IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	ANSWER ON BEHALF OF APPELLEE
v.	)	Crim.App. Dkt. No. 201700246
R. Bronson WATKINS, Staff Sergeant (E-6) U.S. Marine Corps Appellant	)	USCA Dkt. No. 19-0376/MC

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

REGULATIONS, RULES, OTHER SOURCES

Issues Presented

I.

A CONFLICT OF INTEREST EXISTS WHERE THE INTERESTS OF AN ATTORNEY AND DEFENDANT DIVERGE ON A MATERIAL FACTUAL OR LEGAL ISSUE, OR A COURSE OF ACTION. THREATS BY REGIONAL TRIAL COUNSEL AND A REGIONAL TRIAL INVESTIGATOR TOWARDS CIVILIAN DEFENSE COUNSEL CREATED A CONFLICT OF INTEREST BETWEEN CIVILIAN COUNSEL AND APPELLANT. DID THE MILITARY JUDGE ERR IN DENYING CIVILIAN COUNSEL'S MOTION TO WITHDRAW?

II.

THE SIXTH AMENDMENT GUARANTEES AN ACCUSED THE RIGHT TO RETAIN COUNSEL OF HIS OWN CHOOSING. BEFORE TRIAL, AND AFTER HIS CIVILIAN COUNSEL MOVED TO WITHDRAW—CITING A PERCEIVED CONFLICT OF INTEREST—APPELLANT ASKED TO RELEASE HIS CIVILIAN COUNSEL AND HIRE A DIFFERENT COUNSEL. DID THE MILITARY JUDGE ERR BY DENYING THIS REQUEST?

III.

DID THE LOWER COURT ERR IN RATIFYING THE MILITARY JUDGE'S DENIAL OF APPELLANT'S REQUEST FOR CONFLICT-FREE COUNSEL, WHERE IT: (A) FOUND THE REQUEST WAS IN "BAD FAITH," BASED ON ALLEGED MISBEHAVIOR BY APPELLANT OCCURRING BEFORE THE RTC'S UNEXPECTED THREATS; AND, (B) TREATED THE MILITARY JUDGE'S FINDING THAT APPELLANT'S REQUEST FOR COUNSEL WAS "OPPORTUNISTIC," AS A FINDING OF FACT INSTEAD OF A CONCLUSION OF LAW?

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 (2016), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction over this case pursuant to Article 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2) (2016).

Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of failure to follow lawful orders, sexual abuse of a child, and obstructing justice, in violation of Articles 92, 120b, and 134, UCMJ, 10 U.S.C. §§ 892, 920b, 934 (2016). The Members sentenced Appellant to five years of confinement, reduction to pay grade E-1, and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered the sentence executed.

The Record of Trial was docketed with the lower court on August 22, 2017. After Appellant and the United States submitted briefs, the lower court specified an additional issue for supplemental briefing. The lower court held Oral Argument on December 20, 2018. On February 21, 2019, the lower court affirmed the findings and the sentence. On March 25, 2019, Appellant requested *en banc* consideration, which the lower court denied on May 17, 2019.

On July 15, 2019, Appellant petitioned this Court for review, which this Court granted on September 30, 2019. Appellant filed his Brief and the Joint Appendix on November 14, 2019.

Statement of Facts

A. The United States initially charged Appellant with, *inter alia*, sexual abuse of a child for touching his daughter, and Appellant retained Civilian Defense Counsel.

The United States charged Appellant with sexual abuse of a child, alleging he committed "lewd acts upon [the Victim], his daughter, a child who had not yet attained the age of 12 years, to wit: touching her breasts and vaginal area with his hands." (Charge Sheet, Apr. 11, 2016.)

Appellant retained Civilian Defense Counsel in July 2016, who represented Appellant along with two Detailed Defense Counsel. (J.A. 265–66, 309.)

B. Prior to trial, the Victim recanted her accusation.

Following a continuance, Appellant's first trial was scheduled to begin in September 2016. (J.A. 269, 310.) After Arraignment, but before trial, Appellant's daughter requested to not participate in the investigation or prosecution of Appellant. (J.A. 270.)

C. On the first day of Appellant's first trial, the United States requested a continuance due to the disappearance of Appellant's wife and daughter.

At the start of Appellant's trial in September 2016, the United States was unable to locate Appellant's wife and daughter. (J.A. 279–96.) The United States requested a warrant of attachment, as well as a continuance. (J.A. 297–305.)

1. An investigator testified about the efforts made to serve a subpoena on Appellant's wife and daughter, and Civilian Defense Counsel objected to mention of his office location.

In an effort to show perfected service, the United States presented the testimony of the Regional Trial Counsel's investigator, who testified that he subpoenaed Appellant's wife's bank and phone records in an effort to locate her. (J.A. 279–91.) Three days before trial, the investigators discovered that Appellant's wife used her debit card at a bookstore, which was located "next door" to Civilian Defense Counsel's office. (J.A. 285.)

In response to this testimony, during cross-examination, Civilian Defense Counsel told the investigator, "I think you [have] just made me the object of this

case [of alleged obstructing justice]." (J.A. 289.) After the Military Judge said he did not think Civilian Defense Counsel was an object of the investigation, Civilian Defense Counsel proffered that he had only met with Appellant's wife once and he had "intentionally never spoken with [Appellant's daughter]" since he found out about the daughter's recantation. (J.A. 295.) The Military Judge acknowledged this strategy of "[not] muddying the waters." (J.A. 295.)

Trial Counsel then explained, the "obstruction of justice case [is] on the part of [Appellant] and his wife, not the [civilian] defense attorney." (J.A. 297.)

2. The Military Judge did not issue a warrant of attachment but continued the case for several months.

Declining to issue a warrant of attachment, the Military Judge proposed a thirty-day continuance, but Civilian Defense Counsel opposed the short time due to the pregnancy of Appellant's Detailed Defense Counsel. (J.A. 300.) With all parties' approval, the Military Judge continued the case to January 2017. (J.A. 302–03.) His basis for granting the continuance was the disappearance of Appellant's wife and daughter. (J.A. 301.)

The second trial was re-scheduled to March 2017. (J.A. 257.)

D. The United States dismissed and re-preferred the original Charges, adding three Additional Charges for obstruction of justice, conspiracy to obstruct justice, and violating a military protective order.

After locating Appellant's wife and daughter, the United States dismissed and re-preferred the original Charges, with three Additional Charges for conspiracy

to obstruct justice, obstructing justice, and violating a military protective order. (J.A. 105, 109, 111.) The conspiracy alleged that Appellant conspired "with [Appellant's wife] and other unknown persons to commit . . . obstruction of justice." (J.A. 109.)

E. At an Article 39(a) session, the Military Judge ruled that the location of Civilian Defense Counsel's office was irrelevant, after which a "heated exchange" occurred between Civilian Defense Counsel and the Regional Trial Counsel.

An Article 39(a) session took place on March 16, 2017. (J.A. 115–20.)

1. The Military Judge ruled any reference to Civilian Defense Counsel's office location was irrelevant.

During the 39(a), Civilian Defense Counsel again expressed concern about any reference to his office location during the trial. (J.A. 115.) Trial Counsel argued that the office location was relevant as it provided an opportunity for Appellant to meet with his wife in violation of the protective order. (J.A. 117.) In support of that argument, Trial Counsel noted they had surveillance footage of Appellant and his wife at a nearby hotel and a receipt from Appellant's wife at a bookstore near the office. (J.A. 116–17.) However, there was no evidence Appellant was at Counsel's office on the same day. (J.A. 117.)

The Military Judge found the evidence was "irrelevant on 403 grounds." (J.A. 118.)

2. During a recess, a heated exchange occurred between Civilian Defense Counsel and the Regional Trial Counsel.

After the Military Judge's ruling regarding Civilian Defense Counsel's office location, Regional Trial Counsel engaged in a "heated exchange of words with [Civilian Defense Counsel]" while off the record. (J.A. 119.) The Regional Trial Counsel stated: "This isn't over yet," or words to that effect. (J.A. 119.)

F. Three days later, Civilian Defense Counsel emailed the Military Judge and said he may have a conflict.

Three days after the "heated exchange," and the day before Appellant's trial was scheduled to begin, Civilian Defense Counsel emailed the Military Judge. (J.A. 306.) In the email, he stated that the "Government's improper actions combined with [the Regional Trial Counsel's] threat toward me have placed me in a conflict posture such that I may not be able to continue with my representation of [Appellant]." (J.A. 306.) He went on to say "[i]f the Court finds that I must withdraw . . . or if [Appellant] desires to release me," he would refund Appellant's fee. (J.A. 306.)

G. The following day, Civilian Defense Counsel requested to withdraw from representing Appellant, and during the Military Judge's inquiry into the perceived conflict, Appellant requested to hire a new civilian defense counsel.

On March 20, 2017, the day of trial, Civilian Defense Counsel moved to withdraw from his representation of Appellant claiming a "direct, adverse interest." (J.A. 122–23.) He identified the adverse interest as a "self-preservation

piece" stemming from the Regional Trial Counsel's statement—"This isn't over"—and his belief that he was suspected of aiding Appellant's obstruction of justice. (J.A. 123–24.) He also alleged the United States breached the attorney-client relationship by viewing privileged text message communications. (J.A. 124.)

