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

CORRECTED REPLY 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

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Table of Contents

Table of Authorities

OTHER COURTS

STATUTES

MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016)

OTHER AUTHORITIES

Introduction

Trial counsel argued SSgt Watkins met his family in violation of a MPO, under the cover of a legal appointment at lead counsel Mr. White's law office.[1] After the military judge granted Mr. White's request to bar the Government from stating this at trial, Regional Trial Counsel (RTC) LtCol Keane, the area's senior Marine prosecutor, accused Mr. White of one of the same crimes charged against SSgt Watkins—conspiring with Ms. Watkins and others to obstruct justice by tampering with their daughter C.K.W. In a recess after the ruling, the RTC yelled that he did not care Mr. White had said he was not at his law office that day. It was not "over yet" for Mr. White, the "whole thing [wa]s shady."[2]

This Court should find in its *de novo* review that accusing Mr. White of a crime charged against his client, created a conflict of interest. The RTC admitted his outburst was about Mrs. Watkins being near counsel's office, while the Government was trying to serve a subpoena.[3] Mr. White, "in [his] heart," saw his interests and SSgt Watkins as "inversely related . . . . The more liable I am, the less liable he is."[4] He offered SSgt Watkins his $20,000 retainer to hire new counsel. Under this Court's cases applying *Holloway v. Arkansas* and the Second Circuit's *per se* conflict rule, failure to excuse Mr. White requires reversal.

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[1] *See* JA at 115-18.
[2] JA at 311; *see* JA at 141 (RTC admitting he raised his voice).
[3] JA at 134-35.
[4] JA at 144-45, 149.

A. "Law of the case" doctrine precludes the Government from contesting the lower court's finding that the military judge violated R.C.M. 506.

"Where neither party appeals a ruling of the court below, that ruling will normally be regarded as law of the case and binding upon the parties."[5] The lower court here held that the military judge "erred by finding that [Mr. White] had to demonstrate good cause to withdraw" under R.C.M. 506(c).[6] The Government did not certify this issue, or cross-certify it after this Court granted SSgt Watkins' petition. This Court should therefore reject the Government's argument that "the military judge's analysis under the 'good cause prong'" of R.C.M. 506(c) "was correct,"[7] as contrary to the law of the case doctrine.

B. The military judge's failure to follow the plain meaning of R.C.M. 506 prejudiced SSgt Watkins.

Even if this Court does review the lower court's interpretation of R.C.M. 506(c), this Court must "look first to its language."[8] 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." Requiring good cause for a request to excuse defense counsel erroneously transforms this disjunctive "or" into a conjunctive "and."[9]

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[5] *United States v. Lewis*, 63 M.J. 405, 412 (C.A.A.F. 2006).
[6] JA at 8.
[7] Appellee's Answer ("Answer") of Dec. 16, 2019 at 20.
[8] *United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015).
[9] *See United States v. Hutchins*, 69 M.J. 282, 289-90 (C.A.A.F. 2011).

The military judge's erroneous interpretation of R.C.M. 506 prejudiced SSgt Watkins because it: (I) resulted in SSgt Watkins' representation at trial by a lead attorney who had a conflict of interest; and, (II) denied SSgt Watkins his right to representation by the civilian counsel of his choice.

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.

SSgt Watkins was "entitled to have conflict-free counsel."[10] Navy and Marine Corps counsel have a conflict of interest where there is a "*significant risk*" the representation "will be materially limited . . . by a personal interest of the covered attorney" (Rule 1.7).[11]

A. The military judge erred by requiring SSgt Watkins to show an adverse effect on representation where defense raised the conflict of interest at trial

The Answer dismisses the significance of the ethical rules that were the catalyst for Mr. White's concerns. It claims the Supreme Court has held that its

[10] *United States v. Murphy*, 50 M.J. 4, 10 (C.A.A.F. 1998).
[11] JA at 60 (JAGINST 5803.1E) (emphasis added).

conflict jurisprudence "is not to [be used to] enforce the Canons of Legal Ethics," so that in all cases "[a]n 'actual conflict'" exists only if it "adversely affects counsel's performance."[12]

But the case it quotes for these propositions, *Mickens v. Taylor*, involved an alleged conflict of interest raised for the *first time* on *habeas* review.[13] The lower court in *Mickens* did not answer whether counsel had "an actual conflict of interest."[14] It found only that Mickens "failed to identify an adverse effect," the second part of a two-part test for conflicts first raised *on appeal*.[15] As the Supreme Court stated in *Mickens*: "Lest today's holding be misconstrued, we note that the only question presented was the effect of a trial court's failure to inquire into a potential conflict upon the . . . rule that deficient performance of counsel must be shown."[16] The holding in *Mickens* simply does not bear on a trial court's inquiry into a conflict raised before trial begins.

