IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellant	)	BRIEF ON BEHALF OF APPELLANT
v.	)	Crim.App. No. 201600015
James A. HALE III, Staff Sergeant (E-6) U.S. Marine Corps Appellee	)	USCA Dkt. No. 17-0537/MC

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

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Issue Certified

WHAT IS THE CORRECT TEST WHEN ANALYZING AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BASED UPON A CONFLICT OF INTEREST NOT INVOLVING MULTIPLE REPRESENTATION[?]

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and more than one year of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2012).

Statement of the Case

A panel of officer and enlisted members sitting as a general court-martial convicted Appellee, contrary to his pleas, of one specification of failing to obey a lawful general order, one specification of wrongful use of an anabolic steroid, two specifications of rape, one specification of aggravated assault, one specification of adultery, one specification of kidnapping, and one specification of indecent language, in violation of Article 92, UCMJ, 10 U.S.C. § 892 (2006), and Articles 112a, 120, 128, and 134, UCMJ, 10 U.S.C. §§ 912a, 920, 928, 934 (2012). The Members sentenced Appellee to twenty-six years of confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the

punitive discharge, ordered the sentence executed.

The Record was docketed with the lower court on May 2, 2016. Appellee assigned seven errors, including a claim that he received ineffective assistance of counsel due, in part, to the lead Trial Defense Counsel's conflict of interest.

The lower court set aside the findings and sentence. *United States v. Hale*, No. 201600015, 2017 CCA LEXIS 364 (N-M. Ct. Crim. App. May 31, 2017).[1] On July 31, 2017, the United States filed the Judge Advocate General's Certificate for Review of the lower court's decision.

Statement of Facts

A. Appellee was represented at all times by at least two Military Defense Counsel during his court-martial for raping and kidnapping SK.

In May 2014, the United States referred Charges against Appellee alleging, *inter alia*, that he committed an aggravated assault on SK, kidnapped her, and raped her. (J.A. 170-76.)

1. Appellee was represented by Major P and Captain KC. Captain JS joined as Individual Military Counsel. Appellee filed written notice of mixed pleas, then released Major P.

At both the Preliminary Hearing and later arraignment, Appellee was represented by Marine Corps Major (Maj) P and Marine Corps Captain (Capt) KC. (J.A. 177, 204-06.) At the session of trial following arraignment, Marine Corps

[1] The Court issued a corrected version of the Opinion on June 5, 2017.

Capt JS first represented Appellee on the Record as Individual Military Counsel.[2] (J.A. 207-08.)

With Maj P as lead counsel, Appellee filed seven pretrial motions, including an unsuccessful Motion to exclude evidence of his prior sexual assault of his ex-wife, Air Force Technical Sergeant (TSgt) AR. (J.A. 195-96, 412-28.) After the Motion to exclude evidence was denied in October 2014, Appellee submitted written notice of forum selection and of mixed pleas. (J.A. 429-30.) The notice included Guilty pleas to Specifications of conspiring to possess drugs, pandering the Victim, and soliciting the Victim to possess drugs with the intent to distribute. (J.A. 170-76, 429-30.)

In late October, Appellee released Maj P. (J.A. 209-12, 446-47.)

2. Represented by Captains KC and JS, Appellee amended his pleas and filed sixteen additional pretrial motions. As a result, the United States dismissed several Specifications, including one to which Appellee initially planned to plead Guilty.

Captains KC and JS requested a continuance after Maj P's release. (J.A. 213, 431-44.) Appellee amended his pleas and entered pleas of Not Guilty to all Charges. (J.A. 217.)

Captains KC and JS filed sixteen more pretrial motions, including a successful Motion to suppress evidence from a search of Appellee's cell phone.

[2] Captain JS had not yet promoted from First Lieutenant at this appearance.

(J.A. 196-97, 465-70.) As a result, the United States withdrew and dismissed the Specifications based on evidence from Appellee's cell phone, including the Conspiracy specification to which Appellee entered a written guilty plea. (J.A. 170-76, 214, 471-74.)

Captains KC and JS represented Appellee at trial in March 2015, through the first submission of clemency matters in August 2015. (J.A. 218-19, 370-80.)

3. Trial Counsel included Lieutenant Colonel CT and two Assistant Trial Counsel.

Several months before trial, Lieutenant Colonel (LtCol) CT became lead Trial Counsel. (J.A. 209.) At the time, he was Regional Trial Counsel at Camp Pendleton. (J.A. 445.) The two Assistant Trial Counsel included Capt MF from Marine Corps Air Station Miramar. (J.A. 218, 448-49.) A Government Highly Qualified Expert (GHQE) maintained contact with the Victim through the pretrial process. (J.A. 220, 278-79.)

B. The Victim's testimony was corroborated by medical, DNA, video, and cellphone evidence, testimony of outcry witnesses, and Appellee's admissions. Ten years before, Appellee also forcibly sodomized his then-wife.

The Victim, a crack-cocaine addict and prostitute, testified that in August 2013, Appellee bought drugs from her and kidnapped her at gunpoint in his truck, then drove her to the Anchorage neighborhood of Spenard where he forced her to perform oral sex and raped her. (J.A. 247-67.) Afterward, he forced her out of the

truck, said "Welcome to the HIV world, whore," and drove away with her phone and identification. (J.A. 265-68.)

The Victim ran to a nearby house, where the residents saw that she was in distress. (J.A. 269, 285.) The Victim reported Appellee's crimes and received a medical examination, revealing injuries on her back. (J.A. 270-74, 287, 366, 452-56.) Analysis of her vaginal swabs revealed Appellee's DNA. (J.A. 286, 367-69.)

Anchorage Police Detective Sarber used phone records and security video to identify and arrest Appellee. (J.A. 215, 364-65, 456-58, 461, 475.) Appellee admitted meeting the Victim for prostitution, keeping a loaded pistol in his truck, driving the Victim to Spenard with a pistol on his truck's dashboard, and having sex with her. (J.A. 458, 461-62.) But Appellee claimed that he drove away with the Victim's phone and identification after they argued over her fee. (J.A. 462.)

Detective Sarber found the pistol in Appellee's truck. (J.A. 361-62, 463.) Contrary to Appellee's claim to Detective Sarber that he sent "five or six" text messages to the Victim before and after meeting her (J.A. 461), phone records showed they exchanged 200 messages between August 19 and 25, 2013. (J.A. 363.)

Appellee's ex-wife, TSgt AR, testified that in 2003, Appellee forcibly sodomized her until he ejaculated, at which point feces and blood came out of her anus. (J.A. 288-89.) As TSgt AR cleaned herself in the bathroom, Appellee told

her that he had to show her that she could not resist him. (J.A. 290.)

C. The Defense mounted a dual-pronged approach: claiming prosecutorial misconduct; and arguing the Victim fabricated allegations after a fee dispute.

1. Trial Defense Counsel made numerous objections, *voir dired* the Military Judge, complained about the GHQE's actions, and moved mid-trial to dismiss for prosecutorial misconduct.

Before opening statements, Capt KC notified the Military Judge the United States had disclosed text messages between the GHQE and the Victim, and requested additional time to review those messages and consult with her supervisors. (J.A. 220.)

Captain KC objected eight times to Detective Sarber's initial testimony during the United States' case-in-chief.[3] (J.A. 226-230.) After the first morning of trial testimony, Capt JS *voir dired* the Military Judge about his understanding of judicial ethics canons, approach to motions hearings, his perceptions of his own "facial expressions" and "body language," and whether he was frustrated with Capt KC. (J.A. 231-36.)

Before testimony began on the second day of trial, March 25, 2015, based on the text-message communications between the Victim and the GHQE, Capt KC alleged prosecutorial misconduct and moved to dismiss Charges related to the

[3] As noted below, Trial Defense Counsel objected no fewer than 105 times at trial, including at least eighty-six objections by Capt KC. (J.A. 106.)

Victim. (J.A. 237, 41.)

