IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,

Appellee

v.

R. Bronson WATKINS
Staff Sergeant (E-6)
U. S. Marine Corps,

Appellant

BRIEF ON BEHALF OF APPELLANT

Crim.App. Dkt. No. 201700246

USCA Dkt. No. 19-0376/MC

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

DANIEL E. ROSINSKI
LT, JAGC, USN
C.A.A.F. Bar No. 36727
Appellate Defense Counsel
Navy-Marine Corps
Appellate Review Activity
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington, D.C. 20374
Phone: (202) 685-8506
Fax: (202) 685-7426
daniel.e.rosinski@navy.mil

Table of Contents

Table of Authorities

OTHER COURTS

STATUTES

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016)

OTHER AUTHORITIES

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

Staff Sergeant (SSgt) Watkins' approved general court-martial sentence includes a dishonorable discharge and five years' confinement.[1] The Court of Criminal Appeals (CCA) exercised jurisdiction under Article 66(b), UMCJ, and this Court has jurisdiction under Article 67(a)(1), UCMJ.[2]

Introduction

The government bent SSgt Watkins' lead civilian counsel until he broke. It repeatedly threatened him with retaliation for some of the same criminal conduct it charged SSgt Watkins with—conspiring to obstruct justice by tampering with witnesses. It eventually reached the point that counsel felt that "[t]he more liable I am, the less liable he is."[3] Yet even after counsel repeatedly told the Court that he felt conflicted, explained that this may deprive SSgt Watkins of defenses, and offered to refund his entire $20,000 retainer fee,[4] the military judge denied counsel's motion to withdraw for a conflict of interest. The military judge also denied SSgt Watkins' request for new civilian counsel.

---

[1] Joint Appendix (JA) at 1.
[2] 10 U.S.C. §§ 866(b)(1), 867 (2012).
[3] JA at 149.
[4] *Id.* at 123-24, 144 (comments before and after government witness testimony).

Defendants in our system facing trial with their life and liberty on the line have rights to both civilian counsel of their choice, and an attorney who is wholly in their corner. This Court must reverse the findings and sentence to show our system respects both of these rights the government and military judge denied.

Statement of the Case

A general court-martial panel of members with enlisted representation convicted SSgt Watkins, contrary to his pleas, of: two specifications of violating a lawful order in violation of Article 92, UCMJ; one specification of committing a lewd act upon a child in violation of Article 120b, UCMJ; and, one specification of obstructing justice in violation of Article 134, UCMJ.[5]

The Convening Authority approved the members' sentence of reduction to E-1, confinement for five years, and a dishonorable discharge.[6] On February 21, 2019, the lower court affirmed the sentence and the findings as it corrected.[7]

SSgt Watkins timely requested *en banc* reconsideration on March 25, which the lower court denied on May 17. SSgt Watkins petitioned this Court for review on July 15, which it granted on September 30. SSgt Watkins timely files this brief and the joint appendix per this Court's order of October 21.

---

[5] JA at 256; 10 U.S.C. §§ 892, 920b, 934 (2012).
[6] JA at 1.
[7] JA at 19. The lower court corrected the findings to reflect that the members excepted language from Additional Charge III the Convening Authority erroneously included in its action. *Id.*

Statement of Facts

The government repeatedly threatened civilian counsel after it failed to subpoena SSgt Watkins' wife to appear as a witness at his court-martial. SSgt Watkins was accused of touching the breasts and vagina of one of their two daughters, C.K.W.[8] After the initial allegations in early January 2016, SSgt Watkins was ordered out of the family home when he had suicidal ideations,[9] and prohibited from contacting his family.[10] The command placed him in pretrial confinement after it preferred charges in April.[11] But after recanting the allegations,[12] C.K.W. declined to participate in the government's case in May.[13]

After releasing SSgt Watkins from pre-trial confinement in July, the command issued a military protective order (MPO) prohibiting him from visiting his daughters.[14] SSgt Watkins did not comply with the MPO because after C.K.W. had recanted, Mrs. Watkins wanted him to see his children.[15]

A. The government failed to properly subpoena Mrs. Watkins for SSgt Watkins' court-martial.

Even though C.K.W. declined to participate, the Government referred the

---

[8] JA at 259.
[9] JA at 178-79.
[10] JA at 260.
[11] JA at 105, 259.
[12] JA at 218.
[13] JA at 270.
[14] *See* JA at 105.
[15] JA at 231.

charges to a general court-martial. Mr. White, a retired Marine judge advocate, entered his appearance as lead civilian counsel for SSgt Watkins on July 12, 2016.[16] Civilian counsel's office was in a shopping mall in San Diego.[17]

The military judge scheduled SSgt Watkins' trial to begin on September 12, after the government had moved to continue the trial.[18] Starting August 18, government investigators repeatedly tried to serve Mrs. Watkins with a subpoena at their former family home onboard Camp Pendleton.[19] They were unsuccessful because in early August the family had already moved.[20] Instead of formal service, investigators texted Mrs. Watkins a picture of the subpoena.[21]

B. The Regional Trial Investigator accused civilian counsel of helping Mrs. Watkins avoid service of a subpoena, and giving her money.

After the government failed to properly subpoena Mrs. Watkins by the scheduled trial date, the military judge held a motions session that day to discuss Government's motion for a warrant of attachment.[22]

The government's "Regional Trial Investigator," Gunnery Sergeant

---

[16] JA at 265-66.
[17] JA at 295.
[18] JA at 267-69 (moving to continue the first day of trial to September 12 due to a conflict with scheduled leave for NCIS agents).
[19] JA at 279-80 (noting investigators on August 18 confirmed "there was nobody actively living in the residence").
[20] JA at 281 (investigator testifying that the neighbors he spoke with last saw Mrs. Watkins "two weeks prior" to August 18).
[21] JA at 286.
[22] JA at 273-305.

(GySgt) Hawks, testified Mrs. Watkins's bank records showed that on the Friday before trial she bought an item at a bookstore that was in the same shopping mall as civilian counsel's office.[23] The investigator testified Mrs. Watkins was at the bookstore at the same date and time SSgt Watkins was scheduled to meet with civilian counsel nearby, and he suggested that Mrs. Watkins "had visited" counsel's office.[24] The investigator also testified Mrs. Watkins wanted to travel to Uganda (where she is originally from[25]), and that the family's joint bank account had a suspiciously high balance at that time.[26]

Civilian counsel believed that the investigator's testimony had "made me [civilian counsel] the object of the case."[27] Counsel denied meeting ever Mrs. Watkins at his office.[28] Counsel also stated that he never met with C.K.W. at all, "so the government wouldn't be able to bring up this nonsense."[29] In a later e-mail counsel sent to all parties, counsel continued to try to clear his name:

> SSgt Watkins was obligated to pay me this fee . . . . At no time was there ever any suggestion, plan, or intent to provide any of these funds to [Mrs.] Watkins for any purpose. [The investigator's] suggestion as to the purpose for these funds was wildly off base. I have not had any contact with [Mrs.] Watkins since 26 July 2016.[30]

---

[23] JA at 285.
[24] JA at 285-86.
[25] JA at 167 (noting that she moved from Uganda to the United States in 2004).
[26] JA at 282-86.
[27] JA at 289.
[28] JA at 289.
[29] JA at 295.
[30] JA at 271.

Civilian counsel also noted that not talking to C.K.W. "may appear to be ineffective assistance."[31] Trial counsel, however, claimed the investigator's testimony showed "an obstruction of justice case on the part of the accused and his wife, not the defense attorney."[32] The military judge said he did not believe counsel acted improperly, and continued the trial until January 2017.

C. After the Regional Trial Investigator's accusations, the government brought a new charge against SSgt Watkins: conspiring with Mrs. Watkins "and other unknown persons" to obstruct justice.

One month later, the government served Mrs. Watkins with a subpoena, and placed SSgt Watkins in pretrial confinement.[33] The government seized his cell phones and extracted text messages and internet searches "regarding obstruction of justice, avoiding subpoenas, and the status of the extradition agreements of various countries."[34] Some of the texts were between SSgt Watkins and his attorneys. Though the lead Naval Criminal Investigative Service (NCIS) agent had access to the texts, the agent denied viewing them.[35]

The command preferred a second charge sheet against SSgt Watkins in December, including that he "conspir[ed] with [Mrs.] Watkins and other unknown persons to obstruct justice," to wit: by "wrongfully tampering with

---

[31] JA at 295.
[32] JA at 25.
[33] JA at 186, 310.
[34] JA at 160.
[35] JA at 142-44, 162.

[C.K.W.]" between July 1 and October 21, 2016.[36] This included the period in early September when the investigator accused civilian counsel of facilitating a meeting between Mrs. and SSgt Watkins. Around the time of preferral of the additional charges, civilian counsel expressed his concern to SSgt Watkins that 'the government was trying to drag [civilian counsel] and [his] law firm into this case," and began to discourage SSgt Watkins from testifying at his trial.[37]

The government subpoenaed Mrs. Watkins at her in-laws' home in Mississippi in February 2017,[38] in preparation for trial on March 20, 2017.