1. Based on the proffer of Civilian Defense Counsel, the Military Judge summarized the basis of the alleged conflict.

The alleged conflict was based on three facts: (1) the improper viewing of privileged messages on Appellant's cell phone; (2) suggestions that Civilian Defense Counsel was complicit in obstructing justice; and (3) the statement "This isn't over yet" by the Regional Trial Counsel. (J.A. 127–28, 311.)

2. The Military Judge received testimony from the Regional Trial Counsel and lead law enforcement investigator, both of whom denied any suspicion or investigation of Civilian Defense Counsel.

The Regional Trial Counsel testified that he had no evidence of misconduct or unethical behavior by Civilian Defense Counsel, nor did he intend criminal action or an ethical complaint against Civilian Defense Counsel. (J.A. 135.)

The lead law enforcement investigator testified that there was no investigation into misconduct by Civilian Defense Counsel. (J.A. 142.) She also testified that she did not view any text messages between Appellant and his Defense Counsel. (J.A. 142–43.)

3. Following the testimony, the Military Judge repeatedly asked Civilian Defense Counsel to articulate his conflict.

Following the testimony, the Military Judge asked Civilian Defense Counsel if he still believed he was conflicted and to articulate the basis for any conflict. (J.A. 144.) He repeated his request several times. (J.A. 145, 147, 149–50.)

Civilian Defense Counsel stated, "regardless of the testimony," he felt like he was under investigation and that the United States believed he was complicit in Appellant's misconduct. (J.A. 148.) He explained that he "view[ed himself] as the other client in this scenario," and therefore analyzed the conflict as a choice between representing himself and Appellant. (J.A. 149.) Civilian Defense Counsel summarized by saying that he and Appellant's "relationship is directly inversely proportional; and since [he is] facing exposure, potentially," he should be allowed to withdraw. (J.A. 150.)

Civilian Defense Counsel declined to present any evidence. (J.A. 151.)

4. The Military Judge had two colloquies with Appellant. There, he informed Appellant of his rights to counsel, and Appellant stated he wanted to hire another attorney to replace Civilian Defense Counsel.

In a colloquy with Appellant, the Military Judge informed Appellant of his right to counsel and asked by whom he wanted to be represented. (J.A. 151–52.) Appellant stated that he wanted to be represented by his two Detailed Defense Counsel and "another attorney that [he] would like to bring onboard." (J.A. 152.)

Appellant also stated that he was satisfied with Civilian Defense Counsel "[f]or the most part." (J.A. 152.) The Military Judge then asked "[i]s it your wish to continue to retain the services of [Civilian Defense Counsel]?" and Appellant replied "No, sir, it is not." (J.A. 152.) Appellant did not identify another attorney. (J.A. 152.)

Following a recess, the Military Judge asked Appellant about his reasons for no longer wanting Civilian Defense Counsel's representation. (J.A. 153–56.) Appellant claimed that he began to have doubts after the United States mentioned the Civilian Defense Counsel's office location on September 12, 2016. (J.A. 153.) This "confliction" made Appellant "uncomfortable" and concerned that "the focus was no longer on [him] . . . and it was more on trying to clear [Civilian Defense Counsel's] name." (J.A. 154.) After Regional Trial Counsel's "heated exchange" with Civilian Defense Counsel on March 16, 2017, it "solidified" the facts and "removed any doubt" in Appellant's mind that he wanted new counsel. (J.A. 154–55.) Before that incident, he had no concerns about Civilian Defense Counsel's representation. (J.A. 154.)

Further, Appellant claimed that he could not communicate with Civilian Defense Counsel. (J.A. 155–56.) When asked to explain, Appellant stated that everything is "overshadowed about what's going to take priority of him trying to

keep his name clear, keep his firm's name clear, keep his career going. How much of that is he really thinking about?" (J.A. 156.)

Despite his concerns, Appellant took no steps to either sever his relationship with Civilian Defense Counsel or to hire a new attorney at any time between September 12, 2016, and March 19, 2017. (J.A. 155.)

5. The United States opposed any delay due to the proximity to trial and its efforts to secure witnesses.

After acknowledging Appellant's right to discharge his counsel, Trial Counsel stated that the United States was prepared to go to trial as planned. (J.A. 152.) He noted that Appellant's "desire to no longer utilize the services of [Civilian Defense Counsel] does not change that," and that the United States went to "great extents and lengths" to ensure witnesses were present, including the Appellant's wife and daughter. (J.A. 151–52.)

H. The Military Judge made detailed oral and written Findings of Fact and Conclusions of Law denying both Civilian Defense Counsel's request to withdraw and Appellant's request to hire new counsel.

The Military Judge ruled orally and later issued a written Ruling. (J.A. 160–63, 308–17.) The Military Judge found:

> (1) On March 16, 2017, during a recess at an Article 39(a) session:
>
> there was a verbal exchange between [Civilian Defense Counsel] and [the Regional Trial Counsel]. The Civilian Defense Counsel stated to the Regional Trial Counsel, sitting in the gallery, "I wasn't at my office that day," or words to that effect. The Regional Trial Counsel responded, "I don't care," or words to that effect. The Civilian Defense

> Counsel stated, "I know you don't" or words to that effect. The Regional Trial Counsel stated, "This whole thing is shady," and "This isn't over yet," or words to that effect, and then he walked out of the courtroom.

(2) No evidence supported that Civilian Defense Counsel "was in any way complicit with the charges," and nothing supported that any Government actor intended to take "any steps, either criminally or through the bar," against Civilian Defense Counsel. (J.A. 134–44, 160, 311–12.)

(3) The history of the case included multiple continuances and "significant difficulty in securing the presence of [Appellant's wife and daughter]." (J.A. 160, 312–13.)

(4) Continuances in the case were "at least partially due to the actions of [Appellant], as indicated by the government's evidence in support of the charges of obstruction of justice and military protective order violations." (J.A. 317.)

(5) Trial was scheduled to begin the following morning and witnesses had been produced from "Hawaii, Okinawa, Louisiana, Montana, and Mississippi." (J.A. 152, 312.)

(6) "During all sessions of court observed by the military judge, [Appellant] and [Civilian Defense Counsel] were able to communicate effectively with each other and the assigned military defense counsel, and [Civilian Defense Counsel] was able to successfully present pertinent evidence and argument on [Appellant's] behalf." (J.A. 309.) Additionally, "an objective observation" would lead a

"disinterested observer to conclude that an ability to communicate freely . . . is entirely present." (J.A. 316.)

(7) "[Appellant]'s attempts to terminate his representation by [Civilian Defense Counsel] on the morning of the first day of a trial evidences an obvious attempt to further impede the prosecution of the case against him." (J.A. 316–17.) "Based on the timing of the request to terminate [Civilian Defense Counsel] and the lack of any credible evidence supporting [Appellant]'s bases for the request, the court concludes that the request is without merit." (J.A. 317.)

(8) No reference to the proximity of the Civilian Defense Counsel's office was made at trial. Nor was any evidence, argument, or insinuation of the Civilian Defense Counsel's complicity in any misconduct presented at trial. (J.A. 311.)

(9) Civilian Defense Counsel was "not able to cite any actual legal situations that could arise where he would be unable to provide effective and zealous representation for [Appellant]." (J.A. 316.)

In his Ruling, the Military Judge addressed Civilian Defense Counsel's request to withdraw and Appellant's request to hire new civilian counsel in separate sections. (J.A. 313, 315.) In the former section, he cited to R.C.M. 506(c), the Navy Judge Advocate General's ethics rules, and *Cuyler v. Sullivan*, 446 U.S. 335 (1980). (J.A. 313–14.) He then held that "there is no actual conflict of interest present in this case." (J.A. 316.) Based on the testimony of the

Regional Trial Counsel and the investigator, Civilian Defense Counsel's "suspicions were shown to be unfounded and speculative in nature." (J.A. 316.)

In the section analyzing Appellant's request to terminate his relationship with Civilian Defense Counsel and hire a new attorney, the Military Judge cited military and federal caselaw supporting that an accused's right to select a counsel is not unlimited. (J.A. 315–16.) He then analyzed Appellant's request and found it lacked "any credible evidence" and was "without merit" as "an obvious attempt to further impede the prosecution of the case against him." (J.A. 317.)

I. Prior to Member selection, Civilian Defense Counsel assured the court that he was committed to Appellant's case.

The day after the Military Judge's Ruling and as trial began, Civilian Defense Counsel assured the court that he felt he had a conflict "subjectively" that he thought "met the law and the regulations objectively." (J.A. 164–65.) However, his "heart [was] absolutely in this case" and he would "observe every effort to defend [Appellant] . . . with every legal fiber." (J.A. 165.) The alleged conflict was not mentioned again during the trial.

J. Appellant's wife testified about the obstruction of justice and conspiracy Charges. Civilian Defense Counsel examined her and delivered closing argument.