During Trial Counsel's argument on the Motion, Capt KC cried, prompting Capt JS to request and receive a recess. (J.A. 284, 386.)

2. The Defense tried to impeach the Victim's credibility and reliability, and to demonstrate Technical Sergeant AR's bias.

The Defense characterized the Victim as a woman who "knows how to hustle" to survive on the streets, suffers from mental illness, and lies and manipulates. (J.A. 221-22, 330-38.) The Defense focused on the Victim's untrustworthiness and mental illness to show that she fabricated her allegation. (J.A. 224-25, 317-18, 327-28.)

Captain KC cross-examined the Victim for more than four hours. (J.A. 275, 282-84.) She elicited evidence of the Victim's drug use, history of mental illness, and—as possible motive to fabricate her allegation—her pending removal from her housing shelter. (J.A. 276-77, 280.) She also asked about the Victim's communications with the GHQE. (J.A. 278-79.) In addition, the Defense presented expert testimony that the Victim's history of traumatic brain injury and post-traumatic stress disorder could impact her ability to accurately perceive and recall events. (J.A. 293-302.) The expert also testified regarding the Victim's antisocial personality, a condition associated with deceitfulness and manipulation. (J.A. 303-308.)

To attack the Victim's truthfulness, the Defense presented testimony from

the Victim's ex-husband, former mother-in-law, and the father of one of her sons, each of whom testified to the Victim's lack of honesty. (J.A. 309-11.)

To show TSgt AR's bias, the Defense elicited evidence that contrary to her claim, she was aware of the allegations against Appellee when she spoke with investigators. (J.A. 288-90.)

3. Captain JS made several objections to Trial Counsel's closing argument. Captain KC objected four times during Trial Counsel's rebuttal. Captain JS re-raised objections after rebuttal and unsuccessfully moved for a mistrial alleging prosecutorial misconduct.

After Trial Counsel's closing argument, outside the presence of the Members, Capt JS objected to "the first 40 to 45 minutes" of Trial Counsel's argument as "appealing to the passions of the members." (J.A. 312.) He also objected to improper spillover argument, burden shifting, comment on Appellee's silence, suggestion of unethical diagnosis by the Defense Expert, and objected that Trial Counsel was asking the Members to disregard several instructions. (J.A. 313-16.) The Military Judge overruled these objections. (J.A. 315-16.)

Captain KC's argument on findings reiterated the Defense theory. (J.A. 316-45.) During Trial Counsel's rebuttal argument, the Military Judge overruled Capt KC's four objections. (J.A. 346-47.) After rebuttal, Capt JS re-raised objections to the rebuttal argument, arguing unfair portrayal of the United States as a loser if Appellee is found not guilty, improper characterization of the Defense

argument, and improper appeals to the Members' passions. (J.A. 348-49.)

While the Members deliberated, Capt JS moved for a mistrial "based on our previous argument" of prosecutorial misconduct by improper argument; the Military Judge denied the Motion. (J.A. 350-51.)

D. The Members reached mixed Findings and awarded Appellee, *inter alia*, twenty-six years of confinement.

The Members convicted Appellee of Kidnapping, Aggravated Assault, two Specifications of Rape, and Communicating a Threat, as well as Violating a Lawful Order, Wrongful use of an Anabolic Steroid, and Adultery. (J.A. 352.) They acquitted him of Pandering and of Solicitation of wrongful possession of Oxycontin and Vicodin. (J.A. 352.) For sentencing, the Military Judge merged one Rape specification with Adultery, and Appellee faced a maximum sentence including confinement for life without the possibility of parole. (J.A. 355, 357, 476.)

Appellee presented extenuation and mitigation evidence in multiple forms, including: testimony from another of Appellee's ex-wives, military and civilian friends, family, psychologist, and ex-girlfriend; expert testimony regarding Appellee's rehabilitative potential; and an unsworn statement from Appellee. (J.A. 190-91, 194, 356.)

Trial Counsel argued for a sentence including "confinement from 40 to 45 years." (J.A. 358.) Captain JS argued for "8 to 10 years." (J.A. 359.) The

Members sentenced Appellee to, *inter alia*, twenty-six years of confinement. (J.A. 360.)

E. Appellee's post-trial submissions alleged prosecutorial misconduct and unlawful command influence. At a Convening Authority-ordered post-trial hearing, Captain KC denied any conflict of interest. In a later clemency request, Civilian Defense Counsel submitted an affidavit from Captain KC's husband.

After adjournment, Trial Defense Counsel drafted a Motion alleging unlawful command influence and prosecutorial misconduct by Trial Counsel. (J.A. 477-99.) They did not file the Motion because, Capt JS testified at the later post-trial hearing, *see infra*, they "didn't want the trial judge to make findings of fact as to what happened" that would bind the appellate court. (J.A. 388-90.) Instead, Capt JS wrote an affidavit raising the same allegations and emailed it to the Military Judge "for attachment to the record." (J.A. 500-02.)

Captain KC also attached Capt JS's affidavit to Appellee's request for clemency. (J.A. 370-80.) In response, the Convening Authority ordered a hearing under R.C.M. 1102 to inquire into "[p]rosecutorial misconduct and unlawful command influence raised" in the Clemency Petition. (J.A. 381.)

1. At the post-trial hearing, Civilian Defense Counsel raised the matter of Captain KC's husband and his duties.

At the post-trial hearing, Appellee was represented by Civilian Defense Counsel. (J.A. 383.) The post-trial Military Judge stated: "This hearing is simply going to flesh out the facts that have been raised by Captain [KC] in her [R.C.M.]

1105 submission." (J.A. 382-83.) The Military Judge summarized a pre-hearing R.C.M. 802 conference where the parties discussed that:

> Captain [KC's] husband, Captain [CC], . . . had worked for Lieutenant Colonel [CT], and [the] defense indicated that his fitness report performance evaluation was critical to the presentation of their theory that somehow [LtCol CT] had taken retaliatory action against Captain [CC] in his evaluation, and that serves as the basis for unlawful command influence or prosecutorial misconduct.

(J.A. 384.)

2. Captain KC testified in the post-trial hearing that she felt her interactions with Lieutenant Colonel CT and her husband's duties were not worthy of raising in a motion at trial.

Captain KC testified she had known Trial Counsel, LtCol CT, "for several years." (J.A. 401.) Capt KC testified that when she was first detailed to Appellee's case, Capt KC's husband worked as Staff Judge Advocate and Deputy Staff Judge Advocate at Marine Corps Air Station Miramar. (J.A. 393.) In August 2014, her husband changed billets and moved to Camp Pendleton, where he became a trial counsel whose Reviewing Officer, for performance evaluation purposes, was LtCol CT. (J.A. 393.) This transfer occurred during Capt KC's involvement with Appellee's case. (J.A. 393-94.)

Captain KC said she did not remember if she discussed her husband's rating situation with Appellee, but agreed with Civilian Defense Counsel that she never asked Appellee "to execute a writing saying that he was perfectly fine with the notion that [her] husband was part of a prosecution, not of [his] case, but generally

in the prosecution." (J.A. 394.) Asked by Civilian Defense Counsel "Would [her husband's employment] not have been something of significance," Capt KC responded: "I didn't feel so, no." (J.A. 394.)

Captain KC also testified about a conversation she had with LtCol CT where he noted that "on a number of occasions" he had felt "awkward" or that "he felt like" Capt KC "was skeptical of him." (J.A. 396.) Lieutenant Colonel CT theorized that this was either because Capt KC had "bad experiences with the prosecutor" in prior cases, or alternatively because she had "a general distrust of the government and [felt] the commands [were] trying to be out to get [her] Marines." (*Id*.) She recalled he told her, "Remember, you're coming back to the government some time." (J.A. 396.) She reflected that this made her feel "annoyed" and "scrutinized." (J.A. 396-97.)

As to whether her interactions with Trial Counsel affected her representation of Appellee, Capt KC said: "I represented my client to the best of my ability." (J.A. 399.) Asked whether she thought "a motion to relieve" LtCol CT at trial, based on allegations Defense was raising post-trial, would have been "frivolous," she said: "[Y]es, I thought they were not significant at the time, yes." (J.A. 400.)