As one of the Government's own authorities states, "[a] defendant who *raises no objection at trial* must demonstrate . . . an actual conflict of interest adversely affected the adequacy of his representation."[17] In *United States v.*

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[12] Ans. at 18, 23 (quoting *Mickens v. Taylor*, 535 U.S. 162, 171 n.5, 176 (2002).
[13] 535 U.S. at 164, 173; *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996).
[14] *Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001).
[15] *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980)).
[16] 535 U.S. at 174.
[17] *Reyes-Vejerano v. United States*, 276 F.3d 94, 97 (1st Cir. 2002) (citing *Sullivan*, 446 U.S. 348-50) (cited by Answer at 36).

Devitt, this Court observed the "determination that no 'actual conflict of interest' existed" is "similar to deciding that the accused were not prejudiced," but that it is erroneous to confuse the two issues.[18] The military judge (citing *Cuyler v. Sullivan*, the wrong law for a conflict objected to at trial) confused the two issues by requiring *both* "[1] . . . an actual conflict of interest [that 2] adversely affected his lawyer's performance" to grant Mr. White's release.[19] In demanding a forecast of his performance, this holding was error.

B. Mr. White had more than a subjective or potential conflict of interest, given the Government's repeated and flagrant accusations against him.

The Answer claims the RTC's threat caused only a "subjective conflict" on the part of Mr. White—"an incorrect assessment of the situation and devoid of any actual obligation"—or, he only had a potential conflict of interest.[20]

1. No military court has adopted the idea of a "subjective conflict," and Mr. White did not misperceive the RTC's threat.

Dismissing a conflict as "subjective" is inconsistent with the Supreme Court's guidance in *Holloway v. Arkansas* that an "attorney . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial."[21] And, that counsel's "request for the appointment of separate counsel, based on his representations

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[18] 20 M.J. 240, 243 (C.M.A. 1985) ("[S]ometimes the two issues are confused")
[19] JA at 156-57, 315 (alterations in original, citing *Sullivan*, 446 U.S. at 350).
[20] Answer at 19 (quoting *Tueros v. Greiner*, 343 F.3d, 587, 597 (2d. Cir. 2003)).
[21] 435 U.S. 475, 485-86 (1978).

as an officer of the court regarding a conflict of interests, should be granted" because counsel is most likely to know whether they are actually conflicted.[22]

No military court (prior to the lower court here) has rejected a counsel's conflict as merely a "subjective conflict." Contrary to this position, the Air Force Court of Criminal Appeals in *United States v. Hardy* found that military counsel had a significant risk of a material limitation under Rule 1.7—because of his subjective belief ("his perception") he might have to question his current supervisor in order to investigate Hardy's case ("what the attorney believed").[23]

The term "subjective conflict" appears in only a handful of civilian cases.[24] In the case the Government cites, *Tueros v. Greiner*, Tueros' trial attorney told the judge she thought she received attorney-client privileged information from a witness, and requested the witness receive an attorney.[25] The judge said the attorney was incorrect, and that there was no attorney-client privilege. Nevertheless, he appointed a separate attorney for the witness.

This case is inapposite for at least three reasons. First, it is a *habeas* case with a very deferential standard of review of the state court's finding that any conflict was resolved.[26] Second, the *Tueros* court suggested "purely subjective

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[22] *Id.*
[23] 44 M.J. 507, 507-10 (A.F. Ct. Crim. App. 1996).
[24] Counsel found seven cases in a search of all cases on LexisNexis.
[25] 343 F.3d at 589.
[26] *People v. Tueros*, 259 A.D.2d 641, 641 (App. Div. 2nd Dept. 1999).

conflict[s]" are "personal mistakes" that "will almost always slip under the radar of the trial court."[27] In other words, they exist where counsel makes no motion to withdraw at trial, because there is no objective basis for a conflict. Third, the question at issue in *Tueros* was objective, not subjective. Whether an attorney-client relationship "can be inferred" requires "a minimally reasonable" belief on the part of a putative client that the person is their attorney.[28] Since that reasonable belief did not exist, there was no real conflict.

Here the RTC's threat and its effects on Mr. White were different from *Tueros* along every possible axis. First, the attorney in *Tueros* did not move to withdraw from the representation for a conflict of interest. But Mr. White moved to withdraw after the threat, and stood by his objection after the RTC testified.[29] Second, the attorney in *Tueros* did not offer any evidence that the witness actually thought she was his attorney—rendering an otherwise objective notion truly subjective and based only on speculation. Mr. White, by contrast, did not mishear or misunderstand an innocent remark by the RTC. The RTC confirmed when he testified, that he had threatened Mr. White about a factual issue underlying one of the charges—the Government's inability to serve Mrs. Watkins a subpoena while she was at or near Mr. White's office.

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[27] *Id.* at 597 n.8.
[28] *United States v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997) (quote omitted).
[29] JA at 149.

Third, unlike in *Tueros*, Mr. White neither made a "personal mistake," nor was he "devoid of any actual obligation" to his own interests. Mr. White "viewed [him]self as the other client" who was "directly adverse" under the Navy's Rules. The RTC's threat did not create only a subjective conflict.

