)(6), provides that a defendant is not entitled to be represented by more than one military counsel, but competent military authority has the discretion to detail an additional military counsel for the defendant.

2. a. Petitioner committed adultery with the wife of a non-commissioned officer. He then lied to military investigators to conceal the affair and encouraged the woman to do likewise. Gov't CAAF Br. 3.

b. In June 2006, Captain Snow, the senior defense counsel at Marine Corps Base Hawaii, learned that charges had been preferred against petitioner and that

he would face an investigation and a hearing under Article 32, 10 U.S.C. 832.[1] Snow detailed himself as defense counsel for petitioner, but requested assistance because he had just one month of experience as defense counsel. The Chief Defense Counsel detailed Lieutenant Colonel Shelburne, a reservist, to serve as petitioner's defense counsel, thereby giving petitioner two appointed military defense counsel at government expense. Pet. App. 4a-5a.

The convening authority denied a defense request to fund Shelburne's assignment on the ground that there was no authority to detail him as defense counsel for petitioner. Shelburne asked the convening authority to continue the Article 32 hearing pending a resolution of the funding issue, but the convening authority denied that request. Pet. App. 5a.

On July 24, 2006, Shelburne appeared at the Article 32 hearing, objected to the proceeding, and moved for a continuance because he did not have sufficient time to prepare for it. The Article 32 investigating officer de-

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[1] Article 32, 10 U.S.C. 832, requires that no charge may be referred to a general court-martial until a thorough and impartial investigation has been made. The investigation includes a hearing at which the accused is entitled to be represented by counsel and has the right to confront adverse witnesses and to present evidence in mitigation. The Article 32 investigating officer has to determine whether "reasonable grounds exist to believe that the accused committed the offenses alleged." Courts-Martial 405 R. (j)(2)(H) (R.C.M.). An Article 32 investigation is designed "to inquire into the truth of the matters set forth in the charges to review, the form of the charges, and to secure information to determine what disposition should be made of the case." See R.C.M. 405 discussion. It is also "a discovery proceeding for the accused and stands as a bulwark against baseless charges." *United States* v. *Garcia*, 59 M.J. 447, 450-451 (C.A.A.F. 2004) (quoting *United States* v. *Samuels*, 27 C.M.R. 280, 286 (C.M.A. 1959)).

nied the motions but permitted Shelburne to represent petitioner at the hearing. Afterwards, Shelburne objected to the denial of the continuance and to the admission of certain evidence at the hearing. Pet. App. 5a.

Shelburne and Snow asked to meet with the convening authority to discuss plea negotiations, which included an offer to dispose of the case under the nonjudicial punishment provisions of Article 15, 10 U.S.C. 815. The convening authority declined to meet with the attorneys and refused to accept the written plea proposal because Shelburne's name was on it. The convening authority eventually accepted the plea proposal paperwork for consideration after Snow removed Shelburne's name from it. Pet. App. 5a-6a.

The convening authority denied another request to meet with Shelburne, but conducted a meeting with Snow alone to discuss petitioner's plea proposal. Subsequently, the convening authority effectively rejected petitioner's plea proposal by referring the case to a general court-martial. Pet. App. 6a.

After referral, the military judge held an informal scheduling conference by telephone and he refused to allow Shelburne to participate. Snow filed a motion to have Shelburne recognized as defense counsel. The motion was litigated in front of a different military judge, who granted the motion and ruled that Shelburne had been properly detailed and that Shelburne's detail would be funded by Headquarters, Marine Corps rather than the convening authority. The new military judge also denied petitioner's motions for dismissal of the charges for unlawful command influence and for a new Article 32 hearing. Pet. App. 6a-7a.

On November 27, 2006, the convening authority met with Shelburne to discuss a plea agreement. On Janu-

ary 8, 2007, petitioner entered into a plea agreement with the government. As part of the plea, petitioner expressly waived any defect in the Article 32 investigation and agreed that the charges were properly referred to trial. Pet. App. 7a-8a. Petitioner then pleaded guilty at the court-martial, where he was represented by Shelburne. Petitioner did not raise a Sixth Amendment claim there. *Id.* at 8a-9a.