3. Lieutenant Colonel MM testified as to Captain KC's detailing after the trial to a Victim's Legal Counsel billet.

Lieutenant Colonel MM testified that, in her capacity as Officer-in-Charge of the Legal Services Support Team at Marine Corps Air Station Miramar (LSST

Miramar), she was responsible for assigning Capt KC, among the other counsel at LSST Miramar, to billets within the LSST. (J.A. 402-03.) Lieutenant Colonel MM explained that Capt KC was detailed to a Victim's Legal Counsel billet after the *Hale* trial, and not to Capt MF's trial counsel billet at Miramar. (J.A. 403-04.)

4. Captain KC's husband, Captain CC, did not testify. Civilian Defense Counsel submitted an affidavit from him in Appellee's final Clemency Petition.

Neither party called Captain CC to testify at the post-trial hearing.

Instead, Civilian Defense Counsel attached an October 2015 Affidavit from him in a second request for clemency submitted after the post-trial hearing. (J.A. 405-11.)

Captain CC's Affidavit stated that during trial: (a) he informed his wife of his concerns having LtCol CT as a Reviewing Officer "since he was involved in a contested case with her"; and, (b) when his wife "informed me that she was considering raising the issue of prosecutorial misconduct against [LtCol CT and the GHQE,] I told my wife that if she raised the issue I would probably have to ask that someone other than LtCol CT serve as my [Reviewing Officer]." (J.A. 408.) Nothing in the Record supports that Capt CC or any party requested that LtCol CT be removed from his reporting officer relationship with Capt CC.

Captain CC also wrote that he believed "the way LtCol CT was acting" in an April 2015 encounter "was based on the fact that my wife had raised the issue of

misconduct against him and [the GHQE]" during the verbal motion on the second day of trial. (J.A. 408.)

Nothing in the Record or Affidavit supports that Capt CC told his wife that he believed this encounter or any other behavior was actually influenced by the Defense's prosecutorial misconduct Motion.

Summary of Argument

The Supreme Court and this Court have only dispensed with the *Strickland v. Washington*, 466 U.S. 668 (1984), requirement that a defendant demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," in cases where actual or constructive denial of counsel occurs such that prejudice "is so likely that case-by-case inquiry into prejudice is not worth the cost," or in cases of multiple concurrent representation where the defendant shows an actual conflict of interest adversely affected his lawyer's performance. Such is not the case here, where one Detailed Defense Counsel was married to a subordinate of the Trial Counsel, at least two Military Counsel represented Appellee throughout trial, a *DuBay* hearing was held post-trial, and no actual conflict involving concurrent representation exists. This Court should reject any attempt to diminish *Strickland's* clear requirement for defendants to affirmatively demonstrate prejudice.

Even if this Court removes the *Strickland* requirement in a case where no

concurrent representation exists, this Court should correct the lower court's misapplication of *Cuyler*, which failed to find a conflict of interest that adversely affected performance in executing a trial strategy.

Finally, because the lower court acted with an incorrect understanding of the law in *Strickland*, *Cuyler*, and the established and binding legal tests that govern counsel conflicts of interest, the lower court's remedy of disapproving the Findings and Sentence despite its incorrect conflicts analysis exceeded its authority under Article 66(c), UCMJ, and this Court's decision in *Nerad*.

Argument

AN ACCUSED ALLEGING HIS DEFENSE COUNSEL WAS CONFLICTED BECAUSE HER HUSBAND WAS A SUBORDINATE OF TRIAL COUNSEL MUST DEMONSTRATE *STRICKLAND* PREJUDICE TO GAIN RELIEF FROM THE CONFLICT. EVEN EXPANDING *CUYLER*'S EXCEPTION OUTSIDE CONCURRENT REPRESENTATION, AN ACTUAL CONFLICT OF INTEREST EXISTS ONLY WHERE A POTENTIAL CONFLICT CAUSES AN ADVERSE EFFECT ON PERFORMANCE IN EXECUTING A TRIAL STRATEGY. AND THE LOWER COURT EXCEEDED ITS AUTHORITY BY DISAPPROVING FINDINGS AFTER AN INCORRECT AND INCOMPLETE ARTICLE 66(c) REVIEW.

A. The standard of review is *de novo*.

This Court reviews *de novo* claims of ineffective assistance, including those alleging conflicts of interest. *United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005); *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004).

B. Whether a counsel's performance is constitutionally effective in light of her spouse's employment interests is properly tested for prejudice under *Strickland.* It is not a circumstance where counsel is denied or where inquiry into prejudice is not worth the cost.

1. Relief from the burden to demonstrate prejudice under *Strickland* is unavailable beyond the limited circumstance of counsel actively representing conflicting interests.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court held that a defendant alleging a violation of his Sixth Amendment right to counsel must demonstrate a two-prong test that requires establishing (1) his counsel's performance falls below an objective standard of reasonableness, and (2) the defendant suffers prejudice as a result. To establish prejudice, the defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The prejudice component of *Strickland* reflects the purpose of the Sixth Amendment guarantee of counsel, which is to ensure that the defendant has the assistance of counsel necessary to justify reliance on the proceeding. *Id*. at 692-93.

The Supreme Court, however, has recognized limited exceptions to *Strickland*. The first is where, unlike here, "assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Mickens v. Taylor*, 535 U.S. 162, 166 (2002) (citing *United States v. Cronic*, 466 U.S. 648, 658-59 (1984)). In such case, a court need not inquire as to prejudice. *Id*.

The second and third exceptions to *Strickland* are employed where, unlike

here, defendant alleges conflicts of interest from "multiple concurrent representation." *Mickens*, 535 U.S. at 175 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 348-49 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978)). These are the "*Holloway* and *Sullivan* (*Cuyler*) exceptions" to *Strickland*. *Mickens*, 535 U.S. at 176.

In those cases, a defendant's burden of proof is affected by whether counsel timely objects to the multiple concurrent representation. If counsel objects, *Holloway* requires automatic reversal unless the trial court found no conflict. *Mickens*, 535 U.S. at 168 ("*Holloway* . . . creates an automatic reversal rule only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict."). On the other hand, where no one timely objects to counsel's multiple concurrent representation of conflicting interests, *Cuyler* holds that "a defendant must demonstrate that 'a conflict of interest actually affected the adequacy of his representation.'" *Id*. (quoting *Cuyler*, 446 U.S. at 348-49); *id*. at 173 (noting that "the *Sullivan* standard . . . requires proof of effect upon representation but (once such effect is shown) presumes prejudice").

2. <u>In *Mickens*, the Supreme Court cautioned against applying the *Cuyler* presumption to conflicts not involving multiple concurrent representations. Other Federal circuit courts have heeded this warning</u>.

Significantly, the Supreme Court cautioned against "unblinkingly"

extending the *Cuyler* exception beyond the context of multiple concurrent representations, and on to other kinds of alleged attorney ethical conflicts. *Mickens*, 535 U.S. at 174. Noting that some federal courts applied *Cuyler* to "counsel's personal or financial interests, including a book deal," "a job with the prosecutor's office," "the teaching of classes to Internal Revenue Service agents," "entanglement with the prosecutor," and "fear of antagonizing the trial judge," the *Mickens* Court dismissed that such conflicts were constitutionally based: "The language of *Sullivan* itself does not clearly establish, or indeed even support, such expansive application." *Id*. at 174-75.

As *Mickens* explained, "[t]he purpose of [the Supreme Court's] *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is . . . to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure indication of the defendant's Sixth Amendment right to counsel." *Id*. at 176. Those exceptions responded to "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Id*. at 175.

But this exception is "narrow." *See Moss v. United States*, 323 F.3d 445, 461 (6th Cir. 2003). The Supreme Court never expanded it beyond—and has strongly suggested it is limited to—cases that, like *Cuyler v. Sullivan* itself, involve joint or simultaneous representation of multiple defendants. *See Mickens*, 535 U.S.

at 175-76. And in *Mickens*, the Supreme Court noted that cases of prior representation do not present difficulties comparable to those of concurrent representation. *See id.* at 175 (noting that the Federal Rules of Criminal Procedure, thus, treat them differently).