2. The RTC's threat created more than a potential conflict of interest, whether under the definitions applied by this Court or the Second Circuit.

The Answer alternatively argues that the RTC's threat only created a risk of a "potential conflict."[30] Relying on a Second Circuit case (which does not apply the "significant risk" test in Navy Rule 1.7, or its civilian equivalent), the Government defines a "potential conflict" as one creating a risk that defense counsel may be placed "under inconsistent duties at some time in the future."[31]

But this Court has already defined "potential conflict" differently. In *United States v. Akbar*, this Court used "potential conflict" to define a waivable conflict (that counsel had a "working relationship with one of the victims").[32] In *United States v. Saintaude*, Saintaude asserted on appeal a litany of conflict claims which were not objected to at trial,[33] which he had waived at trial,[34] or,

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[30] Answer at 19.
[31] *Id.* (quoting *Ventry v. United States*, 539 F.3d 102, 111 (2nd Cir. 2008)).
[32] 74 M.J. 364, 398 (C.A.A.F. 2015); *see also United States v. Vidal*, 75 M.J. 686, 690-94 (A. Ct. Crim. App. 2016).
[33] 61 M.J. 175, 177-78 (C.A.A.F. 2005) (noting that "Mr. D was not decertified; neither CPT MC nor CPT RB asked . . . permission to withdraw; nor did they bring any of these matters to the attention of the military judge or Appellant").
[34] *Id.* at 177 ("[T]he military judge specifically addressed the

which had already resulted in the withdrawal of the implicated attorneys at trial.[35] Though these were alleged conflicts "between the self-interests of his [several] attorneys and his interests as their client," this Court's description of them as "potential conflicts" comes from other variables.[36] The alleged conflicts were not conflicts because the attorney did not object, because Saintaude consented to the representation anyway, or because the attorney withdrew.

The RTC's threat to Mr. White created not just a potential conflict, but a significant risk that his representation of SSgt Watkins would be materially limited. Unlike in *Saintaude*, Mr. White told the military judge he could not ethically represent SSgt Watkins without "a self-preservation piece" clouding his judgment.[37] And unlike both *Akbar* and *Saintaude*, SSgt Watkins did not waive this conflict. The RTC's threat to Mr. White was therefore not merely a potential conflict of interest under the ways that this Court has used the term.

Nor was this a mere potential conflict under the Second Circuit's definition. Mr. White was under inconsistent duties immediately after the RTC made his threat, not just hypothetically at some uncertain time in the future.

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issue . . . . Appellant responded that he wanted to retain CPT RB.").
[35] *Id.* (noting he "granted the motion by Mr. HG and Ms. C to withdraw").
[36] *Id.* at 179 (claiming "his counsel had the following conflicts: CPT RB leaked confidential defense information; Mr. HG and Ms. C were more concerned with allegations of bribery than with his case; CPT MC placed his concern for his license over his loyalty to Appellant; and Mr. D placed his friendship with Mr. HG and Ms. C over his duty to Appellant").
[37] JA at 123-24

Perhaps Mr. White had only a potential conflict of interest after GySgt Hawks (the RTC's deputy) testified that Mrs. Watkins's bank records showed she was in the same shopping mall as civilian counsel's office.[38] The investigator did not directly threaten Mr. White, and he did not speak for the prosecutor. Trial counsel disclaimed any suspicions, the military judge continued the trial, and Mr. White did not move to withdraw.

And maybe Mr. White still only had a potential conflict of interest when the Government charged that SSgt Watkins conspired with "unknown persons to obstruct justice" by wrongfully tampering with C.K.W. The dates charged covered the date that the investigator suggested they met at civilian counsel's office in violation of the MPO, but the charge was not specific enough to place Mr. White and SSgt Watkins' interests in direct conflict. Though Mr. White was generally concerned that 'the government was trying to drag [civilian counsel] and [his] law firm into this case,"[39] he did not move to withdraw.

But the RTC's direct and specific threat to Mr. White that his troubles were not "over yet," made any potential conflict of interest an actual conflict of interest. That is why Mr. White dutifully moved to withdraw, and offered to refund SSgt Watkins' entire $20,000 retainer so he could hire new counsel.

Nor, despite the Government's suggestion, do Mr. White's comments

[38] JA at 285.
[39] JA at 24-25.

after the military judge denied his motion to withdraw mean that he only had a potential conflict. Mr. White did say he "would observe every effort to defend [SSgt Watkins] with every legal fiber, but he also prefaced this with "I thought we . . . objectively" had a conflict of interest.[40] His comments after denial of the motion reflect a *fait accompli*, with Mr. White trying to put the best possible face on this situation in order to avoid any negative personal consequences.

3. The RTC created an actual conflict of interest for Mr. White, who said that his own culpability increased the more he defended SSgt Watkins.