On appeal, the NMCCA affirmed. Among others, it rejected petitioner's claims that the convening authority's pretrial interference with Shelburne violated petitioner's right to due process and Sixth Amendment right to counsel. 2008 WL 3540244, at *2-*3.

The CAAF granted review on the sole question of whether petitioner was denied his Sixth Amendment right to counsel and then affirmed the N-MCCA. The CAAF held first that the convening authority violated petitioner's Article 27 rights by refusing to recognize Shelburne as petitioner's counsel until the military judge ruled that Shelburne had been properly detailed as petitioner's counsel. Pet. App. 11a-13a. The CAAF found that the convening authority's action had harmed petitioner because Shelburne did not have an opportunity to prepare for the Article 32 hearing, he did not participate in the earlier plea negotiations, and he did not participate in a pretrial scheduling conference. Pet. App. 13a-15a.

The CAAF then considered whether the Article 27 violation violated petitioner's Sixth Amendment right to counsel and whether the error was structural. Pet. App. 15a. The CAAF stated that a structural error occurs when a court has difficulty assessing the impact of the error or the error is so fundamental so as to make harmlessness irrelevant. *Ibid.* (citing *United States* v.

Gonzalez-Lopez, 548 U.S. 140, 149 n.4 (2006), and *United States* v. *Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008)).

The CAAF held that the error was not structural. It stressed that petitioner had the services of Snow throughout the proceedings, that petitioner agreed to waive any defect in the Article 32 investigation in his plea agreement, and that Shelburne ultimately represented petitioner during the later plea negotiations and at trial despite his exclusion from the earlier plea negotiations. The court concluded that the convening authority's actions were capable of harmless-error assessment, and that they were not so fundamental as to make harmless-error analysis irrelevant. Pet. App. 15a-16a.

The CAAF then assumed, without deciding (Pet. App. 17a), that a Sixth Amendment violation had occurred, but found that the error was harmless beyond a reasonable doubt. *Id.* at 17a-18a (citing *Chapman* v. *California*, 386 U.S. 18, 24 (1967)). The CAAF emphasized that Shelburne represented petitioner throughout the trial and post-trial proceedings and that he negotiated a plea agreement for petitioner despite his exclusion from the initial negotiation sessions. Further, the CAAF stated, petitioner had shown no harm from Shelburne's exclusion from the initial scheduling conference, and he did not claim that his guilty plea was involuntary or otherwise deficient. *Id.* at 16a-18a.

Judge Ryan concurred in the result. She agreed that the convening authority's actions violated petitioner's rights under military law and that petitioner was not prejudiced by the error, but she disagreed with the majority's assumption that there was a constitutional error. Instead, she would have held that no Sixth Amendment error occurred because petitioner was represented by

one competent counsel at all times despite the interference with Shelburne. Pet. App. 18a-23a.

ARGUMENT

Petitioner contends (Pet. 3-15) that the military's interference with Shelburne's representation during various pretrial stages of the prosecution constituted a structural violation of petitioner's Sixth Amendment right to counsel that requires automatic reversal of his conviction.[2] There is no merit to that claim, and it does not warrant further review.

1. As an initial matter, petitioner's Sixth Amendment claim is foreclosed by his unconditional guilty plea. Under this Court's decision in *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973), a guilty plea constitutes "a break in the chain of events which has preceded it in the criminal process." Accordingly, a defendant who pleads guilty "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a defendant seeking to raise such "antecedent constitutional violations," *id.* at 266, is limited to attacks on the

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[2] The petitioner (Pet. 3) raises only a Sixth Amendment claim, and he does not assert any independent violation of the UCMJ. Nor could petitioner raise a statutory claim. 28 U.S.C. 1259 limits this Court's review to "[d]ecisions" of the CAAF. The CAAF granted review only on petitioner's Sixth Amendment claim (Pet. App. 2a), and decided that issue only.