D. Regional Trial Counsel threatened civilian counsel on the eve of trial, just after civilian counsel successfully moved to preclude the Government from mentioning that Mrs. Watkins had been near his law office.

Four days before trial, the government suggested it could elicit at trial that civilian counsel's office was near the bookstore Mrs. Watkins visited, and argued that this was relevant information because counsel's office was one place where SSgt Watkins could have met with the family in violation of the MPO.[39] Civilian counsel asked for clarification, and the military judge ruled it was "irrelevant on [M.R.E.] 403 grounds that [civilian counsel's] law office [was] located near . . . where [Mrs.] Watkins was recorded as having been."[40]

---

[36] JA at 109. The government later amended the initial date to July 7.
[37] JA at 24-25.
[38] JA at 187.
[39] JA at 115-18.
[40] JA at 118.

Then Lieutenant Colonel Keane, the Regional Trial Counsel ("RTC"), and "highest ranking prosecutor in the Western Region" demanded from behind the bar in the courtroom that trial counsel ask for a recess.[41] During the recess, civilian counsel told the RTC twice, in front of the military judge and others, "I wasn't at my office that day."[42] The RTC yelled:[43] "I don't care," "[t]his whole thing is shady," and it "isn't over yet."[44] Civilian counsel had the military judge put this on the record, and noted he "had very few conversations with the witnesses in this case because" government was "making allegations against us."[45]

E. Citing the personal conflict of interest the government's repeated threats caused, civilian counsel requested to withdraw, and offered to refund his full $20,000 retainer so SSgt Watkins could hire new counsel.

The day before trial and after filing an earlier motion objecting to the RTC's comments, civilian counsel warned the military judge he would ask to withdraw. He cited "the Government's improper actions combined with [the RTC's] threat toward me have placed me in a conflict" with SSgt Watkins.[46]

On the record the next day, civilian counsel moved to withdraw. Counsel complained "ever since I have joined this case, I have been virtually treated like a co-conspirator," and explained the government's "repeate[d] . . . references to

---

[41] JA at 120, 136, 140.
[42] JA at 134, 311.
[43] *See* JA at 141 (RTC admitting he raised his voice).
[44] JA at 311 (civilian counsel also responded "I know you don't care").
[45] JA at 119 (emphasis added).
[46] JA at 306-07.

me being involved in the obstruction allegation, the changing of the testimony" have "gotten to the point now that . . . I think I have a direct conflict."[47]

Civilian counsel explained that the RTC's assertion that "'[t]his isn't over' . . . in this business, can only mean one thing . . . . I will be the next guy that they are coming after."[48] He believed the government's actions created "a direct, adverse relation" between himself and SSgt Watkins.[49] He decided "out of fairness to [SSgt] Watkins, to make sure he is fairly represented," he would "refund [his] fee 100 percent" so he could "retain another civilian counsel."[50]

Civilian counsel feared "a bar complaint or an ethical complaint," felt "a self-preservation piece" interfering with his cross-examination of Mrs. Watkins, and warned that his "continued presence on this case may actually deprive [SSgt Watkins] of defenses during the case in chief and . . .sentencing:"

> For example, let's look at the obstruction allegation. Let's say, hypothetically, Staff Sergeant Watkins wants to put some of the blame or all of the blame for me—for this allegation on me. If I am on the case and I am his attorney, how can he possibly do that?[51]

Counsel did not misinterpret the RTC's comments: the RTC testified that his threat to civilian counsel was about Mrs. Watkins being near counsel's office, while the government had been trying to serve Mrs. Watkins with a

---

[47] JA at 121.
[48] JA at 123.
[49] JA at 124.
[50] JA at 123.
[51] JA at 123-24.

subpoena.[52] But the RTC claimed he had no knowledge of civilian counsel being "complicit in any of the misconduct described on the charge sheet, and that no part of the government was "*currently* pursuing" criminal action against counsel, or planning to report any misconduct to counsel's Bar organizations.[53] The lead NCIS agent denied knowing of any investigation into counsel, or of "any plans for a possible future investigation for obstruction of justice."[54]

But even after these claims by the RTC and lead NCIS agent, civilian counsel "*still* fe[lt] personally conflicted in this case," still believed SSgt Watkins was "hindered, potentially, with what defenses and what he will say in this case," and still wanted to return to SSgt Watkins his $20,000 retainer fee.[55]

Regarding the obstruction of justice charge, civilian counsel *still* believed that SSgt "Watkins and I are inversely related . . . . The more liable I am, the less liable he is."[56] Counsel "viewed [him]self as the other client" who was "directly adverse" under the Navy JAG's Rules for Professional Conduct.[57]

F. After hearing civilian counsel's interests were adverse to his client's, SSgt Watkins told the military judge he did not want civilian counsel as his attorney, and requested to hire specific new civilian counsel.

After watching civilian counsel explain that he could no longer represent

---

[52] JA at 134-35.
[53] JA at 135 (emphasis added).
[54] JA at 142.
[55] JA at 144-45.
[56] JA at 149.
[57] JA at 148-49 (citing JAGINST 5803.1E (*see* JA at 60)).

SSgt Watkins, the military judge advised him of his right to counsel.[58] SSgt Watkins answered that he did not wish to continue to retain Mr. White, and requested to replace him with "another attorney that I would like to bring aboard."[59] Though the military judge did not inquire further about replacing civilian counsel, SSgt Watkins had already talked to multiple civilian attorneys and identified one who could take his case within about three weeks.[60]

SSgt Watkins was first concerned when the investigator GySgt Hawks had "alleged [a] conspiracy," and civilian counsel was focused "more on trying to clear his name."[61] Though SSgt Watkins' concerns later "dissipated for the most part" and he was mostly satisfied with counsel, the RTC's threat was "the straw that broke the camel's back."[62] SSgt Watkins "saw that [counsel] had to keep defending himself," showing him that the conspiracy allegation was about [counsel] as much as it was about me."[63] SSgt Watkins explained he was not "able to effectively communicate" with civilian counsel at this time because he feared that instead of giving "the best representation possible," counsel would prioritize "trying to keep his name clear" and "keep his firm's name clear."[64]

---

[58] JA at 151.
[59] *Id.* at 152.
[60] *Id.* at 25.
[61] *Id.* at 153-54.
[62] *Id.* at 155.
[63] *Id.* at 153-55.
[64] *Id.* at 155-56.

G. The military judge denied counsel's motion to withdraw and SSgt Watkins' request for new counsel.

The military judge denied the motions of counsel and SSgt Watkins, both the same day as the hearing and in a later written ruling. The military judge read Rules for Courts-Martial (R.C.M.) 506(c) to require "good cause" for civilian counsel's release,[65] and cited case law where counsel tried to withdraw *without* affirmative consent of their client at trial.[66] The military judge's "totality of the circumstances" inquiry attributed "several continuances" to SSgt Watkins, and found that the "difficulty in securing the presence of [Mrs. Watkins &] C.K.W." suggested that they would not appear at a later trial.[67]

1. The military judge believed civilian counsel had to show good cause to withdraw, and required a demonstration that any conflict would have a negative effect on the representation under *Cuyler v. Sullivan*.[68]

The military judge denied civilian counsel's motion, based on counsel's failure to "articulate any examples of how his performance at the pending trial—examination of witnesses, presentation of evidence, challenge of the government's evidence, or arguments on behalf of SSgt Watkins—would be

---

[65] *See* JA at 313 ("[T]his court must decide whether sufficient 'good cause' exists to permit [civilian counsel] to withdraw.").
[66] JA at 313 (citing *United States v. Blaney*, 50 M.J. 533, 539 (A.F. Ct. Crim. App. 1999) ("Appellant's objection notwithstanding, the military judge concluded there was good cause to sever the attorney-client relationship.")).
[67] JA at 160-61, 317 ("[I]n light of Mrs. Watkins' status as an immigrant who still has significant international family ties. The Court is not convinced these witnesses will be available if this case were to be continued.").
[68] 446 U.S. 335, 345 (1980).

tangibly diminished based upon" a conflict of interest with SSgt Watkins.[69] He wrote that civilian counsel "was able to successfully present pertinent evidence and argument to the court" for SSgt Watkins in past "sessions of court" he saw.[70] Citing the Navy JAG's Rules for Professional Conduct,[71] the military judge found that counsel failed "to cite any actual situations that could arise where he would be unable to provide effective and zealous representation."[72]

The military judge ruled that civilian counsel needed to show "good cause" for withdrawal under R.C.M 506(c), and cited the Supreme Court's opinion in *Cuyler v. Sullivan* for the proposition that civilian counsel had to show both (1) a conflict of interest and (2) adverse impact on his performance.[73]

The military judge concluded civilian counsel's "suspicions" of personal consequences were "unfounded and speculative in nature."[74] He cited:
(1) trial counsel's claim before preferral of the second charge sheet that civilian counsel was not suspected of obstruction of justice, and (2) testimony from the RTC and the lead NCIS agent that they had no evidence counsel was implicated in the obstruction charge and had no intent to file a bar complaint.[75]

---

[69] JA at 312.
[70] JA at 309.
[71] JA at 314
[72] JA at 316.
[73] JA at 313, 315 (alterations in original, citing *Cuyler*, 446 U.S. at 350).
[74] JA at 316.
[75] JA at 309, 312, 316-17.