The only military case applying the Government's definition of a potential conflict is *United States v. Hale*.[41] But *Hale* supports Appellant's position. The *Hale* court held that an RTC's threats to a defense counsel indeed created an actual conflict of interest under Navy Rule 1.7, not a mere potential conflict. And it reached this finding on far softer facts than those Mr. White faced.

In *Hale*, defense counsel's "personal circumstances" created the potential for a conflict of interest.[42] Counsel "anticipated becoming a trial counsel in [the RTC's] region shortly after the trial. She was also married to a current trial counsel in the region" whom the RTC supervised.[43] Before trial and outside of court, the RTC reminded her of these circumstantial factors. Then in pretrial

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[40] Answer at 36 (quoting JA at 165).
[41] 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).
[42] *Id.* at 713, 722 (citing *Ventry*, 539 F.3d at 111).
[43] 76 M.J. at 724-28.

litigation the RTC "express[ed] shock and personal offense" at counsel's trial advocacy, making her cry in court.[44] The *Hale* court held that even if counsel's circumstances did not have to result in an actual conflict," the RTC's threats still created an "actual conflict of interest" under the Navy Rule.[45]

Thus in the sole case the Government relies on to support its novel "potential conflict" concept, the court set aside findings for an *unpreserved* actual conflict of interest. And it did so despite several actions by the RTC and counsel. First, the RTC testified in a post-trial session that his threats were "for purposes of levity . . . not for the purpose of intimidating counsel," and the appellate court believed his testimony (finding that the RTC only created the conflict "perhaps unintentionally").[46] Second, defense counsel testified she had "resolved to not let anything [the RTC] said affect the decisions she made in the case," and she filed several prosecutorial misconduct motions on other issues.[47] Third, there was no evidence the RTC adversely evaluated counsel's husband.

The Government does not contest in its Answer that *Hale* involved an actual conflict under Rule 1.7. It also concedes that in *United States v. Cain*, this Court correctly found Cain's counsel (who allegedly committed illegal

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[44] *Id.*
[45] *Id.* at 727.
[46] *Id.* at 725-26
[47] *Id.*

homosexual acts with Cain) had a conflict of interest.[48] This Court in *Cain* found a significant risk of the representation being "materially limited" under Rule 1.7—because counsel had an incentive not to have Cain testify.[49]

Nor does the Answer acknowledge or distinguish the numerous civilian authorities that hold, like this Court in *Cain*, that government accusations that counsel committed a crime create a conflict of interest.[50]

The Government claims that because Mr. White "could not articulate any course of action that would be foreclosed to *him*. . . . [T]here was no conflict."[51] But Mr. White gave the military judge at least one example of an argument that SSgt Watkins could only make if Mr. White was released from the case:

> 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?[52]

4. Mr. White had every reason not to object and should have been believed.

In *Hurt*, the District of Columbia Circuit Court of Appeals found a conflict where there was "no reason whatever to doubt counsel's sincerity."[53] Mr. White had every incentive not to repeatedly object that he had a conflict, which

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[48] Ans. at 29 ("*Cain's* conflicts") (citing 59 M.J. 285, 293-95 (C.A.A.F. 2004)).
[49] 59 M.J. at 293-95 (finding a conflict under substantially similar Army Rule).
[50] *E.g. Gov't of the Virgin Islands v. Zepp*, 748 F.2d 125, 136 (3rd Cir. 1984); *Commonwealth v. Duffy*, 394 A.2d 965, 968 (Pa. 1978).
[51] Answer at 21 (emphasis added) (citing Rule 1.7, Comment 4). *See* JA at 62.
[52] JA at 123-24.
[53] 543 F.2d 162 (D.C. Cir. 1976).

would have guaranteed he would receive full payment. But he explained 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."[54]

5. RTC's testimony did not cure the significant risk of material limitations.

Courts do not need to find a conflict whenever defense objects (like in *Saintaude*). But where counsel objects and the threat of a conflict is subjectively honest and reasonably believable, counsel must receive great deference. Even though the RTC testified that he had no evidence Mr. White was complicit in any charged misconduct or did anything unethical, and had no current plans to pursue criminal or ethical action against Mr. White,[55] this was only a statement of current intent. It was contingent on other factors the RTC testified to—like his not having read any of the attorney-client privileged "text messages that were pulled from [SSgt Watkins'] phone."[56] Mr. White noted that even though he thought the messages were "innocuous" (and the military judge agreed),[57] Mr. White noted that he was worried about "what other people would think in

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[54] JA at 123.
[55] JA at 134-35.
[56] JA at 140.
[57] *See* JA at 162 (finding, based on his *in camera* review, that "[t]he majority of the text messages entailed logistical arrangements, discussions about the procedural posture of the case. In instances where the accused sought specific legal advice, Mr. White, suggesting an awareness that the content of the text could be compromised, instructed his client to call him.").