Accordingly, Federal circuit courts have largely taken care to not extend *Cuyler* beyond the joint- or simultaneous-representation context.[4]

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[4] *See, e.g., United States v. Mota-Santana*, 391 F.3d 42 (1st Cir. 2004) (declining to extend *Mickens* beyond multiple representation, applying *Strickland*); *United States v. DeCologero*, 530 F.3d 36, 77 n.24 (1st Cir. 2008) ("Supreme Court in *Mickens* expressly did not reach . . . whether [Sullivan's] 'actual conflict' standard . . . should apply to cases of successive representation, such as this one. Like the *Mickens* Court, we reserve this question for another day . . . .") (citation omitted); *Beets v. Collins*, 65 F.3d 1258, 1270-1271 (5th Cir. 1995) ("[O]nly in the multiple representation context is . . . the risk of harm high enough to employ a near-per se rule of prejudice."); *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 844 (6th Cir. 2017) ("This Court . . . 'has consistently held that, for § 2254 cases, the [*Cuyler*] standard does not apply to claims of conflict of interest other than multiple concurrent representation; in such cases, including successive representation, the *Strickland* standard applies.'") (internal citation omitted); *Dansby v. Hobbs*, 766 F.3d 809, 837 (8th Cir. 2014) ("This court has found 'much to be said in favor of holding that [*Cuyler*'s] rationale favoring the "almost per se rule of prejudice" does not apply outside the context of a conflict between codefendants or serial defendants.'") (quoting *Caban v. United States*, 281 F.3d 778, 782 (8th Cir. 2002)); *Hunt v. Virga*, 651 F. App'x 713, 715 (9th Cir. 2016) ("It is not clearly established that the *Cuyler* framework applies to instances in which counsel's purported conflict of interest was personal rather than based on improper joint representation."); *Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007)); *Montoya v. Lytle*, 53 F. App'x 496, 498 (10th Cir. 2002) (the Supreme Court "has never extended the *Cuyler* standard to cases involving successive, rather than multiple, representation"); *Downs v. Fla. Dep't of Corr.*, 738 F.3d 240, 265 (11th Cir. 2013) ("Although the *Mickens* observation was dicta, this Court has expressly agreed with *Mickens*, stating: 'there is no Supreme Court decision

And the Supreme Court this year held that even where counsel fails to object to a structural error, automatic reversal is not always required: a defendant must still demonstrate *Strickland* prejudice. *Weaver v. Massachusetts*, No. 16-240, 137 S. Ct. 1899, 1908-13 (June 22, 2017); *see also id*. at 1915 (Alito, Gorsuch, JJ, concurring) (defendants "relieved . . . of the obligation to make this affirmative showing [of *Strickland* prejudice] in only a very narrow set of cases in which the accused has effectively been denied counsel altogether" where "the cost of litigating their effect . . . is unjustified."), and *id*. at 1914 (Thomas, Gorsuch, JJ, concurring) (concurring with Justice Alito's concurring opinion). That is: presumptive prejudice is permitted in only a "very narrow set of cases in which the accused has effectively been denied counsel altogether" in the Sixth Amendment context. *Id*.

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holding that any kind of presumed prejudice rule applies outside the multiple representation context. [*Cuyler*] itself did not involve any other context.'") (quoting *Schwab v. Crosby*, 451 F.3d 1308, 1327 (11th Cir. 2006)); *United States v. Gray-Burriss*, 791 F.3d 50, 63 (D.C. Cir. 2015) ("This court has been careful, however, to reject defendants' attempts to force their ineffective assistance claims into the 'actual conflict of interest' framework . . . and thereby supplant the strict *Strickland* standard with the far more lenient [*Cuyler*] test." (ellipsis in original) (internal quotation marks omitted)).

3. This Court also has heeded *Mickens'* warning, and should likewise decline to further diverge from *Strickland* by expanding *Cuyler* beyond the multiple concurrent representation context.

a. The purpose of the Sixth Amendment is a fair trial—only in the *Cuyler* multiple concurrent representation situation is the risk of a constitutionally unfair trial so high that *Strickland* is abandoned.

The purpose of the Sixth Amendment right to counsel guarantee "is simply to ensure that criminal defendants receive a fair trial." *Strickland*, 466 U.S. at 689. The exceptions to the *Strickland* prejudice requirement, as discussed *supra*, derive from "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice." *Mickens*, 535 U.S. at 175. Those exceptions do not exist "to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." *Id*. at 176 (citing *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("Breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.")).

The Supreme Court has never held that any type of attorney conflict other than concurrent multiple representation presents such a "high probability" of prejudice, or comparable "difficulty of proving that prejudice," so as to warrant a presumption of prejudice. *Strickland*, 466 U.S. at 692. As the Court of Appeals

for the Fifth Circuit explained in *Beets*, "[O]nly in the multiple representation context is . . . the risk of harm high enough to employ a near-*per se* rule of prejudice." *Beets*, 65 F.3d at 1270-1271. Otherwise, when an attorney's duty of loyalty is challenged by his own personal interests, "the range of possible breaches . . . is virtually limitless. Likewise, their consequences on the quality of representation range from wholly benign to devastating." *Id*. (providing a non-exhaustive list of possible attorney personal conflicts: "matters involving payment of fees and security for fees; doing business with a client; the use of information gained while representing a client; a lawyer's status as a witness; and a lawyer's actions when exposed to malpractice claims").

b. The *Cuyler* exception was created as a limited exception to *Strickland* to address the unique risks arising in the multiple concurrent representation situation.

The *Cuyler* petitioner, John Sullivan, and two co-defendants were indicted for multiple first-degree murders. *Cuyler*, 446 U.S. at 337. Two privately-retained counsel represented all three defendants in separate trials. *Id.* at 338. Sullivan was tried first and was the only one of three convicted. *Id.* Neither he nor his counsel objected to the joint, concurrent representation at any time, but Sullivan subsequently claimed that his counsel had labored under a conflict of interest. Sullivan cited, *inter alia*, evidentiary hearing testimony of one counsel that the other counsel decided not to put on a defense case because he did not want to

expose defense witnesses the counsel intended to call in the co-defendants' upcoming trials. *Id.* at 338-39.

The Third Circuit Court of Appeals granted relief, holding that Sullivan had made a showing of possible prejudice. The Supreme Court reversed, holding that more than a showing of "possible" prejudice was necessary: "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected the lawyer's performance." *Id*. at 348-49. Specifically:

> A defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief . . . but until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance.

Id. at 349-50 (citations omitted).

And while the Supreme Court's later admonishments about the limited scope of *Cuyler* were not the basis for its holding in *Mickens*, those dicta came in the form of "analysis by the Supreme Court describing the scope of one of its own decisions." *Schwab*, 451 F.3d at 1325-1326 ("[T]here is dicta and then there is dicta, and then there is Supreme Court dicta. This is not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta.").

c. <u>The finding of inherent prejudice from the *per se* conflict in *Cain* was incorrect under the Supreme Court's narrow *Strickland* exceptions. *Cain* should not be extended</u>.

In the military, two years after *Mickens*, the court in *United States v. Cain*

created a new exception to the *Strickland* requirement. 59 M.J. at 294. There, the defense counsel and defendant—who was charged with three sexual assaults upon fellow males—engaged in a fraternizing, homosexual affair. *Id*. at 286. The counsel committed suicide shortly after trial, upon learning of allegations that he had pressured the defendant for sexual favors. *Id*. at 287-88.