2. The military judge denied SSgt Watkins' request as "opportunistic."

The military judge denied SSgt Watkins' request to "hire a new civilian counsel," finding that request was "opportunistic" and "an obvious attempt to further impede the prosecution of the case against him" on "these facts."[76] He found that in "sessions of court observed" here "throughout the duration of this case," SSgt Watkins and civilian counsel "were able to effectively communicate with each other."[77] The military judge also noted that the government had produced several witnesses to testify, many of whom flew from great distances, including Hawaii, Okinawa, Louisiana, Montana, and Mississippi."[78] Most of these witnesses however, were defense character witnesses.[79]

H. With Mr. White as lead attorney, appellant did not testify on the merits.

After denial of both motions, civilian counsel said he stood by that he had "felt a conflict within," but his "heart is absolutely in this case."[80] SSgt Watkins had planned, with civilian counsel's blessing, to testify.[81] But at trial, civilian counsel "was strongly opposed" and SSgt Watkins did not testify.[82] Civilian counsel was the lead counsel—examining Mrs. Watkins, and giving the closing.

---

[76] JA at 161, 317.
[77] JA at 309, 316.
[78] JA at 312.
[79] *See id.* at 113 (trial counsel stating that "[w]e approved three . . . character witnesses," one each from Hawaii, Okinawa, and New Orleans).
[80] JA at 164-65.
[81] JA at 24-25.
[82] JA at 24-25.

Summary of Argument

I. This Court should find in its *de novo* review that lead civilian counsel had a personal conflict of interest with SSgt Watkins. Counsel, an officer of the court, was in the best position to know if there is a conflict of interest. He moved to withdraw because his presence on the case would deny SSgt Watkins defenses, and because he felt that their interests conflicted such that he could not provide him faithful representation. This Court and others have recognized that counsel accused of misconduct has a conflict of interest requiring excusal upon objection. And when counsel is accused of crimes relating to the client's alleged misconduct, a conflict requires per se reversal—no matter when raised.

II. The military judge abused his discretion in not allowing SSgt Watkins to hire new civilian counsel, even if it required defense's first continuance of the trial dates. It was reasonable for an accused in SSgt Watkins' position to decide he wanted new counsel after observing both the government attack his counsel, and counsel persistently claim that he had a conflict.

III. The lower court improperly treated the military judge's claim that SSgt Watkins' request for new civilian counsel was opportunistic as a finding of fact instead of a conclusion of law. The lower court then erred in relying on that fact by finding SSgt Watkins' request was made in bad faith, and thereby came to the incorrect conclusion on the choice of counsel issue as the military judge did.

Argument

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. THE MILITARY JUDGE ERRED IN DENYING CIVILIAN COUNSEL'S MOTION TO WITHDRAW.

Standard of Review

Though this Court reviews "a military judge's denial of a motion to disqualify trial counsel for an abuse of discretion,"[83] the issue of whether a "trial defense counsel had a conflict of interest" is a "mixed question of law and fact . . . reviewed *de novo*."[84] "By definition, a court 'abuses its discretion when it makes an error of law.'"[85] "When reviewing a decision of a Court of Criminal Appeals on a military judge's discretionary ruling," this Court has "'pierced through that intermediate level' and examined the military judge's ruling," then "decide[s] whether the Court of Criminal Appeals was correct."[86]

---

[83] *United States v. Humpherys*, 57 M.J. 83, 88 (C.A.A.F. 2002).
[84] *United States v. Smith*, 44 M.J. 459, 460 (C.A.A.F. 1996).
[85] *United States v. Moye*, 454 F.3d 390, 398 (4th Cir. 2006).
[86] *United States v. Feltham*, 58 M.J. 470, 474-75 (C.A.A.F. 2003).

Discussion

Under R.C.M. 506(c), "defense 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."[87] Even if good cause is required, good cause exists where counsel has a conflict of interest.[88]

A. The Supreme Court created an automatic reversal rule in *Holloway* where counsel objects to a conflict of interest that is not dispelled by inquiry. The rule defers to an attorney's belief he or she has a conflict of interest and does not require an adverse effect or prejudice to the representation.

The Supreme Court in *Holloway v. Arkansas* held that "whenever a trial court improperly requires joint representation over timely objection" by defense counsel who represents "conflicting interests," "reversal is automatic."[89] The Court noted that any contrary rule "requiring a defendant to show that a conflict of interests—which he and his counsel tried to avoid by timely objections to the joint representation—prejudiced him in some specific fashion," would be impossible to apply intelligently and fairly.[90] Counsel in *Holloway*, represented three defendants accused of jointly participating in the same robbery. Before trial he "moved the court to appoint separate counsel" for each defendant.[91]

---

[87] R.C.M. 506(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016).
[88] *United States v. Kokuev*, 77 M.J. 531, 540-41 (N-M. Ct. Crim. App. 2017) (citing *Humpherys*, 57 M.J. at 88, other citation omitted).
[89] 435 U.S. 475, 488-89 (1977).
[90] *Id.* at 490.
[91] *Id.* at 477.

But "[a]fter conducting a hearing," the trial judge declined to do so.[92] Counsel renewed his motion before the defendants testified, citing the fact that he had a conflict of interest with respect to "any cross-examination."[93] The trial judge denied that a conflict of interest existed. He noted that "[e]very time I try more than one person . . . each one blames it on the other one;" and, that the prosecutor would cross-examine them.[94] The Supreme Court reversed Holloway's conviction "in the absence of a showing of specific prejudice."[95] It did so even though all defendants still testified, and each defendant offered an alibi that did not implicate any other defendant.

The Supreme Court specifically rejected the argument "that appellate courts should not reverse automatically in such cases but rather should affirm unless the defendant can demonstrate prejudice."[96] It noted that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial," and that representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing."[97] Finally, the Court observed that "[w]hen a considered representation regarding a conflict in clients' interests

---

[92] 435 U.S. at 477, *id.* n.1 (noting there was no record of the hearing discussion)
[93] *Id.* at 478.
[94] *Id.* at 479.
[95] *Id.* at 480-81, 487.
[96] *Id.* at 487.
[97] *Id.* at 488-89.

comes from [defense counsel,] an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation."[98]

1. Counsel who have reason to fear personal consequences for representing a client, have a personal conflict of interest with the client under the rules of professional responsibility applicable to courts-martial.

To determine if counsel had a conflict of interest, this Court applies the American Bar Association (ABA) Model Rules of Professional Conduct, and the professional responsibility rules of the service holding the court-martial.[99]

The Navy JAG's Rule of Professional Conduct 1.7, "Conflict of Interest" ("Navy Rule") is substantially the same as ABA Rule 1.7. The Navy Rule states that "[a] concurrent conflict of interest exists" if "there is a significant risk that the representation . . . will be materially limited . . . by a personal interest of the covered attorney."[100] A "covered attorney shall not represent a client if the representation of that client involves a concurrent conflict of interest," *unless* the attorney "reasonably believes" he or she can "provide competent and diligent representation to each affected client," the "representation is not prohibited by law or regulation," *and* "each affected client gives informed consent, confirmed in writing."[101]

Per Comment (4), "a conflict of interest exists if there is a significant risk

---

[98] 435 U.S. at 486 n.9.
[99] *See Humpherys*, 57 M.J. at 87 (considering the ABA Rules and Army Rules).
[100] JA at 60 (JAGINST 5803.1E); *see also* JA at 77 (ABA Rule 1.7).
[101] JA at 60-61 (JAGINST 5803.1E) *see also* JA at 77 (ABA Rule 1.7).

that a covered attorney's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited" by an "attorney's other responsibilities or interests," "in effect foreclos[ing] alternatives" to the client.[102] Per Comment (5), "[i]f the propriety of the covered attorney's own conduct in a transaction is in serious question, it may be difficult or impossible for the covered attorney to give a client detached advice."[103]

This Court in *United States v. Cain* found that Cain's trial defense counsel had a personal conflict of interest under the Army's version of Rule 1.7(b) (substantially similar to the Navy Rule), because he allegedly committed illegal homosexual acts with Cain during the representation.[104] Cain pled guilty to same-sex indecent acts at his court-martial as lesser-included offenses of forcible sodomy. Post-trial defense counsel asked for a hearing on allegations that Cain's prior defense counsel pressured Cain for sex. Trial defense counsel denied he forced Cain into sex, but then killed himself.