this case; and I have to have that in the back of my mind."[58]

As in *Hale*, counsel had reason to believe effective advocacy and preparation would further antagonize the RTC into investigating him. This provided a reasonable basis for Mr. White's claim that he had a conflict—i.e. that he was "hindered, potentially, with what defenses and what he will say in this case."[59]

The Military Judge abused his discretion in finding no conflict of interest, based on Mr. White not listing "actual situations that could arise where he would be unable to provide effective and zealous representation."[60] In so doing he applied *Cuyler*'s heightened requirement to show specific adverse effects on the representation—a requirement reserved for forfeited conflicts raised on appeal. As contemplated in *Devitt*, the military judge erred where he conflated the conflict of interest with prejudice, and required Mr. White to show more than a significant risk that the representation could be materially limited.

C. Mr. White's conflict of interest was *per se* prejudicial, requiring reversal

The Answer excuses the conflict of interest created by the RTC by fitting a square peg—a conflict of interest objected to at trial by defense—into the round hole of *Strickland v. Washington*.[61] But *Strickland* excepts "[c]onflict of

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[58] JA at 145, 159.
[59] JA at 145.
[60] JA at 316.
[61] Answer at 23 ("[T]he prejudice analysis in Appellant's case is governed by *Strickland* and exceptions . . . are inapplicable.") (citing 466 U.S. 668 (1984)).

interest claims" from the "general requirement that the defendant affirmatively prove prejudice."[62] And *Strickland* is the test for claims first raised on appeal.

1. Treating a preserved objection to a conflict of interest identically to an *unpreserved* objection (by testing both for prejudice), means defendants have no incentive to object at trial. They will receive the same review by "sandbagging" an appellate court—raising it for the first time on appeal.

The Answer does not address a significant issue with applying either the *Strickland* or *Cuyler* ("adversely affect[ing] counsel's performance") tests for prejudice.[63] Courts generally review preserved objections more favorably to the defense because "[w]ith harmless error (objected to error) . . . the court and prosecutor have had such opportunity to correct error and the government [on appeal] must therefore show that failing to correct the error doesn't matter because the error itself is harmless to defendant's rights."[64] To do otherwise incentivizes "sandbagging" by the defense.[65] This Court should also continue to follow the *per se* rule which best promotes development of the record at trial and maximal disclosure of conflicts.

2. The correct test for a preserved objection to a conflict remains *Holloway*.

The correct test for a conflict of interest objected to at trial remains *Holloway*. The Supreme Court reversed Holloway's conviction "in the absence

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[62] 466 U.S. at 693 ("Conflict of interest claims aside . . .").
[63] Answer at 18.
[64] STEVEN CHILDRESS & MARTHA DAVIS, 2 FEDERAL STANDARDS OF REVIEW § 7.04, LEXISNEXIS (4th ed. 2010).
[65] *Freytag v. Commissioner*, 501 U.S. 868, 895 (1991) (Scalia, J. concurring).

of a showing of specific prejudice."[66] The Answer tries to narrow *Holloway* as only applying to multiple representation conflicts "objected to but left unresolved by the trial judge."[67] But the trial judge in *Holloway* did hold a hearing into the alleged conflict after counsel objected at trial to the conflict of interest.[68] And, a joint defense was not precluded in *Holloway* because all defendants testified and gave an alibi that did not accuse other defendants.[69]

The Answer claims applying *Holloway* to personal conflicts extends the law.[70] But this Court cited *Holloway* not only in the personal conflict case of *Cain*, but in *United States v. Leaver*[71] and *United States v. Knight*.[72] The Answer misunderstands the claim that Leaver "was left completely without counsel at all after the trial."[73] Leaver had representation but "there *effectively* was an *absence* of counsel" because the attorney had a conflict of interest.[74] This Court reversed to redo that stage with unconflicted counsel, even though it could only speculate this would result in a better clemency submission.[75]

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[66] 435 U.S. at 480-81, 487.
[67] Answer at 24, 26, 34.
[68] 435 U.S. at 477, *id.* n.1.
[69] *Id.* at 480.
[70] Answer at 26.
[71] 36 M.J. 133, 135 (C.M.A. 1992).
[72] 53 M.J. 340, 342 (C.A.A.F. 2000).
[73] Answer at 26 (quoting 36 M.J. at 136).
[74] 36 M.J. at 135 (second emphasis in original).
[75] *E.g. Knight*, 53 M.J. at 343 (suggesting clemency submission would no longer include "bald assertions").