Appellant's wife appeared as both a United States and a Defense witness, and Civilian Defense Counsel examined her in both instances. (J.A. 166–233.) His examinations included questions about the conspiracy to obstruct justice and

her presence at locations near his office, though the office itself was not mentioned before the Members. (J.A. 203, 220.)

Appellant's wife testified that, in September 2016 and shortly before Appellant's first court-martial, she and the Victim vacated base housing and stayed with friends near Los Angeles. (J.A. 185–86.) After investigators located her there and served her with a subpoena, they moved to Clarksdale, Mississippi, and lived with Appellant's parents. (J.A. 187.)

During her testimony, Civilian Defense Counsel objected to references to Appellant's internet searches about how to avoid a subpoena. (J.A. 188–89.) In response, the United States reiterated that it did not intend "in the slightest" to refer to Civilian Defense Counsel's office location, and the objection was overruled. (J.A. 189.)

Appellant did not testify, and he told the Military Judge that not doing so was his personal decision. (J.A. 234.) Civilian Defense Counsel then delivered closing argument, which included comment on the obstruction charges. (J.A. 253.)

K. Members convicted Appellant of numerous charges but acquitted him of conspiracy to obstruct justice.

Members found Appellant guilty of violating a military protective order, sexual assault of a child, and obstruction of justice. (J.A. 256.) They found Appellant not guilty of conspiracy to obstruct justice. (J.A. 256.)

Argument

I.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION BY DENYING CIVILIAN DEFENSE COUNSEL'S MOTION TO WITHDRAW. NO CONFLICT OF INTEREST EXISTED AND THEREFORE NO GOOD CAUSE EXISTED FOR WITHDRAWAL UNDER R.C.M. 506. REGARDLESS, APPELLANT WAS NOT PREJUDICED, AND *HOLLOWAY*'S AUTOMATIC REVERSAL RULE IS INAPPLICABLE TO CONFLICTS BASED ON PERSONAL INTEREST.

A. Standard of review.

A military judge's ruling on a motion to withdraw is reviewed for an abuse of discretion. *United States v. Humphreys*, 57 M.J. 83, 88 (C.A.A.F. 2002); *United States v. Smith*, 35 M.J. 138, 142 (C.M.A. 1992); *see also Wheat v. United States*, 486 U.S. 153, 163–64 (1988) (trial court has discretion regarding motions to substitute counsel based on conflicts of interest).

An abuse of discretion occurs when a military judge's "findings of fact are clearly erroneous, the court's decision is influenced by an erroneous view of the law, or the military judge's decision on the issue at hand is outside the range of choices reasonably arising from the applicable facts and the law." *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008) (citations omitted). Under this standard, findings of fact are affirmed absent clear error; conclusions of law are reviewed *de*

novo. *United States v. Flores*, 64 M.J. 451, 454 (C.A.A.F. 2007) (citation omitted).

Whether a conflict of interest exists is a mixed question of law and fact, reviewed *de novo*. *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996); *see also United States v. Saintaude*, 61 M.J. 175, 179 (C.A.A.F. 2005) (reviewing *de novo* ineffective assistance of counsel claim based on conflict of interest).

B. An attorney may withdraw from representation for good cause, including when that attorney has a conflict of interest.

"[E]very defendant has a constitutional right to 'the assistance of an attorney unhindered by a conflict of interests.'" *Cuyler v. Sullivan*, 446 U.S. 335, 355 (1980) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978)); *see also United States v. Murphy*, 50 M.J. 4, 10 (C.A.A.F. 1998) (military accused is entitled to have conflict-free counsel). "Where a constitutional right to counsel exists . . . there is a correlative right to representation that is free from conflicts of interest." *United States v. Lee*, 66 M.J. 387, 388 (C.A.A.F. 2008) (quoting *Wood v. Georgia*, 450 U.S. 261, 271 (1981)).

A military attorney has an ethical duty to identify conflicts of interest and to take appropriate steps to decline or terminate representation when required by applicable rules. *Humpherys*, 57 M.J. at 88 n.4. Within the Department of the Navy, a conflict of interest exists when, *e.g.*, "there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal

interest of the covered attorney." Rule 1.7(a)(2), Navy JAG Instruction 5803.1E (Jan. 20, 2015).

"[D]efense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown." R.C.M. 506(c).

1. The trial court is best positioned to determine if an actual conflict of interest exists.

The Supreme Court has endorsed trial courts' primary role in assessing conflicts of interest. *Wheat*, 486 U.S. at 164. "The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court." *Id.* Even where an appellant objects to a conflict of interest at trial, it is the trial court's responsibility to determine whether an actual conflict of interest exists. *Sullivan*, 446 U.S. at 347. If during that inquiry the trial court determines that no conflict exists, no automatic reversal is required. *Mickens* 535 U.S. at 168 (citing *Holloway*, 435 U.S. at 488); *see also United States v. Breese*, 11 M.J. 17, 23 (C.M.A. 1981) (holding a rebuttable presumption of a conflict of interest in any case of multiple representation unless the military judge conducts a suitable inquiry into a possible conflict).

2. A conflict of interest must exist in reality, not theory.

"An 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Mickens*, 535 U.S. at 171 n.5. This

means that a conflict is "actual" as opposed to "potential" when the diverging interests between an appellant and his counsel give rise to a "conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Id.* at 171 (emphasis added).

"There is an actual, relevant conflict of interests if, during the course of the representation, the defendants' interests do diverge with respect to a material factual or legal issue or to a course of action." *Sullivan*, 446 U.S. at 356 n.3 (J. Marshall, dissenting); *see also United States v. Perez*, 325 F.3d 115, 125 (2nd Cir. 2003) (actual conflict if "attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action"). Conversely, a potential conflict of interest exists if "the interests of an accused may place the defense counsel under inconsistent duties at some time in the future." *Ventry v. United States*, 539 F.3d 102, 111 (2nd Cir. 2008) (citation omitted).

3. A subjective conflict of interest is insufficient to establish good cause.

A purely subjective conflict of interest does not constitute an "actual" conflict of interest under *Sullivan*. *Tueros v. Greiner*, 343 F.3d 587, 594–98 (2nd Cir. 2003). In *Tueros*, the court held that a "purely subjective conflict is . . . an attorney's individual shortcoming, flowing from an incorrect assessment of the situation and devoid of any actual obligation." *Id.* at 597. Accordingly, subjective conflicts do not rise to the level of structural flaws and are appropriately subjected

to normal ineffectiveness analysis under *Strickland v. Washington*, 466 U.S. 668 (1984). "[W]here a subjective conflict causes injury to the defendant, *Strickland* may provide a remedy." *Tueros*, 343 F.3d at 597.

C. Civilian Defense Counsel did not have a conflict of interest and therefore did not have good cause to withdrawal from his representation of Appellant.

Civilian Defense Counsel requested to withdraw from his representation of Appellant based on a perceived conflict of interest, and the Military Judge properly analyzed that request under the "good cause" prong of Rule 506(c).

1. As a threshold matter, the United States does not concede it was error for the Military Judge to restrict his inquiry to the "good cause" prong of Rule 506(c).

Contrary to the lower court's assertion, the United States never conceded it was error for the Military Judge to require a showing of good cause for Civilian Defense Counsel's withdrawal. *See Watkins*, 2019 CCA LEXIS 71, at *19. The United States maintained both in its Answer to the lower court and at Oral Argument that the good cause prong of Rule 506 was the appropriate analysis. *See* Oral Argument at 38:38–40:15 ("We don't believe that that's what the judge's analysis hung on. . . . We don't think this is the express consent of the Accused.") (*available at* https://www.jag.navy.mil/courts/oral_arguments_2018.htm (last accessed Dec. 16, 2019)). The United States maintains that the Military Judge's analysis under the "good cause" prong was correct.

2. The Military Judge conducted a thorough inquiry into the perceived personal conflict of Civilian Defense Counsel and reasonably held that any conflict was theoretical; therefore, good cause for withdrawal did not exist.

Once Civilian Defense Counsel moved to withdraw, the Military Judge conducted a thorough inquiry into the alleged conflict, as required by caselaw. *See United States v. Hurtt*, 22 M.J. 136 (C.M.A. 1986) ("[W]hen a trial judge 'knows or reasonably should know that a particular conflict exists,' he has an 'affirmative duty to inquire into the propriety of multiple representation.'") (quoting *Sullivan,* 446 U.S. at 347); *Breese*, 11 M.J. at 23. The Military Judge's inquiry included: lengthy discussions with Civilian Defense Counsel and Trial Counsel; testimony from the Regional Trial Counsel and an investigator; and colloquies with Appellant. (J.A. 121–63.)

As a result of his inquiry, the Military Judge determined that Civilian Defense Counsel's alleged conflict was premised on concerns that he would be reported for ethical or criminal violations. (J.A. 316.) However, based on the testimony, the Military Judge found that this concern was not based in fact and speculative—i.e., it was subjective. (J.A. 312, 316.) Moreover, Civilian Defense Counsel could not articulate any course of action that would be foreclosed to him, despite the Military Judge's repeated requests that he articulate the basis of his alleged conflict. (J.A. 144, 145, 147, 149, 150, 316.) Because there was no conflict, there was not good cause to withdraw. (J.A. 316.)