After acknowledging that *Cuyler* does not extend to all conflicts, the *Cain* court focused on the homosexual relationship between attorney and client, which subjected the counsel to disciplinary action and "placed both the attorney and client at the risk of criminal prosecution for violating the very article of the UCMJ, Article 125, that was the subject of the present case." *Id*. at 295. Because of this disciplinary risk, the *Cain* court then relieved the defendant of his burden to demonstrate *Strickland* prejudice, and found that "[t]he uniquely proscribed relationship . . . was inherently prejudicial and created a *per se* conflict of interest in counsel's representation of the Appellant." *Id*.

But *Cain* is an outlier, applying neither *Strickland* nor *Cuyler*, and is legally questionable under the requirements of *Strickland* and its "narrow" exceptions. Given Supreme Court precedent and this Court's precedent before and after *Cain*, absent one of the exceptions enumerated in *Cronic*, *Holloway*, and *Cuyler*, no further relief from the *Strickland* requirement to demonstrate prejudice is available.

d. Nothing in Supreme Court precedent or this Court's precedent before or after *Cain* justifies relieving the burden to prove prejudice under *Strickland*.

Beyond the context of the then-outlawed homosexual relationship and attorney-client affair in *Cain*, this Court has itself created no exception to the *Strickland* requirement for a defendant demonstrate prejudice. This Court noted *Mickens*' admonition that not all attorney conflicts carry a high probability of prejudice, or a high difficulty of proving that prejudice. *Cain*, 59 M.J. at 294 (quoting *Mickens*, 535 U.S. at 175); *Saintaude*, 61 M.J. at 180. And this Court has already agreed that *Strickland* governs "most" conflict cases—not merely those where an appellant fails to meet his *Cuyler* burden. *Id*. In practice, this Court has, save in *Cain*, followed Supreme Court precedent.

First, this Court has never treated a potential conflict caused by defense counsel's mere placement in the rating chain of trial counsel as a *per se* prejudicial. In *United States v. Nicholson*, 15 M.J. 436, 439 (C.M.A. 1983), the Court of Military Appeals considered "the participation at trial of the detailed defense counsel's immediate military superior as assistant trial counsel," strongly warned against the practice, then tested for prejudice and determined "appellant was not prejudiced." And in *United States v. Hubbard*, 20 C.M.A. 482 (C.M.A. 1971), the court looked to whether "the trial counsel [serving simultaneously as] . . . the immediate superior officer of the trial defense counsel and the assistant defense

counsel . . . inherently deprived the appellant of due process." The *Hubbard* court "decline[d] to hold that such a relationship is prejudicial *per se*" and further found "[n]o basis exists for questioning the adequacy of defense counsel's performance." *Id.* at 484-85.

Second, apart from *Cain*, this Court has consistently kept within the "narrow" limits of *Strickland* exceptions when assessing for Sixth Amendment error involving the right to counsel. In the pre-*Mickens* case of *United States v. Babbitt*, 26 M.J. 157 (C.M.A. 1988), this Court tested the civilian defense counsel's sexual relationship with the client for *Strickland* prejudice. The *Babbitt* court cited *Cuyler*, found that the counsel's personal interests neither caused him to "actively represent[ ] conflicting interests" nor adversely affected his performance, and denied the claim on *Strickland* grounds: "Although another defense counsel might have defended the case differently, appellate courts do not lightly vacate a conviction in the absence of a serious incompetency which falls measurably below the performance . . . of fallible lawyers." *Id*. (internal quotations and citations omitted).[5] *Id*. at 159.

[5] The lower court misread *Babbitt* as "applying *Cuyler*." *Hale*, 2017 CCA LEXIS 364, at *17. *Babbitt* did not. As this Court later explained in *Saintaude*: "[W]e concluded that a conflict involving sexual relations during trial between a male civilian attorney and his married female military client should be *tested for actual prejudice*, and we determined that there was no prejudice." *Saintaude*, 61 M.J. at 180 (emphasis added).

The year after *Cain*, in *United States v. Saintaude*, 61 M.J. 175 (C.A.A.F. 2005), the court returned to the *Strickland* test in a conflict case. The *Saintaude* court considered the appellant's claim of non-concurrent-representation conflicts of interest, including: (1) friendships between defense counsel; (2) unresolved concerns of disciplinary action against defense counsel; (3) a conflict between his defense counsel's desire for professional standing and his duty of loyalty to the appellant; (4) allegations of ethical violations by defense counsel; and (5) allegations that defense counsel tried to bribe witnesses. 61 M.J. at 180-81. The *Saintaude* court applied *Strickland*, and reiterated the inapplicability of *Cuyler* "if the conflict does not involve multiple representation." *Id*. The *Saintaude* court looked to each of these allegations of conflicts, assessed for, and found no *Strickland* prejudice. *Id.* at 183.

Finally, in *United States v. Lee*, 66 M.J. 387 (C.A.A.F. 2008), this Court remanded for a *DuBay* hearing on ineffective assistance where the defense counsel had assumed prosecutorial duties by the time of the appellant's trial. But the conflict in *Lee* did not involve the counsel's *personal* interests—it concerned his "simultaneous representation of the United States and a defendant." *Lee*, 66 M.J. at 388-89. But the lower court misreads *Lee* as presenting "a conflict case resembling our own." *Hale*, 2017 CCA LEXIS 364, at *17. There is no dispute that *Cuyler* applies to concurrent multiple representation cases. Nothing in *Lee*

supports that *Cuyler* applies here or otherwise relieves this Appellee of his burden to demonstrate prejudice under *Strickland.*

4. The lower court erred in applying a presumption of prejudice. Appellee's conflict claim is properly tested for *Strickland* prejudice.

Here, Appellee's conflict claim does not concern multiple concurrent representation, nor does it allege the exception to *Strickland* created in *Cain. See Cain*, 59 M.J. at 295. Because LtCol CT was never Capt KC's prospective Reviewing Officer, (J.A. 27, 55; *see infra at* 35-36), the only potential conflict was Capt KC's personal interest in her husband's career. But no case has held that this personal interest presents such a "high probability of prejudice" that determination of the effect on Sixth Amendment effectiveness of counsel is "virtually impossible." *See Mickens*, 535 M.J. at 175; *Cuyler*, 446 U.S. at 348-49; *Holloway*, 435 U.S. at 491. Instead, the purely personal nature of that potential conflict is no different from the potential conflicts in *Saintaude* and *Babbitt*, where this Court applied both *Strickland* prongs. That same test here will "assure vindication of the defendant's Sixth Amendment right to counsel," and thus a fair trial. *Id*. at 176; *Strickland*, 466 U.S. at 689.

The lower court applied the wrong test, and erred in purporting to make this new *Strickland* exception—omitting the threshold requirement that an attorney "actively represented conflicting interests," *Cuyler*, 446 U.S. at 349-50—

applicable to "all cases." *Hale*, 2017 CCA LEXIS 364, at *22, *24 ("We hold that where an appellant demonstrates that his counsel labored under an actual conflict of interest, and where the conflict had an adverse effect on the counsel's performance, the appellant is entitled to a presumption of prejudice."). The lower court's holding should be reversed, and counsel's performance should be assessed for constitutional adequacy under *Strickland*.

5. Appellee fails to demonstrate *Strickland* prejudice.

The success of Appellee's conflict-of-interest claim always depended on relief from the *Strickland* prejudice burden. At the lower court, Appellee claimed only that Capt KC failed to inform him of her potential conflicts, and that "[d]oing so likely would have resulted in the Government assigning a new prosecutor to the case which would have resolved defense counsel's conflict of interest." (J.A. 56, 59-60, 62.)

But Appellee makes no claim that the evidence against him would have been different had it been presented by any other trial counsel, or that his counsel's performance was deficient; Appellee cannot show "that the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Not only is there no evidence of *Strickland* prejudice, but Appellee had not merely one, but multiple military and civilian counsel providing him with effective assistance throughout trial. As in *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011), Appellee

received what he is due: constitutionally effective assistance of counsel.

C. Even under *Cuyler*, an "actual conflict of interest" requires an adverse effect on counsel's performance. The lower court's test incorrectly separates "actual conflict of interest" from the analysis of "adverse effects" and incorrectly states the facts.