In any event, consideration of the independent violation of the UCMJ would yield the same result. The test for non-constitutional error is "'whether the error itself had substantial influence' on the findings." See *United States* v. *Walker*, 57 M.J. 174, 178 (C.A.A.F. 2002) (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946)). That test would be easily met given that the more stringent harmless error test for constitutional errors was met in this case.

knowing, voluntary, and intelligent character of the guilty plea, and when a plea is counseled, he must ordinarily establish that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970). Because petitioner does not allege ineffective assistance of counsel in connection with his guilty plea, that plea bars any effort to challenge his claim of an antecedent violation in the deprivation of counsel at earlier proceedings. See *Fields* v. *Attorney Gen.*, 956 F.2d 1290, 1296 (4th Cir.) (claim of denial of counsel at a critical stage was barred by the defendant's counseled plea of guilty; "[H]is claim concerns an alleged constitutional deprivation that occurred prior to Fields' guilty plea and is unrelated to it. *Tollett* therefore bars this claim."), cert. denied 506 U.S. 885 (1992); *Trahan* v. *Estelle*, 544 F.2d 1305, 1309 (5th Cir. 1977) ("[S]ince Trahan pleaded guilty with at least some advice from court appointed counsel, any question with reference to his uncounselled meeting with the district attorney, two or three days previously, was not open to attack.").

2. In any event, petitioner's claim lacks merit even if the Court were to look past the effect of the guilty plea. First, the CAAF majority's assumption that a Sixth Amendment violation occurred was unwarranted; no Sixth Amendment violation occurred in this case. A defendant's right to counsel under the Sixth Amendment includes the right to have counsel present at all critical stages of the criminal proceedings. *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2085 (2009); *United States* v.

Cronic, 466 U.S. 648, 659 (1984).[3] The right to counsel also includes a right to counsel of choice, but only for those defendants who retain their own counsel. See *United States* v. *Gonzalez-Lopez*, 548 U.S. 140 (2006). A defendant who has counsel appointed for him does not have a right to counsel of choice. See *id.* at 151; *Montejo*, 129 S. Ct. at 2084; *United States* v. *Basham*, 561 F.3d 302, 324 (4th Cir. 2009), petition for cert. pending, No. 09-617 (filed Nov. 23, 2009). Further, the constitutional right to appointed counsel is limited to one attorney; a defendant has no constitutional right to the appointment of a second or an additional attorney for the accused. See, *e.g.*, *Riley* v. *Taylor*, 277 F.3d 261, 273 n.1, 306 (3d Cir. 2001); *Bell* v. *Watkins*, 692 F.2d 999, 1008-1009 (5th Cir. 1982), cert. denied, 464 U.S. 843 (1983). A federal statute may provide for the appointment of an additional counsel for the accused. See 18 U.S.C. 3005 (providing for the appointment of an additional counsel in a capital case). But when an accused is denied his statutory right to additional counsel, that is only a statutory violation, not a Sixth Amendment violation. *United States* v. *Casseus*, 282 F.3d 253, 256 (3d Cir.) (violation of Section 3005), cert. denied, 537 U.S. 852 (2002); *United States* v. *Williams*, 544 F.2d 1215, 1218 (4th Cir. 1976) (same).

Here, petitioner was represented by appointed counsel Snow in addition to Shelburne, and petitioner does not claim either that the military violated his right to Snow's services, or that Snow rendered ineffective assis-

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[3] The Court may assume that plea negotiations and the preliminary hearings in this case constitute "critical stages" for right-to-counsel purposes. See *Coleman* v. *Alabama*, 399 U.S. 1, 9-10 (1970) (preliminary hearing); *Williams* v. *Jones*, 571 F.3d 1086, 1090-1091 (10th Cir. 2009) (plea negotiations).

tance of counsel.[4] Accordingly, petitioner was afforded his Sixth Amendment right to counsel at all critical stages. Therefore, the military's violation of petitioner's right to additional counsel Shelburne under military law was irrelevant for Sixth Amendment purposes.

Even if there were a Sixth Amendment violation in this case, the error was harmless. First, no structural error occurred here. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991). When properly preserved, a structural error is prejudicial per se and requires reversal of the defendant's conviction. *Washington* v. *Recuenco*, 548 U.S. 212, 218-219 (2006). A structural error is rare; most constitutional errors are subject to harmless error review. See *ibid.*; *Neder* v. *United States*, 527 U.S. 1, 8 (1999).