This Court rejected the lower court's theory that there was no conflict of interest because prior counsel had incentive to "represent [Cain's] interests to the utmost" to avoid discovery.[105] Instead, this Court found the representation

---

[102] JA at 62. This is substantially contained in Comment 8 of ABA Rule 1.7.
[103] JA at 63. This is substantially contained in Comment 10 of ABA Rule 1.7.
[104] 59 M.J. 285, 293 (C.A.A.F. 2004) ("[A] lawyer shall not represent a client if the representation . . . may be materially limited . . . by [his] own interests[.]").
[105] *United States v. Cain*, 57 M.J. 733, 738 (A. Ct. Crim. App. 2002).

was "materially limited" as counsel had an inventive not to have Cain testify.[106]

In *United States v. Hale*,[107] the Navy-Marine Corps Court of Criminal Appeals (NMCCA) recently found that a Marine RTC's verbal threats to lead defense counsel created a conflict "between [Hale] and . . . counsel's personal interests" under the Navy Rule.[108] The *Hale* Court implicitly equated this inquiry to the test used by the Second Circuit Court of Appeals to determine if an attorney has an actual conflict of interest: whether "[b]ased on the totality of the circumstances," the "'attorney's and defendant's interests diverge with respect to a material factual or legal issue or to a course of action.'"[109]

The *Hale* Court found that the RTC's verbal abuse of counsel for unremarkable defense motions practice, created a conflict. The *Hale* RTC had "express[ed] shock and personal offense" at counsel's trial advocacy, made her cry in court, told counsel she would be "coming back to the government," and said to counsel's husband—whose evaluations the RTC wrote—"I'm not going to stop holding [counsel's work] against you."[110]

---

[106] *Cain*, 59 M.J. at 293-95.
[107] 76 M.J. 713 (N-M. Ct. Crim. App. 2017), *aff'd* 77 M.J. 138 (C.A.A.F. 2017) (providing no answer to certified issue, to avoid issuing an advisory opinion).
[108] *Id.* at 715-16, 721-23 (finding a "significant risk" the "representation will be materially limited by . . . personal interests") (citing JAGINST 5803.1E (*see* JA at 60)).
[109] *Id.* at 727 (quoting *United States v. Perez*, 325 F.3d 115, 125 (2d Cir. 2003)).
[110] 76 M.J. at 724-28. Counsel expected she would be a trial counsel within the RTC's region soon after the trial. *Id.* at 716.

Similarly, in *United States v. Hardy*, the Air Force Court of Criminal Appeals (AFCCA) held that the Air Force's similar version of Rule 1.7 imposed an unwaivable personal conflict of interest on Hardy's new post-trial counsel.[111] During the post-trial process at the convening-authority level, Hardy alleged his trial defense counsel was ineffective. In order to investigate Hardy's claims of ineffective assistance during plea negotiations, newly-detailed post-trial counsel had to interview trial defense counsel's supervisor. The supervisor generally discussed pretrial agreements with subordinates, and she had supervised Hardy's attorney who signed the plea. New counsel was uncomfortable with questioning her because she was now counsel's supervisor, and new counsel objected that he had a conflict of interest.[112] Even though Hardy opposed counsel's request for release, the Court found that new counsel had a conflict of interest would "render virtually impossible the continuation of the established relationship" by "materially affect[ing] the quality of his representation."[113]

2. As in *Holloway*, military and civilian courts have both recognized that counsel's subjective belief that his or her interests conflict with a client's is entitled to substantial deference in determining whether there is a conflict.

In *Holloway*, the Supreme Court recognized that an attorney "is in the

---

[111] 44 M.J. 507, 510 (A.F. Ct. Crim. App. 1996). ("A lawyer shall not represent a client if the representation . . . may be materially limited by . . . the lawyer's own interests, unless: (1) The lawyer reasonably believes the representation will not be adversely affected; and (2) The client consents . . . .").
[112] *Id.* at 507-10.
[113] *Id.*

best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial."[114]

Military courts have also found a conflict existed based on defense counsel's subjective belief there was a conflict of interest. For example, In *United States v. Kelly*, the NMCCA found that defense counsel who believed he committed ineffective assistance of counsel at trial had a conflict of interest under Navy Rule 1.7 that disqualified him from representing Kelly post-trial.[115]

And in *Hardy*, the AFCCA required disqualification based on counsel's belief that the representation created a personal conflict of interest. Although counsel did not know if his supervisor had actually done anything wrong, the Court found "the correct standard to apply to this situation is not [if] there is proof of actual conflict of interest; rather, it is *what* [counsel] *believed*."[116]

So too have civilian courts. In *United States v. Hurt*, the Court of Appeals for the District of Columbia Circuit found that Hurt's appellate counsel had a conflict of interest where Hurt's trial attorney had filed "a $2 million libel suit against appellate counsel" for allegedly presenting "false and irrelevant facts."[117] Appellate counsel moved to withdraw from a post-trial hearing into ineffective assistance of counsel (IAC) by the trial attorney, and said he felt

---

[114] *Holloway*, 435 U.S. at 485.
[115] 32 M.J. 813, 825-26 (N-M.C.M.R. 1991).
[116] 44 M.J. at 509-10 (emphasis in original).
[117] 543 F.2d 162, 164, 166 (D.C. Cir. 1976).

"inhibited from defending or representing [Hurt] on this remand proceeding" because "I have a personal interest in this matter which may not be at all times and in every respect co-extensive and equal to [Hurt's]."[118] The trial court "directed [appellate counsel] under the threat of contempt" to participate in the hearing.[119] The Court reversed, noting "[t]hat these personal concerns loomed large to counsel is manifest from their assertion over and over again as grounds for leave to retire . . . and from his strenuous efforts—three in all—to free himself . . . . There is no reason whatever to doubt counsel's sincerity[.]"[120]

And in *State v. Harter*, the Hawaii Supreme Court reversed the lower court's determination that there was no conflict of interest.[121] It found a conflict where Harter told the trial court she was unsatisfied with her counsel and went to bar authorities, and counsel moved to withdraw. In seeking to withdraw, counsel cited a fear of "later allegations of me being ineffective" and a "communication breakdown" that would "impede my ability to prepare her or advise her rights to testify in her own defense."[122] The Court cited Hawaii's version of Rule 1.7, and noted that counsel's "opinion regarding her ability to provide effective assistance of counsel should have been afforded significant

---

[118] 543 F.2d at 164.
[119] *Id.* at 164-65.
[120] *Id.* at 167.
[121] 340 P.3d 440, 444-46 (Haw. 2014).
[122] *Id.* at 459 ("[T]he record demonstrates a conflict of interest due to [counsels] personal interest . . . [the] court did not elicit any information to the contrary.").

consideration" as "she was in the 'best position' to determine [if] her personal interest would interfere with the representation"[123]

3. Counsel accused of criminal misconduct have a conflict of interest.

In *Commonwealth v. Duffy*, the Pennsylvania Supreme Court reversed Duffy's convictions for gun theft offenses because a prosecution witness accused defense counsel (out of the presence of the jury) of having illegally "receive[d] stolen guns" from Duffy "as payment for legal services."[124] Defense counsel requested "a continuance to give the defendant the opportunity to obtain other counsel," but the trial judge only responded by prohibiting the prosecution from mentioning the accusation to the jury.[125] Defense counsel represented Duffy at trial, and Duffy objected in a post-verdict motion.

The *Duffy* Court found a "conflict between counsel's and [Duffy's] interests" existed "whether or not the allegation[s] were true."[126] Citing *Holloway*, it found the accusation gave counsel "personal interest" in "having Duffy acquitted in order to lessen any possibility of ever being convicted or charged with participation of any kind in the crime with which Duffy was charged," contrary to Duffy's interest in impartial "advice with regard to what

---

[123] 340 P.3d at 456, 456 nn.17-18, 458 (citing *Holloway*, 435 U.S. at 486).
[124] 394 A.2d 965, 966, 968 (Pa. 1978) (convictions for burglary, larceny, and receiving stolen property).
[125] *Id.* at 966.
[126] *Id.* at 967-68.

plea he should enter."[127]

In *Government of the Virgin Islands v. Zepp*, the Third Circuit Court of Appeals found Zepp's defense counsel had a conflict where he had "equal access and opportunity" to participate in a crime Zepp was charged with.[128] Counsel had been in Zepp's house while Zepp had allegedly flushed cocaine down the toilet. The court reasoned even though "there is no direct evidence of wrongdoing by trial counsel," "it is not necessary to assume wrongdoing to conclude that [counsel] had an actual conflict of interest."[129] The *Zepp* Court rejected "the government's position that there was no actual conflict of interest because Zepp's trial attorney was never subject to any criminal charges as a result of his conduct . . . and thus faced no potential liability."[130] It instead found "that from these facts alone there was an actual conflict of interest which required withdrawal by trial counsel or disqualification by the court."[131]

4. This Court should find in its *de novo* review that civilian counsel had a conflict of interest. Counsel had reasonable and sincere fears creating a "significant prospective risk" of a material limitation on the representation which the government's meager representations could not dispel.

This Court should find in its *de novo* review that civilian counsel had a

---

[127] 394 A.2d at 967-68 (noting the "right to such advice from counsel whose judgment would not be reasonably expected to be, influenced by counsel's own interests").
[128] 748 F.2d 125, 127 (3d Cir. 1984).
[129] *Id.* at 127-28, 136.
[130] *Id.* at 136.
[131] *Id.* The government had also made counsel stipulate he was not involved. *Id.*

conflict of interest with SSgt Watkins under Navy Rule 1.7. There were "significant risk[s] that" counsel's "ability to consider, recommend, or carry out an appropriate course of action for the client w[ould] be materially limited as a result of [counsel's] other responsibilities or interests." Counsel sought to withdraw to avoid any bar or ethical complaint.[132] And as in *Hale*, where conflicted counsel feared that filing routine motions for the client would invite the RTC's wrath, counsel here had reason to believe that actions otherwise normal for case preparation (e.g., communicating with or interviewing Ms. Watkins or C.K.W.), would antagonize the RTC. This risked limiting his preparation.