1. The Supreme Court defines "actual conflict of interest" in conjunction with adverse effect. The concepts are not separately tested.

"An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. at 172 n.5. As the *Mickens* Court explained, *Cuyler* "is not properly read as requiring inquiry into actual conflict as something separate and apart from adverse effect." *Id*; *see also Wood v. Georgia*, 450 U.S. 261, 273 (1981) (remanding "to determine whether the conflict of interest that this record strongly suggests actually existed"); *Cuyler*, 446 U.S. at 348-50 (declining to find actual conflict based on divergent interests of jointly-represented clients and remanding for consideration of whether "possible" conflicts resulted in any actual conflict).

Since *Mickens*, Federal circuit courts have applied the effect-based definition of "actual conflict" when analyzing *potential* conflicts of all types.[6]

[6] *See, e.g.*, *DeCologero*, 530 F.3d at 76-77 (1st Cir. 2008) (no actual conflict when appellant failed to show any potential conflicts based on counsel's personal interests adversely affected counsel's performance); *Eisemann v. Herbert*, 401 F.3d 102, 108 (2d Cir. 2005) (finding no actual conflict when no plausible defense strategy was forgone as consequence of counsel's concurrent representation of

2. Ignoring the Supreme Court's definition of "actual conflict of interest," the lower court instead blended two alternative definitions, wrongly separating "actual conflict" from "adverse effect."

a. The lower court relied on a flawed definition announced in *United States v. Perez*, 325 F.3d 115 (2d Cir. 2003).

The lower court departed from *Mickens*' definition of "actual conflict" in favor of one from *Perez*, a Second Circuit case: "A conflict of interest is actual, as opposed to potential, when, during the course of the representation 'the attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action.'" *Hale*, 2017 CCA LEXIS 364, at *23 (quoting *Perez*, 325 F.3d at 125).

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father and son charged with same crime); *Morin v. Thaler*, 374 F. App'x 545, 550-53 (5th Cir. 2010) (refusing to find concurrent representation presented actual conflict absent adverse effect on counsel's performance); *Fautenberry v. Mitchell*, 515 F.3d 614, 627-28 (6th Cir. 2008) (finding no actual conflict when petitioner failed to demonstrate how counsel's official position in township where murder victim was found affected counsel's trial performance); *Noe v. United States*, 601 F.3d 784, 790 (8th Cir. 2010) (finding no actual conflict after testing potential conflict from third-party fee arrangement for "effect [that is] actual and demonstrable"); *Earp v. Ornoski*, 431 F.3d 1158, 1181 n.17 (9th Cir. 2005) (affirming finding of no actual conflict based on romantic relationship between counsel and client, noting *Mickens* "makes clear that the question of actual conflict is not properly analyzed as two separate inquiries"); *United States v. Wright*, 745 F.3d 1231, 1233 (D.C. Cir. 2014) (finding no actual conflict under *Cuyler* when appellant failed to show counsel's previous representation of co-defendant affected his performance); *see also Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (noting that *Cuyler*'s two requirements, "an actual conflict of interest resulting in an adverse effect on counsel's performance, are often intertwined, making the factual analyses of them overlap") (citation omitted).

The *Perez* definition is inapt. First, the line of Second Circuit cases employing the "divergent interests" definition *Perez* cites arose before *Mickens*. *See United States v. Schwarz*, 283 F.3d 76, 91 (2d Cir. 2002); *United States v. Kliti*, 156 F.3d 150 (2d Cir. 1998); *Winkler v. Keane*, 7 F.3d 304 (2d Cir. 1993), *cert. denied*, 511 U.S. 1022 (1994). Since *Mickens*, the Second Circuit tests a potential conflict for adverse effect. *See Eisemann v. Herbert*, 401 F.3d 102, 108 (2d Cir. 2005); *United States v. Medina*, 282 F. App'x 939, 942 (2d Cir. 2008).

Second, *Perez* concerned assessment of the appellant's waiver of a known potential conflict—not the counsel's performance—and the court analyzed the underlying ineffective assistance of counsel claim under *Strickland*. *Perez*, 325 F.3d at 125-28, 131.

Finally, the *Perez* definition's focus on divergent interests contradicts *Mickens*' requirement to show "a conflict that actually affected counsel's performance—as opposed to a mere theoretical division of loyalties." *Mickens*, 535 U.S. at 171.

b. The lower court improperly augmented the *Perez* definition with a Navy Professional Responsibility Rule.

Even under the overbroad *Perez* definition, the lower court acknowledged there was "no authority that requires us to find a conflict of interest based solely on Capt KC's anticipated duties or her marriage to Capt CC." *Hale*, 2017 CCA LEXIS 364, at *27. However, the court then turned to the Judge Advocate General

of the Navy's Professional Responsibility Rule 1.7, finding that it "informs our analysis here." *Id*. ("Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a covered attorney's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited as a result of the covered attorney's other responsibilities or interests." (quoting JAGINST 5803.1E, R. 1.7).)

But a counsel's breach of an ethics standard does not necessarily establish a Sixth Amendment ineffective assistance claim. *Nix*, 475 U.S. at 165. And this particular Rule is no closer to the *Mickens* definition of "actual conflict" than the *Perez* definition. Further, by incorporating this Rule in its definition of "actual conflict," the lower court ignored that, in attorney conflict cases, the Supreme Court "invoked *Strickland*, not *Cuyler*, as the benchmark for judging ethical violations." *Beets*, 65 F.3d at 1271 (citing *Nix*, 475 U.S. at 166).

c. Through its faulty definition, the lower court's test determines the presence of an "actual conflict" *before* analyzing for adverse effect—contrary to *Mickens*' requirement.

Under *Mickens*, the lower court's finding that a "potential conflict of interest lay in Capt KC's personal circumstances," *Hale*, 2017 CCA LEXIS 364, at *27, is simply the first step in determining whether an actual conflict existed. *Mickens*, 535 M.J. at 172 n.5. The next step is determining whether the potential conflict caused an adverse effect on counsel's performance. *Id*.

But employing its blended definition of "actual conflict of interest," the lower court found it appropriate to "evaluate the cumulative effect of all the facts that could create a conflict of interest," including whether "everyone involved appreciated the precarious nature of Capt KC's situation." *Hale*, 2017 CCA LEXIS 364, at *28. And the lower court's analysis turned on "whether the potential conflict posed by Capt KC's circumstances *ripened* into an actual conflict." *Id.* at *33 (emphasis added). Accordingly—*before* evaluating adverse effect—the lower court found, "based on the totality of circumstance . . . that an actual conflict of interest existed." *Id*. at *37.

This analysis defied the process prescribed in *Mickens*. 535 U.S. at 172 n.5.

3. The lower court's flawed definition of "actual conflict of interest" exacerbated the court's erroneous finding as to Captain KC's personal circumstances—reached without the benefit of an evidentiary hearing on Appellee's conflict claim.

The Supreme Court has endorsed trial courts' primary role in assessing conflicts of interest. *Wheat v. United States*, 486 U.S. 153, 164 (1988) ("The evaluation of the facts and circumstances of each case under [the conflict of interest] standard must be left primarily to the informed judgment of the trial court"); *see, e.g.*, *Mickens*, 535 M.J. at 165 (district court held evidentiary hearing before denying habeas petition alleging conflict of interest); *Cuyler*, 446 M.J. at 338-39 (Pennsylvania Court of Common Pleas held five days of hearings before granting, in part, post-trial relief). This Court and other military courts have

followed suit. *See, e.g.*, *Lee*, 66 M.J. at 390 (directing a *DuBay* hearing to resolve factual matters related to appellant's conflict claim); *see also, e.g.*, *Cain*, 59 M.J. at 289-92 (summarizing *DuBay* findings related to appellant's conflict claim, before granting relief).

With no *DuBay* findings on the existence and nature of Capt KC's "personal circumstances," the lower court acted as a fact-finder in the first instance on Appellee's conflict-of-interest claim, finding as fact that LtCol CT was Capt KC's "prospective [Reviewing Officer]." *Hale*, 2017 CCA LEXIS 364, at *39. This finding was not supported by the Record, or even claimed by Appellee below. (J.A. 27, 55.)