A violation of a defendant's Sixth Amendment right to counsel is a structural error if the error "affected—and contaminated—the entire criminal proceeding." *Satterwhite* v. *Texas*, 486 U.S. 249, 257 (1988). In addition, a complete denial of the right to retained counsel of choice at trial is prejudicial per se and requires reversal of the defendant's conviction. *Gonzalez-Lopez*, 548 U.S. at 148-151. But a violation of the right to counsel at pretrial proceedings alone does not affect the entire criminal trial, so an error in that context is a non-structural one that is tested for harmlessness. See, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (preliminary hear-

[4] Petitioner notes (Pet. 3, 12-13) that Snow was relatively inexperienced compared to Shelburne, but Snow's lack of experience would not have justified a presumption of ineffectiveness under the Sixth Amendment. See *Cronic*, 466 U.S. at 665. Nothing in the record would support a claim that Snow was ineffective in this case.

ing); *Ditch* v. *Grace*, 479 F.3d 249, 253-255 (3d Cir.) (preliminary hearing), cert. denied, 552 U.S. 949 (2007); *United States* v. *Lott*, 433 F.3d 718, 722-724 (10th Cir.) (evidentiary hearing), cert. denied, 549 U.S. 851 (2006); *United States* v. *Owen*, 407 F.3d 222, 226-229 (4th Cir. 2005) (arraignment), cert. denied, 546 U.S. 1098 (2006). Because the errors alleged in this case occurred only at pretrial stages of petitioner's prosecution and did not affect the entire criminal proceeding, they were non-structural errors that the CAAF correctly tested for harmlessness.[5]

A constitutional error is harmless if the government establishes beyond a reasonable doubt that the error did not contribute to the verdict obtained. *Satterwhite*, 486 U.S. at 256; *Chapman* v. *California*, 386 U.S. 18, 24 (1967). In evaluating harmlessness, courts consider many factors, including whether, and to what extent, the government obtained any evidence against the defendant at the proceeding in which counsel was denied, *Coleman*, 399 U.S. at 10, the strength of the government's untainted evidence, *Chapman*, 386 U.S. at 25-26; *Ditch*, 479 F.3d at 255-257, and whether counsel had sufficient time to prepare for trial. *Owen*, 407 F.3d at 229.

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[5] Petitioner's reliance (Pet. 10-11) on *Gonzalez-Lopez* is misplaced for two reasons. First, *Gonzalez-Lopez*'s holding that a denial of the right to counsel of choice is not subject to harmless-error review does not apply here because petitioner was represented by appointed counsel, not retained counsel. Second, in *Gonzalez-Lopez*, the trial court disqualified the defendant's retained counsel before trial and that counsel was therefore absent from the trial and sentencing proceedings. In marked contrast, both counsel represented petitioner during the later pretrial stages, the plea negotiations, and the entry of the plea.

Here, the alleged violations that occurred at the pretrial stages of the proceedings had no effect on petitioner's subsequent decision to plead guilty. The denial of petitioner's motion for a continuance of the Article 32 hearing to allow Shelburne time to prepare was harmless because petitioner ultimately agreed that the case was properly referred to trial and he expressly waived any defect in the Article 32 investigation as part of his plea agreement. Shelburne's exclusion from an initial pretrial scheduling session was an insubstantial error that did not affect the outcome. Further, the convening authority's initial refusals to enter into plea negotiations with Shelburne was cured when he subsequently did negotiate with Shelburne, which led to the plea agreement between the convening authority and petitioner. Petitioner has not claimed that his guilty plea was involuntary or that Shelburne had insufficient time to negotiate a favorable plea for him. Indeed, petitioner raised no Sixth Amendment claim at the court-martial where he pleaded guilty. Finally, petitioner was represented by Snow at all critical stages of the prosecution.[6]

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[6] Petitioner's fact-bound (Pet. 11-14) disagreement with the CAAF's harmless-error ruling warrants no further review. The CAAF expressly applied the *Chapman* harmless-error test (Pet. App. 17a), and it is primarily the task of a court of appeals, not this Court, to conduct harmless-error review. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 504 (1987) (noting that this Court conducts harmless-error review "sparingly").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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