The Answer claims SSgt Watkins' case has "no unusual circumstances comparable to *Cain*."[76] Therefore, it suggests Mr. White's conflict of interest should be tested for prejudice (as in *United States v. Babbitt*).[77] But this case does present unusual circumstances which go beyond the problem in *Cain*—as the Government accused Mr. White of one of the same crimes it charged SSgt Watkins with. *Babbitt* did not present this dilemma, because civilian counsel's sexual involvement with the Babbitt had nothing to do with Babbitt's attempted murder charges.[78] Not even *Cain*, where Cain's misconduct preceded counsel's alleged homosexual acts with Cain, had this type of severe conflict.[79] The charge sheet, combined with the RTC's explicit threat, makes this a *per se* conflict. It is a conflict whether this Court uses the Second Circuit's *per se* rule for cases where an attorney allegedly "engaged in criminal misconduct similar to the conduct at issue in Appellant's trial" (which this Court cited in *Cain*);[80] or, if this Court looks at all the circumstances in this case (as the Answer urges).

The Answer also ignores cases outside the Second Circuit that have applied a similar *per se* rule of reversal. *Commonwealth v. Duffy* explained that even the drive to achieve an acquittal can reflect a lack of impartial advice on

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[76] Answer at 28-29.
[77] *Id.* (citing *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988)).
[78] 26 M.J. at 157-59.
[79] 59 M.J. at 286.
[80] *Id.* at 295 (citing *United States v. Cancilla*, 725 F.2d 867 (2d. Cir. 1984)).

how to proceed pretrial, then cited *Holloway* and reversed "without regard to a showing of harm."[81] In *Hurt*, the Circuit Court noted "proof of prejudice may well be absent from the record precisely because counsel has been ineffective"[82]

3. *Mickens* does not limit *Holloway*, particularly in the military context.

In another effort to distinguish *Holloway*,[83] the Answer claims *Mickens* limits *Holloway*'s *per se* prejudice rule to cases of multiple representation. But even after *Mickens*, this Court (in *Cain*) and the Second Circuit[84] have held that at least some conflicts between the personal interests of counsel and client still require *per se* reversal. The Answer cites only dictum about personal conflicts. And these dictum ignore the "due process hierarchy" in the military justice system, which requires that for military defendants "the more protective of the due process sources (the Constitution, the UCMJ, the Manual, the regulations, or military case law) must prevail."[85]

D. The military judge's erroneous test aside, counsel's conflict did cause an adverse effect on the representation as it foreclosed potential defenses.

Even if this Court requires an adverse effect on the representation under

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[81] 394 A.2d at 967-68.
[82] 543 F.2d at 168.
[83] Answer at 25 (citing *Mickens*, 535 U.S. at 168).
[84] *United States* v. *Jones*, 381 F.3d 114, 117-18, 120 (2d Cir. 2004) (applying its holding in *United States v. Fulton*, 5 F.3d 605, 614 (2d Cir. 1993), that "an attorney's conflict was per se unwaivable when a government witness implicated the defendant's trial counsel in . . . charges against defendant").
[85] *United States v. Davis*, 47 M.J. 484, 487 n.1 (C.A.A.F. 1998) (quote omitted).

Cuyler, the military judge still erred because this only requires an appellant to show any plausible alternative strategy he could not have chosen at trial due to the conflict. In *State v. Figueroa*, the Connecticut Supreme Court found an adverse effect on the representation from the prosecution suggesting to the jury that defense counsel helped Figueroa intimidate a witness.[86] If counsel had been released he "could have testified" that the alleged incident of witness intimidation by Figueroa was false.[87]

Mr. White warned that his continued representation of SSgt Watkins "may actually deprive him of defenses" at trial.[88] SSgt Watkins testifying at trial would have been a plausible alternative defense strategy. Or like in *Figueroa*, SSgt Watkins could have called Mr. White as a witness to testify that even though the Government had alleged SSgt Watkins' family met with him under the cover of a legal appointment,[89] Mr. White had never seen SSgt Watkins improperly tamper with C.K.W. SSgt Watkins could not pursue these plausible alternative strategies, creating an adverse effect.

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[86] 67 A.3d 308, 311 (Conn. 2013).
[87] *Id.*
[88] JA at 124.
[89] *See* JA at 115-18.

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.

SSgt Watkins reacted as any defendant who saw the Government aggressively threaten his lead attorney would have. SSgt Watkins said he did not want to be represented by Mr. White, they could no longer communicate, and he "h[ad] another attorney that I would like to bring aboard."[90] The military judge abused his discretion because he failed to elicit that it would only take "3 weeks or so" for SSgt Watkins to exercise his right to have civilian counsel of choice,[91] and did not apply the right law for a continuance.

A. The denial of a continuance to secure counsel of choice is structural error after *Gonzalez-Lopez*, and this Court presumed prejudice before it.

In *United States v. Saberon*,[92] the Navy-Marine Corps Court of Criminal Appeals quoted *United States v. Gonzalez-Lopez* and noted the denial of a continuance needed to exercise the "right to counsel of choice" is "'not subject

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[90] JA at 267-71.
[91] JA at 25.
[92] JA at 29 (*United States v. Saberon*, 2013 CCA LEXIS 191, at *10 (N-M. Ct. Crim. App. Mar. 5, 2013) (quoting *Gonzalez-Lopez*, 548 U.S. 140, 152 (2006)))

to harmless error.'" Other courts have also found that the erroneous denial of a motion for continuance needed to hire private counsel is structural error.[93]

1. This Court should disregard the new Government argument that denial of a continuance for choice of counsel must be tested for prejudice, where it: (i) conceded to the lower court that *Gonzalez-Lopez* applies, and (ii) fails to cite military authority after *Gonzalez-Lopez* supporting its new position.