Counsel also demonstrated a significant risk of material limitations in warning: that "a self-preservation piece" would interfere with cross-examining Mrs. Watkins. He also noted that his "continued presence on this case may actually deprive [SSgt Watkins] of defenses during the case in chief and . . .sentencing" by removing SSgt Watkins' ability to "put some of the blame or all of the blame . . . on me" for the "obstruction allegation."[133]

This was not a conflict over an issue irrelevant to the representation—e.g., counsel having a different favorite flavor of ice cream from the client. Rather, it was a conflict over a core issue: who was responsible for obstructing justice as the government charged? As in *Cain*, *Zepp*, and *Duffy*, counsel had a

[132] JA at 123.
[133] JA at 123-24.

conflict where he felt blame for criminal offenses his client was on trial for.

Requiring counsel to explain the limitation in more detail is both contrary to the principle in *Holloway*, *Hardy*, *Hurt*, and *Harter* that counsel's perception of a conflict receives great deference, and is bad policy. For example, if counsel cannot withdraw by saying "I cannot effectively cross-examine this witness," but instead has to give a specific example (e.g. if this witness testifies the client told her to recant, she could say on cross that I, counsel, advised them to meet in violation of an MPO), then this conflicted attorney now has an incentive not to withdraw, out of a fear of revealing information that will result in discipline. It also runs the risk of revealing confidential information and trial strategy.

5. RTC's actions spoke louder than his testimony that counsel was not under investigation and faced no risk. Nor did his assertions negate counsel's reasonable and sincere fears that created a "significant prospective risk" of material limitations on counsel's representation of SSgt Watkins.

This Court should find that civilian counsel had a conflict, even though the RTC and NCIS agent testified they knew of no actual misconduct and were not "currently" planning to charge or report counsel. First, the RTC shouted that he *did not care*, in response to counsel claiming he did not met with Mrs. Watkins at the office. In other words, he did not care if counsel was actually innocent—it still "[wa]sn't over" to the RTC. Second, the RTC and NCIS were not the only entities who could later prosecute or investigate counsel. Third, the RTC—selected for Colonel—had other ways to harm counsel (located by Camp

Pendleton), whose livelihood depended on courts-martial with Marine attorneys the RTC supervised. Like in *Hale*, this Court should find a conflict based on the effect of the RTC's comments on counsel, and not excuse them based on the RTC's self-serving testimony that he did not actually mean what he had said.

Most importantly, after the testimony counsel "s*till* felt personally conflicted;" still wanted to refund SSgt Watkins' $20,000 retainer; and, still felt "hindered, potentially, with . . . defenses and what he will say in this case."[134] As in *Hardy*, it is what counsel believed that is most significant. Counsel's conflict of interest continued after the RTC's testimony. Like in *Hurt*, a conflict of interest remained regardless of how "counsel's apprehensions might appear to a disinterested observer" because "the stakes, measured by the gravity of defamation of professional character, were high," and the dangers to counsel, "were very real."[135] Civilian counsel had nothing to gain from repeatedly moving to withdraw, and to refund all the money he was to earn for the representation. This supports the credibility of counsel's continued conflict.

B. Since *Holloway*, the Supreme Court has held that reversing a conviction after a forfeited objection to a multiple representation conflict requires proof of an adverse effect on the trial. But where there was a personal conflict of interest, this Court still reverses without a showing of prejudice.

In *Cuyler*, two attorneys jointly represented three defendants (including

[134] JA at 145.
[135] 543 F.2d at 168.

Sullivan) who were tried separately for the same murder.[136] "At no time did Sullivan or his lawyers object to the multiple representation," either at Sullivan's trial or on Sullivan's direct appeal of his conviction.[137] Sullivan's petition for *habeas corpus* review alleged that his attorneys "represented conflicting interests" during trial.[138] The Supreme Court acknowledged *Holloway*, but held that "a defendant who raised no objection at trial" to a conflict of interest must first demonstrate on appeal "that an actual conflict of interest adversely affected his lawyer's performance" at trial.[139]

The Supreme Court did not require the adverse effect to rise to the level of "prejudice" required to overturn a conviction in a harmless error analysis. But it still required proof of "an actual lapse in representation" that "actually affected the adequacy of [the] representation."[140] The Court cited one of its earlier cases as an "example"—where counsel "failed to cross-examine a prosecution witness whose testimony linked [appellant] with the crime," and "failed to resist the presentation of arguably inadmissible evidence."[141]

---

[136] 446 U.S. at 337.
[137] *Id.* at 337.
[138] *Id.* at 337-38.
[139] *Id.* at 347-48.
[140] *Id.* at 349-50.
[141] *Id.* at 349 (1980) (quoting *Glasser v. United States*, 315 U.S. 60, 72-75 (1942)). The Court reasoned that counsel's decisions in *Glasser* reflected "counsel's desire to diminish the jury's perception of a codefendant's guilt," as a result "of counsel's 'struggle to serve two masters." 446 U.S. at 348-49.

In *Mickens v. Taylor*, Mickens first asserted on federal *habeas* review that his trial attorney had a conflict, because the attorney had previously represented the victim in a different judicial proceeding.[142] The Supreme Court held it was "at least necessary, to void the conviction, for [Mickens] to establish that the conflict of interest adversely affected his counsel's performance."[143] Some civilian courts have cited dicta from *Mickens* to require an adverse effect under *Cuyler*,[144] even where counsel objected to the conflict at trial.[145]

1. In *Cain*, this Court continued to apply the *Holloway* automatic reversal rule to alleged crimes by defense counsel that relate to the representation.

This Court reversed in *Cain* even though it "d[id] not know whether [Cain's] defense counsel" had "*rejected any specific option* on the grounds that it was not in [Cain's] best interest, or because it was not in [counsel's] best interest."[146] This Court cited *Holloway*, *Cuyler*, and *Mickens*, and found that prior counsel's "potential criminal liability and ethical misconduct" for "the same criminal offense for which the attorney's client was on trial" was

---

[142] 535 U.S. 162, 164 (2002).
[143] *Id.* at 173-74.
[144] *E.g.*, 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.").
[145] *E.g.*, *United States v. Vargas-Deleon*, 124 Fed. Appx. 854, 856, 859 (5th Cir. 2005) (per curiam) (finding judge's denial of public defender's motion to withdraw from Vargas-DeLeon's sentencing, due to a continuing duty of loyalty to someone Vargas-DeLeon wanted to inform on, "had no adverse effect on [his] representation of Vargas-DeLeon and was, accordingly, not an actual conflict").
[146] 59 M.J at 295 (emphasis added).

"inherently prejudicial and created a *per se* conflict of interest."[147] *Cain* favorably cited the Second Circuit's opinion *United States v. Cancilla*,[148] for the proposition that "the conflict created by [counsel's] conduct was 'real, not simply possible' and 'so threatening as to justify a presumption that the adequacy of representation was affected.'"[149]

i. This Court's application of *Holloway*, follows a rule the Second Circuit Court of Appeals has continued to apply after *Cuyler* and *Mickens*: alleged participation by counsel in a client's crimes requires per se reversal.

Cancilla is part of a long line of Second Circuit precedent holding that a trial defense counsel's conflict of interest is "a *per se* violation of the Sixth Amendment when the "attorney is implicated" with a "reasonable possibility" of truth "in the crimes of his or her client."[150] The Second Circuit adopted this rule after *Cuyler*, and has consistently followed it even after *Mickens*.[151]

---

[147] 59 M.J. at 294 (emphasis added).
[148] 725 F.2d 867, 870 (2d Cir. 1984).
[149] 59 M.J. at 296 (quoting *Cancilla*, 725 F.2d at 870). Cancilla was convicted of mail fraud for submitting fraudulent car insurance claims. After trial, the government revealed "Cancilla's trial [defense] counsel may have himself conspired with someone connected to the Cancilla schemes on similar fraudulent insurance claims." 725 F.2d at 868. The lower court declined to order a new trial, as Cancilla did not meet his "burden of showing that the conflict adversely affected his counsel's performance at trial." *Id.* at 868-70. The Second Circuit reversed, finding "a per se violation of the Sixth Amendment right to effective assistance of counsel." *Id.*
[150] *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993).
[151] *See*, *e.g.*, *United States v. Elder*, 311 F. Supp. 3d 589, 596-97 (E.D.N.Y. 2018) (noting that an allegation at trial that Elder's attorney "helped him avoid arrest" was "sufficient to create and actual, *per se* unwaivable conflict").