In his Ruling, the Military Judge cited the correct rules, numerous cases that interpreted those rules, and the ethical standards for military practitioners. (J.A. 313.) His conclusions were neither arbitrary nor unreasonable, and because he resolved any suspected conflict with his inquiry, he did not abuse his discretion.

3. The Military Judge applied the correct law. He properly interpreted Civilian Defense Counsel's request as requiring good cause.

This Court has held that a lack of specificity may alter the deference afforded to a court in the exercise of its discretion. *See Humpherys*, 57 M.J. at 88 (no abuse of discretion by trial judge where appellant's motion to disqualify consisted of "vague assertions"); *United States v. Douglas*, 56 M.J. 168, 170 (C.A.A.F. 2001) (no abuse of discretion by appellate court where appellant's vague filings lacked sufficient specificity).

Here, Civilian Defense Counsel's request was premised on a conflict of interest and the Military Judge correctly identified the applicable R.C.M. 506. (J.A. 313.) At no point did Civilian Defense Counsel re-frame his request to withdraw as one based on the "express consent of the accused" under the first prong of Rule 506.

To the extent that Appellant did "consent" to Civilian Defense Counsel's withdrawal, his "consent" was premised on the alleged conflict of interest. This is evidenced by Appellant's statement that his concerns about a "confliction" arose in

September 2016 and "solidified" upon the Regional Trial Counsel's heated exchange. (J.A. 153–55.) Aside from the alleged conflict, Appellant stated he had no reservations about Civilian Defense Counsel's representation. (J.A. 154.)

Furthermore, any "consent" is undermined by the Military Judge's finding that Appellant was making an "obvious attempt to further impede the prosecution against him." (J.A. 317.) This finding of fact, discussed further in Sections II.D.1 and III, is supported by Appellant's previous contributions to delay and the lack of support for his claim that he could not communicate with Civilian Defense Counsel. (J.A. 155–56, 160, 310, 317.) Therefore, the Military Judge's interpretation of Counsel's request as a withdrawal request requiring good cause should be afforded deference by this Court.

D. Even if Civilian Defense Counsel had a personal conflict of interest, or if the Military Judge erred by requiring a showing of good cause, Appellant's Sixth Amendment claim is outside the limited exceptions of *Holloway* or *Sullivan*.

For the reasons discussed below, the prejudice analysis in Appellant's case is governed by *Strickland* and exceptions to that standard are inapplicable.

1. Appellant's case does not involve multiple representation, and *Holloway* does not apply. *Strickland* prejudice is the correct test according to *Saintaude*.

"The purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is not 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." *Mickens*, 535 U.S. at 176; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986) ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel.").

Cases not involving concurrent representation of multiple clients will "require specifically tailored analyses in which the appellant must demonstrate both the deficiency and prejudice under the standards set by *Strickland*." *United States v. Cain*, 59 M.J. 285, 294 (C.A.A.F. 2004) (citations and internal quotations omitted). "Conflicts of interest, like other actions by an attorney that contravene the canons of legal ethics, do not necessarily demonstrate prejudice under the second prong of *Strickland*." *Saintaude*, 61 M.J. at 179 (citing *Mickens*, 535 U.S. at 175–76; *Nix*, 475 U.S. at 165). Thus, "the question of whether there is inherent prejudice in a conflict between the self-interest of an attorney and the interests of the client must be assessed on a case-by-case basis." *Id.* at 180.

a. <u>*Holloway* governs preserved, multiple representation conflicts, and subsequent caselaw did not change that</u>.

In *Holloway*, the Supreme Court held that multiple representation of defendants, when objected to but left unresolved by the trial judge, results in automatic reversal. 435 U.S. at 484–85. This is because "an inquiry into a claim

of harmless error would require, unlike most cases, unguided speculation." *Id.* at 490.

Several years later, in *Sullivan*, the Court declined to extend *Holloway*'s automatic reversal rule to multiple representation conflicts that were neither preserved nor apparent at trial. 446 U.S. at 347–48. Instead, where there is only a "mere possibility" of a conflict that was unobjected to at trial, an appellant must show that "an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 345.

Finally, in *Mickens*, the Court clarified that *Holloway*'s rule applies "only where defense counsel is forced to represent codefendants over his timely objection, unless the trial court has determined that there is no conflict." 535 U.S. at 168; s*ee also, e.g., United States v. Williamson*, 859 F.3d 843, 856 (10th Cir. 2017) ("[W]e conclude that *Mickens* clarified that the automatic reversal rule applies only to multiple representation conflicts of interest.").

b. Appellant's case does not involve multiple representation and the Military Judge conducted a proper inquiry, so *Holloway* does not apply.

Unlike *Holloway*, the alleged conflict here is based on a personal interest of Civilian Defense Counsel, not multiple representation. (J.A. 145 (Counsel felt "personally conflicted"); Appellant's Br. at 27–30.) Even those military cases that cite *Holloway* for non-multiple representation conflicts do not purport to apply

Holloway's holding. *See Cain*, 59 M.J. at 294; *United States v. Babbit*, 26 M.J. 157 (C.M.A. 1988) (both discussed *infra* Section I.D.2). Simply, *Holloway*'s holding, as recognized in *Mickens*, does not extend beyond the multiple representation context. *Mickens*, 535 U.S. at 168.

Furthermore, unlike the trial judge in *Holloway*, the Military Judge conducted a thorough inquiry into the alleged conflict of interest once it was raised to him. This fact also takes Appellant's case outside of *Holloway*'s reach. *See Gillard v. Mitchell*, 445 F.3d 883, 892 (6th Cir. 2006) ("Since the trial court inquired into the purported conflict of interest, the automatic reversal rule was not implicated." (citations omitted)).

c. There is no basis to extend *Holloway* to cases not involving multiple representations.

Appellant incorrectly urges an extension of *Holloway* based on *Leaver* and *Knight*. (Appellant's Br. at 37, 39.) Both of those cases involved appellants who sought to fire counsel post-trial due to alleged ineffectiveness. *United States v. Leaver*, 36 M.J. 133, 134–35 (C.A.A.F. 1992); *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000). In *Leaver*, when the staff judge advocate denied the appellant's request for substitute counsel, the appellant "was left completely without counsel at all after trial." *Leaver*, 36 M.J. at 136. This Court cited *Sullivan*, *Holloway*, and other precedent to generally support that a post-trial challenge to counsel's adequacy creates a conflict requiring new counsel. *Id.* at

135. It then concluded that, because of the "absence" of counsel, a new post-trial process was required. *Id.* at 136.

But *Leaver* did not purport to extend *Holloway*'s automatic reversal rule to any new situation, nor did it provide any meaningful analysis for conflicts raised and inquired into pre- or mid-trial. Likewise, the other case, *Knight*, is merely a block quote of *Leaver*, again devoid of relevant analysis.

This Court should decline Appellant's invitation to extend *Holloway*'s automatic reversal rule to cases not involving multiple representations.

2. Appellant's case can properly be tested for prejudice under the *Strickland* standard.

This Court's holdings in *Babbitt*, *Cain*, and *Saintaude* rebuke an automatic reversal rule in favor of a case-by-case analysis as a means to test counsel's trial performance in conflict cases. In *Babbit*, trial defense counsel had an extramarital sexual relationship with his client. 26 M.J. at 159. This Court, citing to *Strickland* and *Sullivan*, held that the circumstances did not warrant a *per se* presumption of prejudice because Appellant failed to show either that counsel "actively represented conflicting interests" or that any conflict "adversely affected counsel's performance." *Id*. Rather, the Court noted that counsel's presentation "was, if anything, spurred on by his relationship with appellant," and counsel effectively prepared, cross-examined witnesses, and presented both evidence and argument. *Id.* In closing, the Court noted that the Sixth Amendment's guarantee "is not to

improve the quality of legal representation . . . [it] is simply to ensure that criminal defendants receive a fair trial." *Id.* (quoting *Strickland*, 466 U.S. at 689.)

Later, in *Cain*, this Court found an attorney's egregious criminal conduct created a "*per se* conflict" and was "inherently prejudicial." 59 M.J. at 295. There, while representing a sailor charged with forcible sodomy, lead defense counsel began a homosexual sexual relationship with his client, conduct that was criminal at the time. *Id.* at 286, 292–93. When counsel's misconduct was revealed post-trial, he committed suicide. *Id.* at 295. Citing *Holloway*—but declining to create a *per se* rule—this Court held that a *per se* conflict existed because of the specific circumstances of the case. *Id.* Namely, those circumstances were "an attorney's abuse of a military office, a violation of the duty of loyalty, fraternization, and repeated commission of the same criminal offense for which the attorney's client was on trial[, all] left unexplained due to the attorney's untimely death." *Id.* Moreover, because the conflict was "real, not simply possible," that conflict threatened the normal presumption of adequacy of representation and was held inherently prejudicial. *Id.*

The next year, in *Saintaude*, this Court applied *Strickland* to a conflict case involving counsel's personal interests. 61 M.J. at 183. There, the appellant alleged numerous conflicts related to defense counsel's personal relationships, unresolved disciplinary actions, and allegations of ethical violations. *Id.* at 180–

81. The Court reiterated that a "case-by-case" assessment is the correct approach, and the Court held that appellant's case did not involve "the unusual combination of factors" that rendered *Cain*'s conflicts inherently prejudicial. *Id.* Accordingly, the Court applied *Strickland* and determined no prejudice resulted. *Id.* at 183.