In *United States v. Augspurger*, then-Judge Crawford held that the Government could not "advocat[e] at this Court a position inconsistent with that of the trial prosecutor."[94] Other courts have found that inconsistencies in a party's briefing, or "[f]ailure to press a point (even if it is mentioned) and to support it with proper argument and authority[,] forfeits" that point.[95] In the lower court, SSgt Watkins asserted that a failure to grant a continuance which deprives an appellant of counsel of choice is structural error after *Gonzalez-Lopez*.[96] The Government agreed with SSgt Watkins' position in its lower court filing.[97] This Court should agree, and reject the Government's new and contradictory claim (offered without new military authorities) that denial of counsel of choice is not structural error if it involves the denial of a continuance.

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[93] *E.g. State v. Holm*, 304 P.3d 365, 370 (Mont. 2013).
[94] 61 M.J. 189, 193 (C.A.A.F. 2005) (Crawford, J., concurring and dissenting).
[95] *Hartmann v. Prudential Ins. Co. of Am.*, 9 F.3d 1207, 1212 (7th Cir. 1993) (noting that the party's brief and reply brief were inconsistent).
[96] Appellant's Supplemental Brief on the Specified Issue of Nov. 19, 2018 at 1, 18 (citing *Gonzalez-Lopez*, 548 U.S. at 150-52; *Saberon*, 2013 CCA LEXIS 191, at *10).
[97] Appellee's Response to Specified Issue of Nov. 30, 2018 at 19.

2. Even before *Gonzalez-Lopez*, military courts effectively presumed prejudice from the denial of a continuance required to obtain new counsel.

Even before *Gonzalez-Lopez*, this Court presumed prejudice from the improper denial of a continuance to obtain counsel of choice. In *United States v. Wiest*, this Court set aside Wiest's convictions where the military judge denied him a continuance to find new civilian counsel.[98] It did so even though new detailed military counsel "w[on] an acquittal on all but one lesser included offense," and Wiest "did not express any dissatisfaction"—leaving "pure speculation to conclude [civilian counsel] would have obtained a better result."[99] Then-Chief Judge Crawford did not explain why denial of the continuance prejudiced Wiest beyond stating "prejudice to the accused is likely."[100]

B. This Court should find the military judge wrongly denied SSgt Watkins' plea to replace counsel, where he did so just because it would have required a continuance.

As in *Wiest*, this Court should find that "the military judge erred by exercising an inelastic attitude in rescheduling Appellant's trial, where such request was predicated on . . . negative comments about . . . counsel."[101]

1. The military judge does not deserve deference where he failed to place on the record law on the continuance issue and its application to the facts.

Citing an opinion of this Court on a different claim (admission of expert

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[98] 59 M.J. 276, 278-79 (C.A.A.F. 2004).
[99] *Id.* at 281, 283 (Erdmann, J. dissenting).
[100] *Id.* at 279.
[101] *Id.* at 278.

testimony), the Answer argues that the military judge's ruling deserves deference.[102] But in *United States v. Manns*, this Court held military judges are "are entitled to . . . no deference if they fail to conduct the [M.R.E.] 403 balancing" test on the record.[103] Even though the military judge in *Manns* placed something on the record, this Court's judges decided to "examine[] the record ourselves" since the military judge "did not conduct a Rule 403 balancing."[104]

The military judge did not cite any law specific to whether SSgt Watkins should receive a continuance to exercise his right to choice of counsel.[105] That he placed some facts on the record, does not receive deference under *Manns*. In any event, *Flesher* recognized if a military judge fails to articulate his reasoning then appellate courts will give those decisions substantially less deference.[106]

2. SSgt Watkins did not act opportunistically or in bad faith, where he promptly tried to hire counsel who did not have an interest in avoiding threats from the Government, and did not make the RTC threaten counsel.

In *United States v. Miller*, this Court considered whether the defendant promptly sought replacement counsel in assessing the "good faith of the moving party."[107] In *Wiest*, this Court overruled the lower court's finding of bad faith,

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[102] Answer at 39 (citing *United States v. Flesher*, 73 M.J. 303, 312 (C.A.A.F. 2014)).
[103] 54 M.J. 164, 165 (C.A.A.F. 2000).
[104] *Id.* at 165; *see United States v. Tanner*, 63 M.J. 445, 449 (C.A.A.F. 2006).
[105] JA at 159-63, 315-17 (citing law on the termination of counsel generally).
[106] *Flesher*, 73 M.J. at 312-13.
[107] 47 M.J. 352, 358 (C.A.A.F. 1997).

since he timely moved for new counsel in response to a surprising event.[108] Here, SSgt Watkins quickly "ha[d] another attorney that [he] would like to bring aboard."[109] The military judge's finding of "opportunis[m]" based on other concerns,[110] reflects failure to apply correct law on continuance factors.