In one of these cases—*United States v. Fulton*—Fulton was on trial for alleged drug trafficking.[152] During trial, the government revealed that a witness about to testify against Fulton, also claimed that he had trafficked drugs for Fulton's lead trial counsel. Though the government did not "know if [this accusation against counsel was] true or not," the trial judge disclosed this accusation to counsel and to Fulton, and advised Fulton that he had to decide "whether [lead trial counsel] can continue to represent you."[153] Fulton agreed to continue the trial with this counsel as lead attorney. The lead attorney "requested that the government not 'bring this up,'" and it did not come up at trial.[154]

Though the lower court in *Fulton* held, in a post-trial proceeding, that Fulton had waived the conflict and "failed to demonstrate that he had been prejudiced by lead trial counsel's representation,"[155] the Second Circuit Court of Appeals reversed Fulton's conviction under the *per se* rule. It noted that that when "an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great."[156] The Court provided two key reasons for adopting a per se rule to an accusation that an attorney participated in a client's crimes:

---

[152] 5 F.3d. at 606-07.
[153] *Id.* at 607-08.
[154] *Id.* at 608.
[155] *Id.* at 608-09.
[156] *Id.* at 609.

> First, if the allegations are true, [the] concerns we expressed in *Cancilla* arise: the attorney may fear that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney. Moreover, the attorney is not in a position to give unbiased advice to the client about such matters as whether or not to testify or to plead guilty and cooperate since such testimony or cooperation from the defendant may unearth evidence against the attorney.
>
> Second, *even if the attorney is demonstrably innocent and the government witness's allegations are plainly false*, the defense is impaired because vital cross-examination becomes unavailable to the defendant. Ordinarily, a witness's blatantly false allegations provide a rich source for cross-examination designed to cast doubt on the witness's credibility; but, when the allegations are against the defendant's attorney, this source cannot be tapped.[157]

Both the Court of Appeals for the District of Columbia Circuit,[158] and the District of Columbia Court of Appeals,[159] have favorably cited this rule.

ii. Other federal and state courts have also automatically disqualified attorneys accused of misconduct related to the client's alleged offenses.

Many federal and state courts have similarly required reversal where a defense attorney represents a client after alleged involvement in related crimes,

---

[157] *Fulton*, 5 F.3d. at 610 (emphasis added, internal citations omitted).
[158] *United States v. Lopesierra-Gutierrez*, 708 F.3d 193, 201 (D.C. Cir. 2013) (citing *Fulton*, 5 F.3d at 611 (suggesting that "when the attorney's alleged criminal activity is 'sufficiently related to the charged crimes,'" it "might agree with the Second Circuit" that the attorney is "incapable of providing constitutionally adequate representation").
[159] *Douglas v. United States*, 488 A.2d 121, 136 n.16 (D.C. 1985) (citing *Cancilla*, 725 F.2d at 868-71) (noting "certain 'personal conflicts of interest' may so undermine an attorney's ability to render adequate representation that they require reversal without regard to whether the defendant objected at trial or is able to show on appeal that adverse effect resulted from the conflict").

even though others have applied *Cuyler*.[160] In *United States v. White*, the Fifth Circuit Court of Appeals reversed White's conviction for escape from custody because the government had investigated his counsel "for complicity in the escape."[161] The Fifth Circuit held that this was a situation where "reversal is *automatic regardless of a showing of prejudice*," even though White had been "informed of his right to have [counsel] dismissed and was questioned extensively by the court regarding his awareness of the existence of a conflict."[162] Even without proof of actual adverse effect on the representation,[163] the court gave several reasons the lower court should "*have . . . anticipated* [how counsel's] conduct of the defense would have prejudiced the defendant"[164]

And in *Duffy*, the Pennsylvania Supreme Court found that the "conflict between counsel's and [Duffy's] interests" required reversal "without the need to prove actual prejudice"—even though the Court did not mention any

---

[160] *E.g. Zepp*, 748 F.2d at 139 (finding an "adverse effect" from the stipulation).
[161] 706 F.2d 506, 507-08 (5th Cir. 1983)
[162] *Id.* at 510. Unlike the Second Circuit, the Fifth Circuit allows a defendant to knowingly and intelligently waive this type of conflict. *Id.*
[163] The Fifth Circuit has required an adverse effect for other conflicts of interest of counsel besides the alleged criminal activity in *White*. *E.g. United States v. Greig*, 967 F.2d 1018, 1024-25 (5th Cir. 1992) (disciplinary investigation for counsel going around co-defendant's counsel, to speak with co-defendant).
[164] 706 F.2d at 509 (suggesting counsel "might not present detailed evidence regarding the circumstances of the escape for fear of incriminating himself," "might not call certain witnesses or only cursorily examine others for fear of self-incrimination," that counsel was ineligible to testify, and "would resist plea bargaining for fear that the defendant might turn state's evidence against him").

observed adverse effects on defense counsel's representation of Duffy.[165]

2. Even for personal interest conflicts besides alleged crimes related to the representation, this Court and others have required automatic reversal where there was a timely objection to the conflict when it existed.

In *United States v. Leaver*, this Court—citing both *Holloway* and *Cuyler*—held that "where an accused challenges the adequacy of his counsel's trial representation and *certainly where the accused expresses a desire to sever his relationship with that counsel*, the conflict between the accused and counsel is so great" that new proceedings must occur.[166] In *United States v. Knight*, this Court cited *Leaver* and reaffirmed this scenario created a reversible conflict.[167]

After trial, Leaver had asked the convening authority (CA) to discharge his trial defense counsel "from this detail before he does any more damage," "complained of . . . counsel's inadequate preparation for trial and infrequent contacts," and claimed counsel "could not properly represent" him.[168] Though counsel complained to the CA he had a conflict of interest, the CA detailed him to represent Leaver in clemency. Counsel wrote a reply to the staff judge advocate's (SJA's) recommendation on Leaver's behalf, and "did not submit a clemency petition . . . because Leaver had already."[169] This Court ordered post

---

[165] 394 A.2d at 967.
[166] 36 M.J. 133, 135 (C.M.A. 1992) (quotations omitted, emphasis added).
[167] 53 M.J. 340, 342 (C.A.A.F. 2000) (quoting *Leaver*, 36 M.J. at 135).
[168] 36 M.J. at 134-35 (internal quotations omitted).
[169] *Id.* (noting counsel "felt that [he] should be assigned another attorney").

-trial processing with new counsel, even though (1) the SJA had dismissed Leaver's "bare assertion of ineffective assistance of counsel" as an inadequate "basis for the removal of" counsel; and, (2) the lower court noted Leaver had "not claimed . . . any error in the counsel's response [to the SJAR] or anything else that should have been done in his behalf."[170]

In *Hurt*, the District of Columbia Circuit Court of Appeals also set aside the post-trial proceeding, even though Hurt failed to "suggest in retrospect anything that appellate counsel intended to undertake at the hearing that he did not feel free to do" (i.e., an adverse effect) from the personal conflict, noting that:

> We have recognized that proof of prejudice may well be absent from the record precisely because counsel has been ineffective; we recognize, too, that lawyers frequently do not realize their own shortcomings. The pressure under which appellate counsel labored may well have resulted in subtle restraints which not even he could pinpoint or define. Try as we might, we could not approximate the effect which the overhanging threat of the libel suit had on the vigor of counsel's endeavors at the remand hearing. In sum, prejudice in the circumstances involved here is incapable of any sort of measurement.[171]

C. The military judge abused his discretion in failing to apply the correct law to counsel's request to withdraw because of a conflict of interest.

The military judge's refusal to release civilian counsel was an abuse of discretion because he: (1) incorrectly required, contrary to the plain text of R.C.M. 506, "good cause" for civilian counsel's removal—even though SSgt

---

[170] *United States v. Leaver*, 32 M.J. 995, 997 (C.G.C.M.R. 1991).
[171] 543 F.2d at 168 (internal quotations and citations omitted).

Watkins had also requested civilian counsel's release; and, (2) incorrectly believed that a conflict of interest had to have a specific adverse effect on the representation.[172] As the lower court said, "the military judge's attempt to apply *Cuyler* prospectively makes no sense. He could not have known before trial whether a conflict had affected [civilian counsel's] representation at trial."[173]

D. This Court should automatically reverse SSgt Watkins' convictions for a new trial because conflicted civilian counsel represented him at trial.

The RTC accused civilian counsel of assisting with witness tampering while representing SSgt Watkins while the government charged SSgt Watkins with obstruction of justice and conspiring to do so with unknown persons. This requires reversal under the *Cain*, *Cancilla*, *Fulton*, *White* and *Duffy per se* rule.

Even if this Court does not believe that counsel faced criminal liability, military courts including this Court have applied the *per se* reversal rule in *Holloway* to all types of conflicts, and there is certainly no need to depart from that practice here where civilian counsel preserved his objection at trial. As in *Leaver* and *Knight*, civilian counsel had a conflict and moved to withdraw, and SSgt Watkins objected to continued representation by counsel. This Court should still apply the *per se* reversal rule from *Holloway* that it applied in *Leaver* and *Knight* where counsel timely objected to a conflict of interest.

---

[172] JA at 315.
[173] JA at 8.

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. THE MILITARY JUDGE ERRED BY DENYING THIS REQUEST.