Here, Appellant's case presents no unusual circumstances comparable to *Cain*. There is no evidence Civilian Defense Counsel engaged in ongoing criminal conduct or violated his duty of loyalty, nor is there the complicating factor of counsel's post-trial suicide to navigate. Thus, as it did in *Saintaude*, this Court should review for prejudice under *Strickland*. Under that standard, three reasons demonstrate that Appellant both received a fair trial and was not prejudiced by any conflict that may have existed.

a. Civilian Defense Counsel provided assurance his heart was in the case.

First, unlike the secreted criminal conduct of *Cain*, Civilian Defense Counsel assured the court that his "heart [was] absolutely in this case" after the Military Judge denied his withdrawal request. (J.A. 164–65.) This is a far cry from *Cain*, where the attorney labored under a real threat of criminal prosecution, had violated several ethical obligations, and was unable to provide any assurances once the conflict was exposed. *See Cain*, 59 M.J at 295. Instead, like the counsel in *Babbit*, Civilian Defense Counsel went on to perform a cross and direct examination of Appellant's wife and delivered a lengthy closing argument, and in

each, he referenced the alleged conspiracy or obstruction Charges. (J.A. 219, 231, 251.) There is no indication his representation was anything but zealous.

b. Appellant fails to identify an alternative strategy.

Second, Appellant fails to identify any course of action that would have been different. While his declarations state he desired to testify, they simultaneously reveal the well-reasoned advice of his counsel that the evidence against him would have undermined his testimony, likely referencing his obstruction of justice. (J.A. 25.) He also confirmed at trial that the decision was his own. (J.A. 234.)

Appellant's claim that Civilian Defense Counsel refused to interview Appellant's wife and daughter is also countered by the Record. With respect to Appellant's daughter, Civilian Defense Counsel stated his lack of an interview was a strategic choice to avoid an appearance of influence given her favorable statements and recantation. (J.A. 295.) With respect to Appellant's wife, Civilian Defense Counsel interviewed her once. (J.A. 21.) She then delivered favorable testimony for Appellant in every regard, and there is no indication that further interviews would have led to additional information, or that Civilian Defense Counsel omitted beneficial evidence due to his personal interests.

c. Appellant was acquitted of the conspiracy Charge, mooting any claim that Civilian Defense Counsel's personal interests detracted from his effectiveness.

Finally, Appellant was acquitted of the conspiracy Charge. (J.A. 256.) Since Counsel's alleged conflict was premised on his theoretical involvement in the conspiracy to obstruct justice, the acquittal of that Charge mooted any decision by Counsel to elevate his personal interests over those of the Appellant. *See Strickland*, 466 U.S. at 697 ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.") This is similar to the attorney in *Babbitt*, whose representation was, if anything, improved by the potential conflict. Civilian Defense Counsel succeeded in the one realm where his personal interests may have arisen, so Appellant was not prejudiced.

Accordingly, even presuming error in the Military Judge's ruling, Appellant cannot show prejudice.

3. Even if Appellant's case did involve multiple representation, neither *Sullivan* nor *Holloway* would require reversal as they are distinguishable.

At trial, Civilian Defense Counsel attempted to re-cast his personal interest conflict as one of multiple representation, (J.A. 149), but even if that were true, his claim would still fail under *Sullivan* and *Holloway*.

a. *Sullivan* involved no inquiry into a conflict that was not apparent at trial, unlike here, where the Military Judge resolved the perceived conflict pre-trial.

In *Sullivan*, trial defense counsel represented three codefendants who were tried separately, and there was no objection to the concurrent multiple representation at trial. 446 U.S. at 347–48. Nevertheless, after trial it was revealed that several tactical decisions were made, at least in part, in order to strengthen the cases of the codefendants. *Id.* at 338–39. Sullivan appealed, claiming *Holloway* demanded automatic reversal, despite no objection at trial and only the "mere possibility" of a conflict. *Id.* at 345. The Supreme Court disagreed. The Court held that an objection to multiple representations at trial requires a trial court to inquire into the potential conflict. *Id.* at 348. However, where there is no objection, an appellant must establish that "an actual conflict of interest adversely affected his lawyer's performance." *Id.*

Here, even if Civilian Defense Counsel actually had a conflict of interest, there is no evidence that he made tactical decisions in order to strengthen his own case or that his personal interests were mentioned at trial. (J.A. 311.) Moreover, Appellant was acquitted of conspiracy to obstruct justice, which was the basis for the perceived conflict. (J.A. 149–50.) His case is unlike *Sullivan*.

Notably, the Supreme Court in *Mickens* dicta questioned the expansive use of *Sullivan* by appellate courts. 535 U.S. at 174–75. It noted that, under *Sullivan*,

a defendant must show his counsel "actively represented conflicting interests" in order to establish "the constitutional predicate for his claim of ineffective assistance." *Id.* at 175. The Court then stated that *Sullivan* and *Holloway* stressed the high probability of prejudice from "multiple concurrent representation," but "[n]ot all attorney conflicts present comparable difficulties." *Id.*

b. *Holloway* involved the binary choice between the rights of multiple indicted defendants, unlike here, where only one party was entitled to Sixth Amendment protections.

In *Holloway*, trial defense counsel objected to his joint representation of three codefendants because he was unable to cross-examine them without betraying another's interest. *Id.* at 479–80. The trial judge "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 484. The Supreme Court held this was error, concluding that "whenever a trial court improperly requires joint representation over timely objection reversal is automatic." *Holloway*, 435 U.S. at 488 (citing *Glasser v. United States*, 315 U.S. 60, 75–76 (1942)). The Court highlighted that the trial judge "failed to take adequate steps in response to the repeated motions, objections, and representations made to it, and no prospect of dilatory practices was present to justify that failure." *Id.* at 487. Thus, the Court's holding did not preclude a trial court from "exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests." *Id.* at 487.

Unlike *Holloway*, the Military Judge did not fail to explore the adequacy of the basis for Civilian Defense Counsel's perceived conflict. Quite the opposite, he called two witnesses, invited evidence, and heard arguments from both sides to reach his conclusion. In doing so, he performed the inquiry that was absent in *Holloway* and central to the Supreme Court's resolution of that case. He then found that Civilian Defense Counsel only had a hypothetical conflict. (J.A. 159–60.) Accordingly, none of the constitutionally-required obligations to another client that occurs with multiple representation were present—the interests he might have sought to protect were only his own. *See United States v. Gouveia*, 467 U.S. 180, 187–88 (1984) (right to counsel attaches at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment"). Thus, *Holloway* is distinguishable on its facts.

i. Appellant's reliance on the Second Circuit's *per se* rule is misplaced because the Military Judge addressed the alleged conflict pre-trial and resolved the issue through a sufficient inquiry.

Appellant's reliance on the Second Circuit's use of a *per se* rule to bypass the need to show an adverse impact is misplaced. (Appellant's Br. at 33–35.) The Second Circuit's approach pre-dated *Mickens* and has been challenged or rejected by other circuits. *See Mora v. Williams*, 111 Fed. Appx. 537, 547 n.4 (10th Cir. 2004) (unpub.) (questioning Second Circuit's method in light of *Mickens* and

noting its rejection by Seventh Circuit). Even the Second Circuit has recognized that its *per se* rule is in discord with the Supreme Court post-*Mickens*. *See Cardoza v. Rock*, 731 F.3d 169, 183 n.8 (2nd Cir. 2013) (noting Supreme Court recognizes a *per se* rule in only one circumstance: "where defense counsel is forced to represent codefendants over his timely objection").

Even were the Second Circuit's approach viable post-*Mickens*, Appellant's case is distinguishable as those cases required counsel to compromise the client's interests to avoid personal liability. For instance, in *United States v. Cancilla*, 725 F.2d 867, 868 (2nd Cir. 1984), an effective defense required shifting blame to a separate entity that the counsel previously represented for identical misconduct. *Id.* When the trial judge raised the concern, the appellant's counsel became markedly less vigorous in his defense. *Id.* The Second Circuit held that a *per se* conflict existed, regardless of whether the appellant could identify specific prejudice. That is, under *Sullivan*, the appellant showed that "a conflict of interest actually affected the adequacy of his representation," and this fact relieved the appellant of his "need [to] demonstrate prejudice in order to obtain relief." *Id.* at 870 (quoting *Sullivan*, 446 U.S. at 349–50).