Even if this Court defers to the military judge's finding, his conclusion that SSgt Watkins' "opportunistic[ally]" requested to replace Mr. White was clearly erroneous. None of the cases the Answer cites involved prosecution attacks on counsel before the request to hire new counsel. Most of these cases involved no motion to withdraw by the counsel whom the appellants wanted to replace.[111] And most had repeated defense continuance requests.[112]

Defense to this point had not asked for any continuance of the trial dates. The alleged obstruction referenced by the military judge ("Google searches on the accused's phone" and MPO violations),[113] all occurred not only before the RTC's threat, but before SSgt Watkins was confined. SSgt Watkins was in pretrial confinement when he requested new counsel, so any delay for new counsel would have only continued his confinement. As in *Wiest*, SSgt

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[108] *Compare* 59 M.J. at 279, *with* 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) (lower court finding bad faith)).
[109] JA at 152.
[110] JA at 161 (citing that SSgt Watkins raised this issue now for the first time).
[111] *E.g. United States v. Gaffney*, 469 F.3d 211, 218 (1st Cir. 2006).
[112] *E.g. United States v. Lyles*, 223 F. App'x 499, 502 (7th Cir. 2007).
[113] JA at 160, 316.

Watkins did not make the RTC threaten Mr. White. The military judge thus erred in finding that his request for new counsel of choice was opportunistic.

3. SSgt Watkins was reasonably diligent in moving to hire new counsel, particularly where the military judge failed to ascertain the relevant facts.

The Answer acknowledges courts have found error in denying a continuance where a judge does not "ask how much time was necessary to hire a new attorney."[114] In *Miller*, defendant only made the request the day before, and then at the proceeding once again.[115] A military court also found an abuse of discretion in denying a continuance request "six days before the scheduled trial date" to secure new civilian counsel, noting even "if [defendant's] continuance request" by new counsel "is characterized as an 'eleventh hour' request, it was neither unexpected [by Government] nor untimely under the circumstances."[116]

And a civilian court held that a judge wrongly denied a "fair opportunity to select and employ counsel of his own choosing" in denying the continuance requested the morning of trial.[117] Counsel told the defendant four days before trial that counsel "could not appear . . . at the trial," and that counsel's "associate" (who had previously appeared in the proceedings) "would try the case."[118] The morning of trial, defendant told the judge he did not want the associate to

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[114] Ans. at 49 (citing *United States v. Sellers*, 645 F.3d 830, 835 (7th Cir. 2011))
[115] 47 M.J. at 358.
[116] *United States v. Joseph*, 68 M.J. 551, 554 (A. Ct. Crim. App. 2005).
[117] *United States v. Johnson*, 318 F.2d 288, 289-91 (6th Cir. 1963).
[118] *Id.*

represent him, and "the lawyers he [had] contacted told him it would be impossible for them to handle the case"[119] without a continuance. The Court found error even though the defense made the request at the last minute, a few days after the event, and the defendant had not firmly retained new counsel.

The military judge clearly erred in faulting SSgt Watkins for requesting new counsel "on the morning of the first day of a trial."[120] This was the next session of court (after a weekend), and only three days after the RTC threatened Mr. White. It was the next day after Mr. White officially notified all parties he believed he had to withdraw from the case.[121] It was also the first time that the military judge had asked SSgt Watkins about his choice of counsel since the RTC's threat. It is unreasonable to insist a defendant represented by conflicted counsel and concerned about angering the military judge, must interject earlier than this. That he did not even ask how long it would take new counsel for SSgt Watkins to try the case, shows an abuse of discretion from an "arbitrary insistence upon expeditiousness in the face of justifiable request for delay."[122]

4. The military judge had no basis to conclude from observations before the RTC's threat that SSgt Watkins and counsel could communicate.

The military judge clearly erred in rejecting SSgt Watkins' answer that

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[119] *Id.* at 290.
[120] JA at 317.
[121] JA at 306.
[122] *United States v. Weisbeck*, 50 M.J. 461, 466 (C.A.A.F. 1999).

he could no longer communicate with Mr. White. Almost all of the military judge's claimed "observations throughout the duration of this case,"[123] would have preceded both the RTC's threat and Mr. White's withdrawal motion. They were therefore irrelevant to whether SSgt Watkins and Mr. White could now communicate after Mr. White's claim he had a conflict of interest. Even if these were relevant, the military judge did not know what counsel and client were saying to each other. This finding did not oppose granting a continuance.

Respectfully Submitted,

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[123] JA at 275, 316.

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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 March 2, 2020.

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