Standard of Review

Denial of a continuance needed to obtain counsel of choice is "tested for an abuse of discretion."[174] An "[u]nreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion.[175] And where the military judge "provide[s] little or no basis or explanation" in "denying [an] appellant's request for a continuance," this Court "can give little deference to his ruling"—making review practically "*de novo*."[176] Wrongful denial of a continuance needed to obtain civilian counsel of choice is structural error and thus is "not subject to harmless-error-analysis."[177]

---

[174] *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997) (brackets original)
[175] *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999).
[176] *United States v. Walker*, 66 M.J. 721, 737 (N-M. Ct. Crim. App. 2008), *rev'd on other grounds*, 71 M.J. 523 (N-M. Ct. Crim. App. 2012) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000) (citation omitted)).
[177] JA at 29 (*United States v. Saberon*, No. 201200103, 2013 CCA LEXIS 191, at *10 (N-M. Ct. Crim. App. Mar. 5, 2013) (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152 (2006))); *see United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (listing denial of counsel of choice as structural error).

Discussion

In *United States v. Gonzalez-Lopez*, the Supreme Court held that even though a court may "balanc[e] the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar," the Sixth Amendment "commands . . . that the accused be defended by the counsel he believes to be best," and a "choice-of-counsel violation occurs *whenever* the defendant's choice is wrongfully denied."[178] This Court stated in *United States v. Miller* that "[a] military judge should" normally "grant a continuance in order to allow an accused a reasonable opportunity to obtain civilian counsel for the proceeding," and it "ought to be an extremely unusual case when a man is forced to forego [his choice of counsel] and go to trial with . . . counsel rejected by him."[179]

A. The military judge should have granted the continuance under *Miller*.

This Court applies the "*Miller* factors" to test for an abuse of discretion in denying a continuance to obtain counsel: "[s]urprise, nature of any evidence involved, timeliness . . . substitute testimony or evidence, availability of witness or evidence requested, length of continuance, prejudice to opponent, moving party received prior continuances, good faith of moving party, use of reasonable diligence by moving party, possible impact on verdict, and prior notice."[180]

---

[178] 548 U.S. at 146, 150, 152 (citations omitted, emphasis in original).
[179] 47 M.J. at 358 (quotation omitted).
[180] *Weisbeck*, 50 M.J. at 466 (quotation omitted).

Here, the military judge failed to cite *Miller* or to consider most of the relevant factors. This Court should therefore afford no deference to his decision, and find in its *de novo* review that SSgt Watkins had the right to replace lead civilian counsel even though it would have required a continuance.

1. SSgt Watkins was surprised by the RTC's attack on civilian counsel; and his response to its attack on civilian counsel was not surprising.

In *United States v. Wiest*, a military judge questioned whether detailed counsel were "competent advocate[s]" in front of Wiest.[181] Wiest replied, "in light of your statements that my counsel were ineffective . . . . I would like to fire both."[182] A week later, prospective civilian counsel moved to continue the trial for one month. The military judge denied the motion and Wiest went to trial with new detailed counsel, but without civilian counsel of his choice.[183] This Court found error in the military judge's denial of the continuance under the *Miller* factors. It noted that because Wiest "was *clearly surprised by the harsh criticism of his counsel* by the military judge . . . this factor weighed in favor of a continuance."[184] And "[b]ased on the record, this request was not a surprise" to the military judge or the government.[185]

SSgt Watkins had no reason to expect the government would threaten

---

[181] 59 M.J. 276, 277-78 (C.A.A.F. 2004).
[182] *Id.* at 277-78.
[183] *Id.*
[184] *Id.* at 279 (emphasis added).
[185] *Id.*

civilian counsel on the eve of trial, leading counsel to move to withdraw because of a conflict of interest. SSgt Watkins' request for new civilian counsel after hearing these unnerving claims was no surprise. This *Miller* factor, ignored at trial, favored allowing SSgt Watkins to obtain new civilian counsel.

2. A continuance would not affect the nature of the evidence involved.

The nature of the evidence the government introduce would have been the same after a continuance, making this *Miller* factor irrelevant.

3. SSgt Watkins' request was timely under the circumstances.

In *Wiest*, this Court favorably cited that Wiest's "request for new counsel was submitted shortly after" the military judge's comments denigrating his detailed counsel.[186] Here, SSgt Watkins requested to replace civilian counsel the next session of court following the RTC's threats. The military judge's finding of untimeliness based on the request coming "on the morning of the first day of a trial"[187]—is therefore an abuse of discretion in light of *Wiest*. This *Miller* factor favored allowing SSgt Watkins to obtain new civilian counsel.

4. Just because he believed that civilian counsel and SSgt Watkins appeared to be communicating, the military judge could not deny SSgt Watkins his right to civilian counsel of choice.

In *Carlson v. Jess*, Carlson requested a continuance four days before trial for substitute counsel, based on his loss of confidence in, and "breakdown in

[186] 59 M.J. at 279.
[187] JA at 317.

communication" with civilian counsel.[188] The trial judge denied the request, "finding that communication between Carlson and [counsel] had not totally broken down" just because they had different views.[189] The Seventh Circuit Court of Appeals found the "trial judge's finding was clearly unreasonable," because he "simply ma[de] a factual finding that the relationship has [not] broken down to the point where there's no communication" without "prob[ing] the matter further."[190]

Here the military judge's assumed based on personal observations from earlier in the proceedings that civilian counsel and SSgt Watkins had "an ability to communicate freely."[191] This was clearly erroneous as their ability to communicate before the RTC's threat was irrelevant. And the military judge had little if any chance to observe any further communications between SSgt Watkins and counsel before the withdrawal motion in the next court session. This factor favored allowing SSgt Watkins to obtain new counsel.

5. SSgt Watkins could have readily obtained a substitute civilian attorney to replace lead civilian counsel.

In *United States v. Wiesback*, this Court found this *Miller* factor favored a defense continuance request to obtain an expert witness where "[t]here is no

---

[188] 526 F.3d 1018, 1020, 1022-23 (7th Cir. 2008).
[189] *Id.* at 1023.
[190] *Id.* at 1024.
[191] JA at 316.

factual dispute that the witness would have been available if the continuance had been granted."[192] As the military judge never challenged SSgt Watkins' request to replace civilian counsel with "another attorney that I would like to bring aboard,"[193] this factor favored allowing SSgt Watkins to replace counsel.

6. The military judge wrongly assumed that any length of continuance would be unacceptable.

In *Wiesback*, this Court indicated that the fact a "requested continuance" to obtain expert testimony "was for less than 6 weeks," favored the defense.[194] In *People v. Young*, an Illinois Court found "an abuse of discretion" in denying Young's day of trial motion "for a continuance to seek another counsel."[195] Though the prospective replacement counsel did not say when he would be available, the *Young* court noted that "the only reason we do not know if [replacement counsel] was ready to [appear for the defendant] unconditionally is because the court never asked."[196] Had the military judge conducted the proper inquiry, SSgt Watkins' prospective civilian counsel would only have needed about three weeks. Assuming that any continuance would have been too much was an abuse of discretion.

---

[192] 50 M.J. at 465.
[193] JA at 152.
[194] 50 M.J. at 465.
[195] 565 N.E.2d 309, 310-12 (Ill. Ct. App. 1990); *see People v. Friedman*, 382 N.E.2d 684, 685-87 (Ill. Ct. App. 1978) (noting court should have investigated).
[196] 565 N.E.2d at 310, 312.

7. The military judge wrongly assumed a defense continuance would prejudice the government.

In *Wiest*, this Court faulted the government for failing to "show that witnesses would not be available at a later date."[197] In *United States v. Keys*, a military court found an abuse of discretion where the military judge "denied the request for a continuance" of two weeks—made by Keys' desired civilian counsel "on the day before trial."[198] Even though the military judge "stated that four witnesses from thousands of miles away were produced with some effort and inconvenience on their part," the *Keys* Court held that "the appellant could not be forced to have representation by his detailed defense counsel."[199]

The military judge here cited the fact that the government had produced out-of-area witnesses for trial, as well as "several and significant challenges in procuring the presence of [Ms.] Watkins and C.K.W. and identifying their various locations."[200] But most of the out-of-area witnesses were defense character witnesses, whose remote testimony would not have prejudiced the government. And the one who was not just a character witness, Ms. Watkins, ultimately accepted service of a subpoena both in California and Mississippi. The military judge's refusal to grant a continuance because of defense character

---

[197] 56 M.J. at 279.
[198] 29 M.J. 920, 921, 923-24 (A.C.M.R. 1989).
[199] *Id.* at 921, 924 (emphasis added).
[200] JA at 312-13.

witnesses, and because of speculation that Ms. Watkins and C.K.W. would not honor a subpoena after they had accepted service was erroneous under *Wiest*.

8. Even if the government had to request a continuance when it could not subpoena Mrs. Watkins, it requested the only other trial date continuance.

The military judge found that SSgt Watkins' case "ha[d] been continued several times based in large part upon the prosecution's inability to arrange for the presence of the accused's wife and daughter to be called as witnesses in the case against him—at least partially due to the actions of the accused[.]"[201] But this finding was clearly erroneous in imputing all of this to the defense: the government's first continuance "from the original trial dates of August" was due to a government witness' schedule.[202] This factor is evenly balanced.