Unlike *Cancilla*, and assuming *Sullivan* applied, Appellant can point to no portion of Civilian Defense Counsel's representation that was actually affected by a conflict of interest. There is no indication in the Record—either express or

implied—that Civilian Defense Counsel abandoned any line of questioning or defense strategy, or that he acted with any less zeal than required. In fact, in Counsel's own words, he said he "would observe every effort to defend [Appellant] with every legal fiber that [he could] squeeze." (J.A. 165.) Thus, any conflict of interest was potential, not actual, and distinguishable from Second Circuit precedent.

ii. Like *Reyes-Vejerano*, Appellant's case is devoid of evidence that Civilian Defense Counsel's personal interests impacted his representation.

Appellant's case is close to *Reyes-Vejerano v. United States*, 276 F.3d 94 (1st Cir. 2002). There, the appellant alleged his counsel had an actual conflict of interest because defense counsel, who feared he too was facing indictment, exchanged "heated words" with the prosecutor and law enforcement. *Id.* at 97–98. The First Circuit acknowledged that "a defense lawyer within the sights of a targeted criminal prosecution may find his personal interests at odds with his duty to a client" but "rejected any *per se* rule of conflict." *Id.* at 99 (citing *United States v. Montana*, 199 F.3d 947, 949 (7th Cir. 1999)). Notably, the First Circuit denied relief because, while it was "unclear, . . . but arguable that[] counsel was being investigated . . . . there is nothing to show counsel pulled any of his punches" and appellant "offered no reason to think [his] personal interests diverged from those of [his attorney] other than [a] general and unspecified theory." *Id.*

Like *Reyes-Veierano*, Civilian Defense Counsel here had, at best, an arguable claim that he was under investigation. But the Military Judge resolved that claim, finding Civilian Defense Counsel was not the object of any criminal or ethical investigation or complaint. (J.A. 316.) Following this, and while giving assurances that he would perform zealously, Civilian Defense Counsel acknowledged his conflict was "subjective." (J.A. 164.) Then, during trial, there was no mention of his personal interests or any conflict concerns, nor is there any indication in the Record that he pulled any punches in his representation of Appellant. (J.A. 311.) As in *Reyes-Veierano*, Appellant's claim is no more than a general and unspecified theory unsupported by evidence in the Record.

In looking for similar personal interest conflict cases, Appellant misunderstands *United States v. White*, 706 F.2d 506 (5th Cir. 1983). (Appellant's Br. at 36, 39.) The court there reversed not because of counsel's alleged criminal activity but because the trial court neglected to follow the Circuit's established procedures for an effective conflict waiver. *Id.* at 509–10 ("The district court's actions in the present case fall short of the 'affirmative judicial involvement in the waiver process' outlined in *Garcia*." (citations omitted)).

This Court should decline Appellant's invitation to find a *per se* conflict here given the circumstances of Appellant's case and the Military Judge's detailed Findings of Fact. Instead, this Court should hold that the Military Judge did not

abuse his discretion in his application of R.C.M. 506(c), or if he did, this Court should hold that Appellant was not prejudiced.

II.

THE MILITARY JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT'S REQUEST TO REPLACE HIS CIVILIAN COUNSEL. APPELLANT'S REQUEST, WHICH IS CORRECTLY REVIEWED AS A CONTINUANCE REQUEST, WAS AN OPPORTUNISTIC, DILATORY TACTIC, AND THE MILITARY JUDGE PROPERLY DENIED IT. EVEN IF THE MILITARY JUDGE ERRED, IT WAS NOT STRUCTURAL ERROR AND APPELLANT WAS NOT PREJUDICED.

A. Standard of review.

This Court reviews the a denial of a continuance request to retain new counsel for an abuse of discretion. *United States v. Wiest*, 59 M.J. 276, 279 (C.A.A.F. 2004); *Miller*, 47 M.J. at 358 (citing *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986)). A military judge's denial of a continuance is an abuse of discretion "where 'reasons or rulings of the' military judge are 'clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice.'" *United States v. Weisbeck*, 50 M.J. 461, 464 (C.A.A.F. 1999) (*quoting Miller*, 47 M.J. at 358).

Appellant mistakenly states that the Military Judge's failure to cite *Miller* entitles him to no deference and therefore the standard of review is *de novo*. (Appellant's Br. at 42.) But the standard of review remains the same regardless of

the level of deference afforded by this Court. *See United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014) (judge's failure to make essential findings still reviewed for abuse of discretion but with less deference). Moreover, even without citation to *Miller*, the Military Judge made numerous Findings of Fact that support his reasoning for denying Appellant's request. (J.A. 308–17.) This Court should apply the well-established abuse of discretion standard of review.

B. Only improper or erroneous deprivations of the right to counsel violate the Sixth Amendment, and trial courts enjoy "substantial latitude" in balancing the right to counsel against the needs of justice.

The Sixth Amendment right to counsel includes the right to be represented by retained counsel of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006). A violation of this Constitutional right occurs when a defendant's choice of counsel is wrongfully denied. *Id.* at 150.

But the right to counsel of choice is not absolute; only "improper or 'erroneous' deprivations of a defendant's counsel of choice violate the Sixth Amendment." *United States v. McKeighan*, 685 F.3d 956, 969 (10th Cir. 2012) (citing *Gonzalez-Lopez*, 548 U.S. at 146). The exercise of the right to civilian counsel "cannot operate to unreasonably delay the progress of the trial." *Thomas*, 22 M.J. at 59 (citing *Morris v. Slappy*, 461 U.S. 1 (1983)).

1. A trial court's discretion is at its zenith when an appellant seeks to replace counsel shortly before trial.

Trial courts have "wide latitude in balancing the right to counsel of choice against the needs of fairness." *Gonzalez-Lopez*, 548 U.S. at 152 (citations omitted); *see also Wheat*, 486 U.S. at 163–64 (trial judge "must be allowed substantial latitude" or "broad latitude"); *United States v. Cordy*, 560 F.3d 808, 817 (8th Cir. 2009), *cert. denied*, 558 U.S. 878 (2009) ("trial court's discretion is at its zenith when the defendant endeavors to replace counsel shortly before trial"). While a military judge should grant continuances to allow a "reasonable opportunity to obtain civilian counsel," *Miller*, 47 M.J. at 358, if the totality of the circumstances do not justify a continuance, the right to counsel of choice is circumscribed, and any deprivation of choice of counsel is not improper, *Thomas*, 22 M.J. at 59.

2. A military judge's denial of a continuance is only an abuse of discretion if it reflects an unreasonable and arbitrary decision.

When an appellate court reviews a military judge's decision to deny a continuance, "only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay will result in reversal." *See United States v. Wellington*, 58 M.J. 420, 425 (C.A.A.F. 2003) (quoting *Slappy,* 461 U.S. at 11–12) (internal quotations omitted). "In determining whether the decision was arbitrary, we consider both the circumstances of the ruling and the reasons given

by the judge." *United States v. Velazquez*, 772 F.3d 788, 797 (7th Cir. 2014) (citation omitted).

Relevant factors to determine if a trial judge abused his discretion include: (a) surprise; (b) the nature of evidence involved; (c) timeliness of the request; (d) substitute testimony or evidence; (e) the length of the continuance; (f) prejudice to the opponent; (g) moving party received prior continuances; (h) good faith of the moving party; (i) use of reasonable diligence by the moving party; (j) possible impact on the verdict; and (k) prior notice. *Wiesbeck*, 50 M.J. at 464 (citing *Miller*, 47 M.J. at 358).

C. Despite no specific continuance motion at trial, Appellant's request is properly reviewed as a continuance denial based on the facts of the case and Appellant's framing of the issue both here and before the lower court.

The Ninth Circuit recognized in *United States v. Turner* that a continuance request that implicates the right to counsel "can be analyzed either as the denial of a continuance or as the denial of a motion to substitute counsel." 897 F.3d 1084, 1101 (9th Cir. 2018) (quoting *United States v. Nguyen*, 262 F.3d 998, 1001 (9th Cir. 2001)). The lower court's "primary reasons for not allowing a defendant new counsel may determine which analysis to apply." *Id.*

1. The Military Judge identified Appellant's request as an opportunistic attempt to delay trial, and it is therefore akin to a request for more time.

In *United States v. Gaffney*, the First Circuit encountered a situation like Appellant's. 469 F.3d 211 (1st Cir. 2006). There, on the day of his guilty plea, the defendant stated that he did not want to go to trial with his lawyer and wanted to hire a different one. *Id.* at 213–14. The trial judge denied the request. *Id.* On appeal, the defendant claimed his motion was for a substitution of counsel and therefore the judge denied his right to choice of counsel. *Id.* at 215. The court disagreed and reviewed his claim as a continuance denial because the defendant merely "wanted more time to consider securing alternative counsel." *Id.* at 216. The court juxtaposed the defendant's claim with the facts of *Gonzalez-Lopez*, where the defendant (1) retained a new attorney, (2) had his new attorney present and ready to try his case, and (3) moved to fire his current counsel. *Id.* (citing *Gonzalez-Lopez*, 548 U.S. 140). But (1) Gaffney had not identified alternative counsel, (2) there was no motion to withdraw or fire his current counsel, and (3) there was no communication problem. *Id.* at 218–19.