It was also incorrect as a matter of Marine Corps regulation. Captain KC may have anticipated becoming a trial counsel, but as LtCol MM testified, that billet was to be *in Miramar*, where Capt MF—the Assistant Trial Counsel—was stationed. (J.A. 402-04, 448-49.) Marine Corps regulations provide that the Reviewing Officer of a trial counsel who is geographically separated from the Legal Service Support Section is the Legal Service Support Team Officer in Charge. MCO 5800.16A Ch-7, § 1202, ¶ 3.b.(2)(b).1 (Feb. 10, 2014). Here, the Legal Service Support Section was in Camp Pendleton. As such, Capt KC's Reviewing Officer would not have been LtCol CT¸ but rather the Legal Service Support Team Officer in Charge, LtCol MM.

Thus the lower court's bifurcated test of whether Capt KC's personal circumstances "ripened" into an actual conflict—already improper under *Mickens*, as demonstrated, *supra*—was compounded by a misunderstanding of those very circumstances. This misunderstanding was based on an entirely unsupported finding of fact that the lower court should not have made in the first place.

D. Under *Cuyler*, whether a potential conflict "adversely affects" performance must include considerations of reasonable alternative strategies and causality at trial. The lower court's novel test ignored each of those considerations.

In *Mickens*, the Supreme Court affirmed the Fourth Circuit's denial of habeas relief for failure to demonstrate an adverse effect. 535 U.S. at 174 ("[I]t was at least necessary, to void the conviction, for petitioner to establish that the conflict of interest adversely affected his counsel's performance. The Court of Appeals having found no such effect the denial of habeas relief must be affirmed.") (citing *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001)).

There, the Fourth Circuit had employed a three-part test to evaluate whether the successive representation conflict had an "adverse effect." *Mickens*, 240 F.3d at 361. That test requires a petitioner to (1) "identify a plausible alternative defense strategy or tactic that [the] defense counsel might have pursued," (2) "show that the alternative strategy was objectively reasonable under the facts of the case," and (3) "establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict." *Id*.

Since *Mickens*, several federal circuits have explicitly adopted that three-part adverse effects test. *See, e.g.*, *Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004); *Quince v. Crosby*, 360 F.3d 1259, 1264-65 (11th Cir. 2004); *see also Eisemann*, 401 F.3d at 107-08 (adopting causality requirement, while noting that Second Circuit has required only that alternative strategy be "plausible," not necessarily "reasonable"). Even circuits that have not, still require that an adverse effect be demonstrated through impact upon counsel's execution of a *trial strategy*—particularly for conflicts not involving multiple concurrent representation.[7]

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[7] *See United States v. Segarra-Rivera*, 473 F.3d 381, 385-86 (1st Cir. 2007) (reviewing whether counsel's personal interest in concealing lack of investigation caused her to advise defendant to sign plea deal); *LoCascio v. United States*, 395 F.3d 51, 58 (2d Cir. 2005) (evaluating whether conflict of interest was manifest in mid-trial shift in theory of defense after counsel received death threat); *Rubin v. Gee*, 292 F.3d 396, 406 (4th Cir. 2002) (finding adverse effect when counsels' conflict—as witnesses to client's post-murder conduct—inhibited defense ability to challenge premeditation and deliberation issues at trial); *United States v. Lafuente*, 426 F.3d 894, 898 (7th Cir. 2005) (finding possible successive-representation conflict caused no adverse effect when client was opposed to plea deal and conflict did not impact trial strategy); *cf. Chester v. Comm'r of Pa. Dep't of Corr*., No. 13-9004, 598 F. App'x 94, 105 (3d Cir. 2015) (per curiam) ("Chester's conflict claim lacks merit because he failed to show that the pending [driving under the influence] charge against [the counsel] caused him to change his trial strategy adversely and/or not employ certain methods in his trial strategy that should have been employed.").

In discussing whether to expand *Cuyler* to attorneys' personal interests, the lower court cited these cases, but ignored the *strategic* nature of the "adverse effect" at issue in each case. *Hale*, 2017 CCA LEXIS 364, at *17.

Cuyler itself also demonstrates both the strategic scale of the necessary "adverse effect" and the requirement for causality. 446 U.S. at 349-50. There, the Supreme Court remanded to evaluate whether the multiple-representation potential conflict *caused* counsel to *fail to put on a defense case*. *Id*.

As the Third Circuit announced in a pre-*Mickens* case:

> [T]here is no conflict of interest adversely affecting the attorney's performance if an attorney at trial does not raise a defense on behalf of his client because to do so is not in that client's interest even though it is also in the interest of another client that it not be raised. To the contrary, that is a *coincidence* of interests.

United States v. Gambino, 864 F.2d 1064, 1071 (3d Cir. 1988) (emphasis added). For example, in *United States v. Lafuente*, 426 F.3d 894 (7th Cir. 2005), the Court of Appeals for the Seventh Circuit denied an ineffective assistance of counsel claim for failure to demonstrate an adverse effect from counsel's representation of another witness. *Id*. at 898. The appellant argued that the conflict "foreclosed the possibility of an agreement under which [he] would testify against [the witness] in exchange for a recommendation by the government for a reduced sentence." *Id*. The *Lafuente* court held that the record independently proved the appellant was unwilling to engage that strategy—regardless of his counsel's conflict. "'If the petitioner's counsel could not have done anything differently, if there was no alternative course of action, then there can be no Sixth Amendment violation, even if a conflict of interest existed.'" *Id*. (quoting *Cates v. Superintendent of Ind.*

Youth Ctr., 981 F.2d 949, 955 (7th Cir. 1992)).

Likewise, the reasonableness of an attorney's decisions can disprove causality. In *Campbell v. Rice*, 408 F.3d 166 (9th Cir. 2005), the Court of Appeals for the Ninth Circuit affirmed the district court's denial of a habeas petition for failure to show a potential conflict adversely affected execution of a trial strategy. *Id*. at 1170. There, the counsel was arrested for felony possession of drugs, and was pending prosecution by the same district attorney's office that was prosecuting the petitioner for burglary. *Id*. at 1168-69. Even assuming an "actual conflict" as the state and federal district courts had, the Ninth Circuit found that the counsel's trial actions—failing to object to the admission of DNA evidence and present evidence of other burglaries in the same area—were reasonable decisions that did not result from the conflict. *Id*. at 1171.

1. <u>The lower court's novel test made no mention of alternative strategies—reasonable or otherwise—available to the Defense team</u>.

Here, in support of its conclusion "that Capt KC's representation was adversely affected by the conflict of interest," the lower court identified three aspects of her trial performance: her emotional response during argument on her prosecutorial misconduct motion; her failure to notify the court or her client of the potential conflict with LtCol CT; and her failure to object to LtCol CT's closing argument. *Hale*, 2017 CCA LEXIS 364, at *39-42.

This evaluation fails in two regards. First, none of these "effects" involves the execution of a trial strategy. No court has held that either a counsel's affect or her lack of objection to argument—not evidence—satisfies *Cuyler*. And failure to notify the court or client of any potential conflict is a question of compliance with professional responsibility rules—not trial performance. *See Nix*, 475 U.S. at 165. Nor did the lower court identify any reasonable, or even plausible, alternative strategy the Defense team could have pursued. *See Mickens*, 240 F.3d at 361; *Gambino*, 864 F.2d at 1070-71.

Second, in analyzing a claim of ineffective assistance, "the performance of defense counsel is measured by the combined efforts of the defense team as a whole." *United States v. Boone*, 42 M.J. 308, 313 (C.A.A.F. 1995); *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 481 (C.A.A.F. 2001); *see also Lee*, 66 M.J. at 391 n.1 ("Without evidence that Appellant's defense team, including both Appellant's civilian counsel and detailed counsel, acted deficiently, Appellant cannot establish prejudice.") (Ryan, J., dissenting); *cf. Hutchins*, 69 M.J. at 293 (reversing lower court for presuming prejudice from improper severance of counsel when multiple defense counsel were present and record could have been tested for prejudice).