9. SSgt Watkins' request for new counsel was not made in bad faith.

In *Wiest*, this Court found the military judge abused his discretion in part because the government did not "establish an attempt by Appellant to 'vex' the Government" by moving for the continuance.[203] This Court also held there was not "any delay *or bad faith* by Appellant as he contacted [desired new counsel] almost immediately" after the military judge berated detailed counsel.[204] This Court overruled the lower court's finding of a lack of "good faith" in *Wiest*,

---

[201] JA at 317.
[202] JA at 267-69.
[203] 59 M.J. at 279.
[204] *Id.* at 279 (emphasis added).

which it had based on (1) the three prior continuances Wiest requested; (2) the military judge's finding that civilian counsel had time in his schedule to try the case without a continuance; and, (3) counsel's "indicat[ion] that he was moving for the continuance to preserve the issue for appeal."[205]

In *Carlson*, the Seventh Circuit found error in denial of the continuance, in part because "Carlson had remained in jail from the time of his arrest; thus, he had nothing to gain by needlessly delaying the trial. He had never requested to substitute counsel previously and had no history of 'gaming' the system."[206]

SSgt Watkins was in pretrial confinement. Further delay in his trial would only have kept him in pretrial confinement. Mrs. Watkins had then been served with a subpoena, and could have been subject to a warrant of attachment.

And SSgt Watkins did not decide to have the RTC threaten his lead civilian counsel in the days before trial, or to have his counsel then claim he had to withdraw. Like in *Wiest*, SSgt Watkins lined up new civilian counsel almost immediately after the RTC's threat. Even if SSgt Watkins visited his family while the government imposed a military protective order, and shared responsibility for government's failures to serve Ms. Watkins and C.K.W., these unrelated past events were like the defense's prior continuances in *Wiest*,

---

[205] JA at 42-44 (*United States v. Wiest*, No. 33964, 2002 CCA LEXIS 233, at *21-22, 27-28 (A.F. Ct. Crim. App. Sep. 24, 2002)).
[206] 526 F.3d at 1026.

which this Court found irrelevant to the question of bad faith.

The request was not in bad faith merely because SSgt Watkins wanted the court to grant the continuance. Otherwise, this Court would have found bad faith in *Wiest*. The lower court's expansive reading of "bad faith" to include conduct *before* the unexpected event, improperly replaced the flexible *Miller* factors test with an inelastic rule prohibiting disfavored defendants from using their right to counsel of choice even after intentional government misconduct.

10. SSgt Watkins and counsel were reasonably diligent.

As discussed above in factor 3 (timeliness), SSgt Watkins was reasonably diligent in responding to what the government did. This factor favors him.

11. Denial of choice of civilian counsel inherently impacts the verdict.

In *Gonzalez-Lopez*, the Supreme Court cautioned that "[i]t is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings.[207] This factor supported granting SSgt Watkins' request.

12. SSgt Watkins did not have prior notice that the government would attack his civilian counsel four days before trial.

In *Miller*, this Court reversed denial of a continuance where the "notice given was insufficient to allow Miller to obtain a civilian counsel."[208] The short

[207] 548 U.S. at 150.
[208] 47 M.J. at 358.

timeframe here likewise favored granting the request of SSgt Watkins.

B. The wrongful denial of SSgt Watkins' right to civilian counsel of choice was structural error—requiring reversal without testing for prejudice.

This Supreme Court in *Gonzalez-Lopez* found "structural error" where the trial court erroneously denied Gonzalez-Lopez's motion to replace one civilian counsel with another.[209] This Court should do the same where improper denial of a continuance denied SSgt Watkins the right to counsel of his choice.

III.
THE LOWER COURT ERRED 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.

Standard of Review

This Court reviews conclusions of law *de novo*. It also reviews *de novo* both whether a military judge's statement is a finding of fact or a conclusion of law,[210] and if a CCA has properly classified a statement.[211]

---

[209] 548 U.S. at 146, 150-52.

[210] *See United States v. Cossio*, 64 M.J. 254, 256-57 (C.A.A.F. 2007) (deciding whether particular findings of military judge were "findings of fact," or merely "criticism, apparent belief," or "opinions") (quotations and citation omitted).

A. The military judge's finding that SSgt Watkins' request for new counsel was in "bad faith" was an erroneous conclusion of law.

As discussed below, this Court should review *de novo* as a conclusion of law whether SSgt Watkins requested new counsel in good faith. Per *Miller* factor 9 discussed above, this Court should find the request was in good faith.

B. The lower court erroneously treated the military judge's finding that SSgt Watkins' request for counsel was "opportunistic" as a finding of fact.

In *United States v. Cossio*, this Court limited the scope of findings of fact "to things, events, deeds or circumstances that 'actually exist'"—distinguishing them from conclusions of "'legal effect, consequence, or interpretation.'"[212] In *United States v. Johnson*, this Court rejected the lower court's characterization of its finding that the information used to justify a search authorization had been "stale" was a finding of fact. This Court contrasted this finding of legal effect, with objective findings of fact such as the "length of time which passed between . . . events on which probable cause was based."[213] And in *United States v. Boyce*,[214] this Court held that the military judge's finding that the convening authority was "bombproof," was a "legal conclusion," not a "factual finding (i.e., based on the facts in this case, the military judge reached the legal

---

[211] *See United States v. Johnson*, 23 M.J. 209, 212 (C.M.A. 1987) (per curiam) (CCA "could not transmute a conclusion of law . . . into a factual finding").
[212] *Cossio*, 64 M.J. at 256-57 (quotation omitted).
[213] 23 M.J. at 211.
[214] 76 M.J. 242, 250 (C.A.A.F. 2017).

conclusion that [he] was immune to unlawful command influence)."

In *Cossio*, this Court also agreed with the CCA that the military judge had improperly labeled statements of "criticism, apparent belief, and opinion[]" as findings of fact in his ruling on a speedy trial claim.[215] The CCA had explained that the military judge's statements that the government "took way too long" at various points and had engaged in unnecessary investigation, were "not . . . matters of objective fact which can be tested for clear error . . . which must necessarily affect our holding" as findings of fact normally would.[216]

Here the military judge stated on the record that SSgt Watkins' request for new counsel was "opportunistic," and in his written ruling that it was "an obvious attempt to further impede the prosecution of the case against him."[217] The lower court decided this was a "finding of fact" that SSgt Watkins request was "opportunistic," and used it to conclude he made his request in bad faith.[218]

But this does not accord with the military judge's full statement on the record, which was that "the arguments in support of excusing [civilian counsel] *on these facts strike the Court as* opportunistic."[219] The military judge's claim

---

[215] 64 M.J. at 257.
[216] JA at 52-53 (*United States v. Cossio*, No. 2006-02, 2006 CCA LEXIS 128, *7-8 (A.F. Ct. Crim. App. May 10, 2006), *aff'd*, 64 M.J. 254 (C.A.A.F. 2007)).
[217] JA at 161, 317.
[218] JA at 12 (claiming that this "finding of fact" was that SSgt Watkins "saw [RTC's] loss of composure as an opportunity to stall the trial").
[219] JA at 161 (emphasis added).

reads more like an expression of frustration—the sort of "criticism, apparent belief, and opinion[]" that this Court ignored in *Cossio*. At most, the military judge's claim was a conclusion of law as in *Boyce*, or a statement of legal effect as in *Johnson*. Either way, the lower court legally erred when it held "the finding [of fact] of bad faith swamps the rest of the *Miller* factors."[220] This Court should review the *Miller* factors *de novo*, showing no deference to the military judge's claim of bad faith. Per Issue II, it should find the military judge wrongly denied SSgt Watkins' right to counsel of choice.

Conclusion

SSgt Watkins respectfully requests that this Court set aside the sentence and the findings of guilty to all charges and specifications, on the basis that the military judge erroneously denied civilian counsel's motion to withdraw and SSgt Watkins' request for new civilian counsel of his choice.

Respectfully Submitted,

DANIEL E. ROSINSKI
LT, JAGC, USN
C.A.A.F. Bar No. 36727
Appellate Defense Counsel, NAMARA
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington, D.C. 20374
Phone: (202) 685-8506
Fax: (202) 685-7426
daniel.e.rosinski@navy.mil

[220] JA at 12.

Certificate of Compliance

1. This Supplement complies with the type-volume limitation of Rule 21 because it contains 12,976 words.

2. This Supplement complies with the type style requirements of Rule 37 because it has been prepared with a monospaced typeface using Microsoft Word with 14 point, Times New Roman font.

Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to the Deputy Director, Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on November 14, 2019.

DANIEL E. ROSINSKI
LT, JAGC, USN
C.A.A.F. Bar No. 36727
Appellate Defense Counsel, NAMARA
1254 Charles Morris Street, SE
Bldg. 58, Suite 100
Washington, D.C. 20374
Phone: (202) 685-8506
Fax: (202) 685-7426
daniel.e.rosinski@navy.mil