As in *Gaffney*, the Military Judge viewed Appellant's request as a means to acquire delay, calling it "an obvious attempt to further impede the prosecution against him." (J.A. 317.) And like the defendant in *Gaffney*, Appellant only requested to secure a new, unidentified substitute counsel, (J.A. 152), but he never

fired his current counsel or retained new counsel, and Civilian Defense Counsel did not claim there was a communication problem. While Civilian Defense Counsel did move to withdraw, he did so based on his erroneous belief that he was conflicted and not because of Appellant's express consent. (J.A. 144–46.) Thus, comparing Appellant's facts to *Gaffney*, and using the Ninth Circuit's insightful method of examining the reasons for the trial judge's denial, it is correct to characterize the Ruling as a denial of a request for more time.

2. Additionally, Appellant frames the issue as a continuance denial.

In *United States v. Lyles*, a trial judge denied a defendant's "last-minute" request for additional time to retain private counsel. 223 Fed. Appx. 499, 502 (7th Cir. 2007) (unpub.). The defendant was granted several previous continuances to retain private counsel but took no action. *Id.* Although the case was "not completely clear cut" and the court disagreed with the judge's decision, it held it was not an abuse of discretion given the "deferential standard of review." *Id.* at 503. Importantly, despite an "extensive record" of "troubles" with her appointed counsel, the court only reviewed the judge's denial of a continuance because the defendant "appealed only the denial of her request for additional time." *Id.* at 502.

Here, Appellant frames his appeal as a denial of a request for additional time. (Appellant's Br. at 41.) Appellant so framed the issue before the lower court, too. *See Watkins*, 2019 CCA LEXIS 71, at *24–25 ("[B]oth parties agree

that the military judge's decision to deny the appellant's request should be considered using the [*Miller*] factors."). Accordingly, this Court should review the Military Judge's ruling under the rubric of *Miller*.

3. Even were Appellant requesting substitution of counsel, his request necessarily involved a continuance request.

Even were Appellant's request framed as a substitution of counsel, a continuance request would have undoubtedly followed. *See generally United States v. Mangual-Santiago*, 562 F.3d 411, 430 (1st Cir. 2009) (recognizing that, once new counsel was substituted, "the court had an obligation to ensure that his counsel had adequate time to prepare for trial"). This is certainly true in Appellant's case where substitute counsel was neither retained nor present on the first day of trial. (J.A. 25.)

D. The Military Judge's denial of Appellant's request was not an abuse his discretion considering the *Miller* factors.

An application of the relevant *Miller* factors demonstrates that the Military Judge did not abuse his discretion in denying Appellant's request.

1. Appellant's request was not made in good faith, and that reason alone justified the Military Judge's denial of his request.

"A defendant will not be permitted to subvert judicial proceedings or cause undue delay by designating a certain lawyer . . . . Nor must a court honor a belated request made not in good faith but as a transparent ploy for delay." *United States v. Rankin*, 779 F.2d 956, 958 (3rd Cir. 1986) (citing *Slappy*, 461 U.S. at 13); *see*

also United States v. Goldberg, 67 F.3d 1092, 1098 (3rd Cir. 1995) ("[A] court has discretion to deny a request for a continuance if made in bad faith, for purposes of delay or to subvert judicial proceedings.").

In *United States v. Torres-Rodriguez*, the defendant moved to substitute his counsel on the day of trial. 930 F.2d 1375, 1380–81 (9th Cir. 1991). The new counsel was present in the courtroom, but the trial judge denied the substitution request without inquiring into potential delay or the nature of the defendant's complaint. *Id.* at 1381. In holding this was an abuse of discretion, the court noted that other similar cases involving day-of-trial requests were supported by findings by the trial judge and were therefore not an abuse discretion. *Id.* Specifically, the court cited *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir. 1979), in which the defendant sought "a continuance to allows the substitution," and *United States v. Pruitt*, 719 F.2d 975, 978 (9th Cir. 1983), in which the trial judge "made an express finding that the motion to substitute had been made for purposes of delay." *Id.*

Unlike the judge in *Torres-Rodriguez*, and comparable to those cases without an abuse his discretion, the Military Judge supported his denial with extensive findings, including an express finding that Appellant's request was "opportunistic" and "an obvious attempt to further impede the prosecution of the case against him." (J.A. 161, 317); *see infra* Section III; *see also Watkins*, 2019

CCA LEXIS 71, at *31 ("The military judge's conclusion that the appellant's request was motivated by opportunism rather than LtCol K's conduct is a finding of fact."). This finding of bad faith renders the Military Judge's denial a proper exercise of his discretion, and it was supported by the Record in two ways.

First, Appellant previously attempted to impede the prosecution of his case. Appellant's internet search history evidenced an attempt to aid his wife in avoiding subpoenas and obstructing justice, and Appellant actively facilitated their evasion of service. (J.A. 160, 310, 317.) This produced significant delay, which was "at least partially attributable to Appellant," (J.A. 317), and ultimately led to withdrawal and dismissal of the first trial, (J.A. 160, 310–11).

Second, nothing in the Record supports Appellant's claim that he could not communicate with his Civilian Defense Counsel. (J.A. 155–56.) Appellant stated only that his communications with Civilian Defense Counsel were "overshadowed about what's going to take priority," not that they had no communication. (J.A. 156.) And none of his three Defense Counsel raised a communication problem, either before or during trial. Appellant's reliance on *Carlson v. Jess*, (Appellant's Br. at 42–43), which involved a judge that ignored repeated statements that communication had "completely broken down," is therefore unavailing. 526 F.3d 1018, 1023 (7th Cir. 2008); *see also United States v. Lott*, 310 F.3d 1231, 1252 (10th Cir. 2002) ("Brief disagreements or arguments will not suffice to prove total

breakdown."). The Military Judge inquired into the claim and found that it was not credible given Appellant's answers, his observations throughout the trial, and the opportunistic nature of the request. (J.A. 155–56, 316–17.) It was therefore reasonable to conclude that a "disinterested observer [would] conclude an ability to communicate freely . . . [was] entirely present." (J.A. 316.)

Accordingly, Appellant's request was a ploy for delay and, as the lower court held, that fact overwhelms the other *Miller* factors. *Watkins*, 2019 CCA LEXIS 71, at *32 ("finding of bad faith swamps the rest of the *Miller* factors"). This factor favors the United States and is dispositive.

2. The potential loss of key witnesses—Appellant's Wife and daughter—meant the United States would be prejudiced by a continuance.

The Military Judge found that the United States encountered "several and significant challenges" in producing Appellant's wife and daughter. (J.A. 312.) In his oral ruling, he noted that Appellant had searched for information on extradition agreements with his phone and Appellant's wife was an "immigrant who still has significant international ties." (J.A. 160.) For these reasons, he concluded that those key witnesses may become unavailable if the case were continued. (J.A. 160.) This factor favors the United States.

3. Appellant's request was untimely and not a reasonable exercise of diligence, regardless of any surprise to Appellant.

Appellant had five days after the "heated exchange" with Regional Trial

Counsel to find new counsel, yet he did not articulate to the Military Judge who he wanted to retain or when they might be available. Further, Appellant stated that his concerns about Civilian Defense Counsel's representation began in September 12, 2016, during Appellant's first trial. (J.A. 153–54.) Yet, Appellant presented no evidence that he even considered procuring new counsel until the eve of the second trial, nor did either of his Detailed Defense Counsel voice support for his position. Thus, even assuming Appellant's desire for new counsel was sincere, his delay in retaining new counsel rendered his request untimely. (J.A. 154.)

Even if the "heated exchange" constituted surprise to Appellant, (*see* Appellant Br. at 42–43), Appellant conceded that the reasons he was concerned surfaced well before that. (J.A. 155.) And as Appellant knew his trial date, and waited until the day before trial to alert the Military Judge that he wanted new unspecified counsel, and then only after the Military Judge asked Appellant by whom he wanted to be represented, Appellant's request was untimely under the circumstances. *See Velazquez*, 772 F.3d at 798 ("The right to counsel of one's choice does not give [an accused] the power to manipulate his choice of counsel to delay the orderly progress of his case."). This factor favors the United States.

4. The Military Judge did not ask, and Appellant did not provide, a timeline for Appellant to procure new counsel, but there is no evidence the denial was arbitrary.

In *United States v. Sellers*, the court reviewed a trial judge's denial of a continuance request to seek new counsel to determine if it was impermissibly "arbitrary." 645 F.3d 830, 837–38 (7th Cir. 2011). There, the defendant had retained new counsel but required additional time to prepare, and communication with his former attorney "had completely deteriorated." *Id.* at 832–33, 839. The trial judge denied the request without asking how much time was needed and citing to general scheduling concerns, as well as "the propensity of other . . . counsel to request last minute continuances." *Id.* at 835. The court held the denial was arbitrary because: (1) it employed a rigid rule that substitute counsel "take the case as he finds it"; (2) it made only general findings about scheduling without a balance of interests; and (3) it relied on other attorneys' actions in unrelated cases. *Id.* at 837–38.