But by its singular focus on tertiary quibbles over Capt KC's actions, the court failed to analyze the effect of any potential conflict on the Defense *team*.

After acknowledging that the Individual Military Counsel, Capt JS, "was not conflicted," the lower court found he was unable to convince Capt KC to alert the trial court of LtCol CT's actions and concluded his independence was insufficient to overcome Capt KC's conflict. *Hale*, 2017 CCA LEXIS 364, at *43-44.

This cursory analysis—based on no trial-level findings as to Capt JS's actions, Capt KC's actions, or the reasons they took them—ignores the Defense team's vigorous pursuit of the only *trial strategy* available to them given the evidence against Appellee. Beyond the Victim's convincing testimony, phone and video records, DNA and medical evidence, prior sexual assault evidence, and Appellee's own admissions proved his offenses. Like the counsel in *Lafuente*, the Defense team "could not have done anything differently" to confront that evidence at trial. *See* 426 F.3d at 898. Indeed, the lower court neglected that *after* Capt KC and Capt JS took over the case from Maj P, the Defense won dismissals and acquittals on Charges to which Appellee had previously entered written guilty pleas.

2. The lower court's novel test omitted any causal link between Captain KC's potential conflict and the Defense team's actions.

Here, the lower court made no findings as to what caused the purported adverse effects, *i.e.*, *why* Capt KC cried, did not notify the court or her client of any potential conflict, and did not object during closing argument. Nor did the court defer to trial court findings, as the post-trial hearing—on a separate set of issues—

resulted in none.

The Record contains scant evidence that a potential conflict *caused* the Defense team to take or decline any particular action. Instead, the Record facts omitted by the lower court dispel any connection between the potential conflict and the "effects" identified by the lower court.

First, Capt KC disclaimed the potential conflict as "not significant" to her. Second, the Defense team raised multiple objections to LtCol CT's closing argument—each of which the Military Judge overruled—and Capt KC herself repeatedly objected to his rebuttal. Third, despite her husband's professed concerns about his Reviewing Officer in light of Capt KC's pending prosecutorial misconduct motion, the Defense *raised that issue anyway*—both mid-trial and again after trial, strategically maneuvering to avoid harmful trial court findings. Fourth, regardless of any potential conflict, the Defense aggressively litigated the entire case, withdrawing Appellee's guilty pleas, filing more than a dozen pretrial motions, raising scores of objections, *voir diring* the Military Judge, moving for a mistrial based on prosecutorial misconduct, presenting a comprehensive case on the Merits and in Sentencing, and strategically re-alleging prosecutorial misconduct in a clemency submission rather than a post-trial motion.

Just as in *Campbell v. Rice*, these Defense team trial actions were reasonable decisions that did not result from the conflict. *See* 408 F.3d at 1171. These actions

collectively overwhelm any possible notion that a potential conflict with the Trial Counsel *caused* an adverse effect in the Defense team's performance.

E. Because there was no legal error under any extant legal tests governing Appellee's right to counsel, the lower court exceeded its Article 66(c) authority in disapproving the Findings with an incorrect view of the law.

A Court of Criminal Appeals "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." 10 U.S.C. § 866(c). In *United States v. Nerad*, 69 M.J. 138 (C.A.A.F. 2010), this Court reversed the lower court's exercise of its Article 66(c) "should be approved" powers because it appeared that the court "exceeded its authority by disapproving a finding with reference to something other than a legal standard, potentially infringing on the sole prerogative of the convening authority under Article 60, UCMJ . . . to disapprove a finding based on purely equitable grounds." *Id*. at 140. This Court held that the Article 66(c) power to disapprove findings that "should not be approved" has a clear limit: "It must be exercised in the context of legal—not equitable—standards, subject to appellate review." *Id*. at 146 (citation omitted).

According to *Nerad*'s common sense explanation of this limit, the "should be approved" power may be properly exercised in one of two ways.

First, the lower court may exercise this power by disapproving findings and

sentence because they are legally incorrect. Article 66(c), UCMJ.

Second, even when the sentence is "correct," the lower court may approve only that sentence, or part of the sentence, that it "determines, on the basis of the entire record, should be approved." Article 66(c). But this "broad language with which we have described the CCA's powers has been cabined in practice." *Nerad*, 69 M.J. at 146. That is, historical practice produced precedent "in the context of trial and post-trial errors in which doctrines . . . such as waiver . . . would have precluded CCA action." *Id.* at 147.

Thus the ways in which the lower court may simply "disapprove" findings or sentence that are *legally correct* are limited: (1) the lower courts may conduct a sentence appropriateness review that is not unfettered, but limited by "legality" of the sentence and "appropriateness," and subject to abuse of discretion review by this Court, *see Nerad*, 69 M.J. at 142; (2) *United States v. Quiroz*, 55 M.J. 333, 338 (C.A.A.F. 2001), lays out the test for reviewing the lower courts' application of the judicially-created error of "unreasonable multiplication of charges"; (3) *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998), permits lower courts to "moot claims of prejudice" in the extra-judicial post-trial process; (4) *United States v. Claxton*, 32 M.J. 159, 164 (C.M.A. 1991), permits lower courts to order sentence rehearings despite that waiver otherwise would have precluded relief.

But this Court has correctly interpreted Congress' statute to require that the

lower court's "exercise of its Article 66(c), UCMJ, power [must be] made based on a *correct view of the law*." *Nerad*, 69 M.J. at 147 (emphasis added). This Court in *Pease* found no *Nerad* error where the Navy-Marine Corps Court of Criminal Appeals correctly defined otherwise undefined statutory language for its own Article 66 factual sufficiency review. *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016). But this Court set aside the lower court's disapproval of a conviction in *Nerad* where the lower court, without a correct view of the law, had concluded the appellant's conduct was not and should not be criminal.

Here, clear Sixth Amendment law applies to Appellee's claim of ineffective assistance of counsel. No doctrine such as waiver precludes action on that legal error. Despite this, the lower court relies on Article 66(c) to hold that—after an incorrect analysis of the legal error under *Strickland* or *Cuyler*—the findings and sentence in this case nonetheless "should not be approved." *Hale*, 2017 CCA LEXIS 364, at *44, *51. This is the "equitable" solution to errors of law already governed by extant legal tests and prohibited in *Nerad*. 69 M.J. at 146. The lower court must apply the law as it is—not the law that it wishes it had.

Likewise the lower court's invocation of "public perception," sounding in unlawful command influence, cannot justify its holding under Article 66(c) where the court conducted no unlawful command influence analysis and clear Congressional statutes and precedent governs errors of unlawful command

influence. *See United States v. Boyce*, 76 M.J. 242, 249 (C.A.A.F. 2017) (quoting *United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006)). Unlawful command influence did not preclude action on Appellee's Sixth Amendment claim, nor did Appellee make a case that satisfied the extant legal standard for evaluating unlawful command influence.

The lower court's resort to Article 66(c), after conducting an incomplete and legally incorrect review, exceeded its power to disapprove convictions absent legal error. *Nerad*, 69 M.J. at 146-47. Before any lower court uses that power as "cabined in practice," it must first give indication that it applied the correct law. That is, before resort to use of the Article 66(c) power to disapprove the findings and sentence, the lower court must actually apply *Strickland* and apply the right law in determining whether the findings and sentence are correct; it may not simply apply no legal standard—where clear legal standards exist—and then "set it all aside" as a prophylactic. And even then, the situations where it may do so have been "cabined in practice."

Conclusion

Wherefore, the United States respectfully requests that this Court reverse the decision of the lower court, find no *Strickland* error due to the alleged conflict, and remand for review of Appellee's other Assignments of Error.

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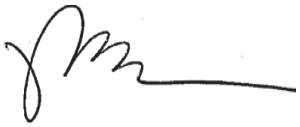

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