Appellant's case is like *Sellers* in that the Military Judge's did not Appellant ask how much time was necessary to hire a new attorney. (J.A. 152.) The similarity ends there, though. Appellant had not retained another attorney. (J.A. 25, 152.) There was no complete breakdown in communication. (J.A. 309.) And the Military Judge made extensive Findings that evidenced his weighing of the interests of justice and Appellant's request. (J.A. 308–13.) The Military Judge

focused on Appellant's basis for the request, not the logistics of it, and found it wanting. (J.A. 316–17.) His denial was not, as in *Sellers*, a rigid rule applied arbitrarily. This factor therefore favors the United States.

5. Prior continuances in the case were partially attributable to Appellant.

Prior continuances in the case were primarily due to the United States' inability to locate Appellant's wife and daughter. (J.A. 310, 317.) The Military Judge found that this was "at least partially due to the actions of [Appellant]." (J.A. 317.) This factor favors the United States.

6. The remaining factors are neutral.

The remaining *Miller* factors—nature of the evidence, impact on the verdict, and prior notice—do not favor either party here. These factors are neutral.

7. In addition to the *Miller* factors favoring the Military Judge's decision, Appellant's case is distinguishable from *Wiest*.

In *Wiest*, this Court held that a military judge abused his discretion in denying a good faith continuance request that was a result of surprise, timely made, and arbitrarily opposed by the United States. 59 M.J. at 279. There, following the military judge's criticism of the appellant's appointed military counsel, the appellant "promptly" retained—not just sought—civilian counsel and requested new military counsel. *Id*. Immediately upon retention, and nearly one month before trial, the new civilian defense counsel requested a continuance to prepare.

Id. Without establishing a reason to do so, the United States opposed the continuance. *Id.* The military judge denied the continuance, abusing his discretion. *Id.*

Unlike *Wiest*, Appellant's request was not made in good faith, and he neither retained new civilian counsel nor fired his retained counsel. Instead, despite apparently harboring concerns for six months, he waited until the eve of trial to raise the issue; quite different than the prompt action in Wiest. (J.A. 155, 160.) Furthermore, the United States articulated a reasonable basis for its opposition, which was that two key witnesses were notoriously difficult to produce and may leave the United States to avoid appearing. (J.A. 160.)

Both the *Miller* factors and a comparison to *Wiest* support that the Military Judge did not abuse his discretion in denying Appellant's request.

E. Even if the Military Judge did abuse his discretion in denying Appellant's request, it was not structural error because Appellant's case is distinguishable from *Gonzalez-Lopez*, and it can be tested for prejudice.

Gonzalez-Lopez recognized that the "erroneous deprivation of the right to counsel of choice" constitutes structural error. *Gonzalez-Lopez*, 548 U.S. at 150. But the facts of *Gonzalez-Lopez* are unique. There, the defendant hired a civilian counsel who was present and ready to try his case; however, the trial court repeatedly denied the counsel *pro hac vice* admission and prohibited him from even communicating with the defendant during trial. *Id.* at 142–43. On appeal, the

United States conceded this was a deprivation of the defendant's right to counsel of choice. *Id.* at 144. The Court held that the "right at stake here is the right to counsel of choice, not the right to a fair trial;" thus, the violation was complete once the deprivation occurred and no showing of prejudice was required. *Id.* at 146.

Appellant's case is distinguishable from *Gonzalez-Lopez*. Appellant did not retain a new counsel or even identify one, and the Military Judge never prohibited him from doing so. (J.A. 152.) *Gonzalez-Lopez* protects a defendant's choice of counsel, but where a person has not yet chosen counsel, there is no choice to protect.

When properly framed as a continuance denial, this Court may test for prejudice, as it has in the past. *See Miller*, 47 M.J. at 359. In *Miller*, after finding error, this Court stated that "prejudice to the accused is likely" when there is an improper denial of a continuance request to obtain civilian counsel. *Id.* at 359. There, the continuance denial resulted in defense counsel making an "on-the-record admission" that he was unprepared and failing to take a number of "reasonable actions" due to time constraints. *Id*. Thus, because the continuance denial resulted in those deficiencies, the military judge abused his discretion. *Id.*

Appellant's case in like *Miller* in that it can be tested for prejudice, but it lacks the same prejudice. Unlike *Miller*, Appellant's three Defense Counsel were

prepared for trial, and Civilian Defense Counsel provided assurances to that effect. (J.A. 165.) Other than the baseless conflict of interest claim, Appellant had no reservations about Civilian Defense Counsel's representation and he was confident in it. (J.A. 154–55.) As discussed in Section I, there is no indication in the Record that Civilian Defense Counsel provided anything less than zealous representation, and Appellant does not now point to any action that was not taken as a result of the Military Judge's denial. Appellant was not prejudiced.

III.

THE LOWER COURT CORRECTLY CHARACTERIZED THE MILITARY JUDGE'S FINDINGS THAT APPELLANT'S REQUEST WAS "OPPORTUNISTIC" AND NOT MADE IN GOOD FAITH AS FINDINGS OF FACT. BOTH ARE FINDINGS SUPPORTED BY THE MILITARY JUDGE'S OBSERVATIONS AND ARE AKIN TO CREDIBILITY DETERMINATIONS.

A. Standard of review.

This Court reviews whether a statement is a finding of fact or a conclusion of law *de novo*. *See United States v. Cossio*, 64 M.J. 254, 256–67 (C.A.A.F. 2007).

B. Findings of fact include credibility determinations and conclusions based on observation of witnesses.

"Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City,*

470 U.S. 564, 574 (1985) (citing *United States v. Yellow Cab Co*., 338 U.S. 338, 342 (1949)). "When findings are based on determinations regarding the credibility of witnesses, [the rule governing special findings] demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.*

Credibility determinations are correctly categorized as findings of fact based on demeanor and observation. *See, e.g., United States v. Chatfield*, 67 M.J. 432, 437 (C.A.A.F. 2009) (considering forthrightness, sincerity, preparation, attitude, manner, and tone in forming credibility determinations as findings of fact).

Federal Circuit Courts routinely treat a trial court's determination of "bad faith" as a finding of fact reviewed under the clearly erroneous or clear error standard. *See, e.g., McMullen v. Sevigny (In re McMullen)*, 386 F.3d 320, 329 (1st Cir. 2004) ("Whether a party has acted in bad faith constitutes a quintessential issue of fact, which must be determined by the factfinder following an examination of the totality of the circumstances."); *United States v. Ossai*, 485 F.3d 25, 28 (1st Cir. 2007) ("We review conclusions of law *de novo*, whereas subsidiary findings of fact (e.g., whether the police acted in bad faith) are reviewed only for clear error."); *Ford v. Temple Hospital*, 790 F.2d 342, 347 (3rd Cir. 1986) ("[D]istrict court's finding of bad faith or the absence of bad faith in a particular case is a factual

determination and may be reversed only if it is clearly erroneous."); *United States v. Mitchell*, 777 F.2d 248, 257–58 (5th Cir. 1985) (treating bad faith basis for continuance as a finding of fact); *Brown v. Sullivan*, 916 F.2d 492, 495 (9th Cir. 1990) ("[D]istrict court's finding regarding a party's bad faith is reviewed under the clearly erroneous standard."); *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 221–22 (D.C. Cir. 1991) (holding question of bad faith to be a question of fact subject to clearly erroneous review because it involves credibility determinations and evidentiary weighing).

C. The lower court properly characterized the Military Judge's findings that Appellant's request was opportunistic and made in bad faith.

In *Bessemer City*, the Court held that deference to findings of fact, particularly those based on credibility, reflects that "the trial judge's major role is the determination of fact." 470 U.S. at 574. The Court then warned that requiring parties to re-litigate factual determinations on appeal would "contribute only negligibly to the accuracy of fact determination" while forcing parties to "concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one." *Id.* at 574–75.

Appellant's case presents the scenario envisioned in *Bessemer City*. The Military Judge was in the best position to make credibility determinations and weigh the evidence on Appellant's request, and from that position, he found Appellant's request was not made in good faith. (J.A. 316–17.) His finding is

supported by the Record, including Appellant's previous attempts to impede the prosecution by causing the unavailability of key witnesses, as well as his manufacturing of a communication problem. (J.A. 155–56, 309–311, 317.)

Were this Court to accept Appellant's invitation to review a finding of bad faith *de novo*, it would require the parties to re-litigate Appellant's credibility, but this time without the benefit of demeanor, tone, manner, forthrightness, or any of the hallmarks of traditional credibility determinations. *See Chatfield*, 67 M.J. at 437. The clearly erroneous standard already provides a vehicle to reverse unsupported findings of fact; there is no support for applying a *de novo* standard.

This Court should decline Appellant's invitation to single out bad faith factual findings for *de novo* review and, like other courts, review them under a clearly erroneous standard.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

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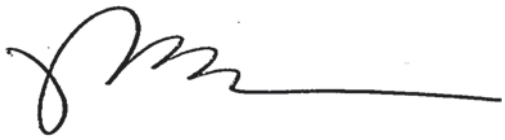

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