IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. Wuterich, Staff Sergeant (E-6), United States Marine Corps, Appellant,	) WRIT APPEAL PETITION FOR REVIEW) OF NAVY-MARINE CORPS COURT OF) CRIMINAL APPEALS' DECISION ON) APPLICATION FOR EXTRAORDINARY) RELIEF
v.	)
David L. Jones, Lieutenant Colonel, United States Marine Corps, In his official capacity as Military Judge, and	) Crim.App. Misc. Dkt. No.) 200800183))) USCA Misc. Dkt. No. _____))
The United States, Appellees.	)

Dwight H. Sullivan, Colonel, USMCR
CAAF Bar No. 26867
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20032-8000
(202) 767-8885

Kirk Sripinyo, Major, USMC
CAAF Bar No. 34753
1254 Charles Morris Street, S.E.
Bldg. 58, Suite 100
Washington, DC 20374
(202) 685-7093

Neal Puckett
CAAF Bar No. 26121
Email: Neal@puckettfaraj.com

Haytham Faraj
Email: Haytham@puckettfaraj.com

Puckett & Faraj, PC
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. Wuterich, Staff Sergeant (E-6), United States Marine Corps, Appellant, v. David L. Jones, Lieutenant Colonel, United States Marine Corps, In his official capacity as Military Judge, and The United States, Appellees.	) WRIT APPEAL PETITION FOR REVIEW) OF NAVY-MARINE CORPS COURT OF) CRIMINAL APPEALS' DECISION ON) APPLICATION FOR EXTRAORDINARY) RELIEF)) Crim. App. Misc. Dkt. No.) 200800183))) USCA Misc. Dkt. No. _____)))

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

Preamble

Appellant hereby prays for an order declaring that Appellant's right to the continuation of his established attorney-client relationship with his original detailed military defense counsel (Lieutenant Colonel (LtCol) Colby Vokey, United States Marine Corps (Retired)) was violated and directing Appellee Judge Jones to either abate the proceedings until the Government has restored Appellant's attorney-client relationship with LtCol Vokey (Ret.) or fashion another appropriate remedy.

I.

History of the Case

Charges were preferred against Appellant on December 1, 2006 and were referred for trial by general court-martial on December 27, 2007. Appellant is charged with several offenses arising from his actions during combat operations on a patrol in Haditha, Iraq on November 19, 2005. Specifically, he is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice in violation of Articles 92, 119, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 919, 928, and 934 (2000).

Appellant's case has been the subject of two government appeals pursuant to Article 62, UCMJ. *See United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App.), *vacated*, 67 M.J. 63 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (en banc), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009). Trial on the merits is currently scheduled to begin on January 24, 2011 at Camp Pendleton, California.

On September 13 and 14, 2010, the military judge held a hearing on Appellant's motion to dismiss the charges or for other appropriate relief arising from his loss of LtCol Vokey as his detailed military defense counsel. On October 22, 2010, the

military judge sent counsel for the parties an e-mail announcing that he had denied the defense's motion and would put his ruling on the record on November 2, 2010.

On October 25, 2010, Appellant petitioned the Navy-Marine Corps Court of Criminal Appeals for extraordinary relief in the nature of a stay of proceedings. On October 26, 2010, the military judge issued findings of fact and conclusions of law. On October 27, 2010, the Navy-Marine Corps Court denied Appellant's petition for a stay "without prejudice to the Plaintiff's ability to petition for relief from the military judge's denial of the motion for appropriate relief." [Appendix, Tab A.]

On October 28, 2010, Appellant petitioned the Navy-Marine Corps Court for a writ of mandamus. His petition asked for a declaration that his right to continuation of his established attorney-client relationship with his original detailed military defense counsel was violated and sought appropriate relief. The following day, the Navy-Marine Corps Court denied the petition without prejudice to Appellant's right to raise the matter during the ordinary course of appellate review. [Appendix, Tab B.]

With the exception of the denied motion and the denied petition below, no prior actions have been filed or are pending seeking the same relief in this or any other court.

II.

Relief Sought

Appellant seeks declaratory and mandamus relief in the form of: (1) a declaration that Appellant's right to the continuation of an established attorney-client relationship was violated; and (2) a writ of mandamus directing Appellee Judge Jones to abate court-martial proceedings until LtCol Colby Vokey, USMC (Ret.) is restored as Appellant's defense counsel or, in the alternative, a writ of mandamus directing Appellee Judge Jones to fashion an appropriate remedy.

III.

Jurisdictional Basis for Relief Sought

The Supreme Court has recognized that "military appellate courts" are "empowered to issue extraordinary writs . . . in aid of [their] existing statutory jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Because Appellant is being tried by a general court-martial authorized to impose a dishonorable discharge and more than a year of confinement, this case falls within this Court's potential appellate jurisdiction. *See* Article 67, UCMJ, 10 U.S.C. § 867 (2006). Courts are authorized to issue relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), in cases falling within their potential appellate jurisdiction. *See, e.g., FTC v. Dean Foods Co.*, 384

U.S. 597, 603-04 (1966); *In re Tennant*, 359 F.3d 523, 528 (D.C. Cir. 2004).

Furthermore, as a "court of the United States," this Court is empowered to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006).

IV.

Issue Presented

WHERE THE ACCUSED'S DETAILED MILITARY DEFENSE COUNSEL: (1) SEEKS TO REMAIN ON ACTIVE DUTY TO CONTINUE REPRESENTING THE ACCUSED IN A HOMICIDE CASE; (2) IS INFORMED BY THE DEPUTY DIRECTOR OF HEADQUARTERS MARINE CORPS' MANPOWER SECTION THAT HE WILL NOT BE EXTENDED FURTHER; (3) TERMINATES HIS STATUS AS DETAILED DEFENSE WITHOUT AUTHORIZATION FROM EITHER THE ACCUSED OR ANY COURT; AND (4) ACCEPTS CIVILIAN EMPLOYMENT THAT CREATES AN IMPUTED CONFLICT ULTIMATELY LEADING A MILITARY JUDGE TO SEVER HIS ATTORNEY-CLIENT RELATIONSHIP WITH THE ACCUSED, HAS THE ACCUSED'S RIGHT TO THE CONTINUATION OF AN ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP BEEN VIOLATED?

V.

Statement of Facts

No record of trial is currently available in this case.[1] The facts set out below are established by the evidentiary

[1] On 28 October 2010, after denying Appellant's petition for a stay the previous day, the Navy-Marine Corps Court rejected Appellant's motion to compel production of a verbatim transcript of the court sessions relevant to his petition for extraordinary relief. Appendix at Tab C. A handwritten note on the motion's

hearing that was held on September 13 and 14, 2010, and the military judge's findings of fact and conclusions of law dated October 26, 2010.

A. LtCol Vokey's representation of Appellant

In January 2006 — almost a year before charges against Appellant were sworn and almost two years before the charges were referred for trial by a general court-martial — both LtCol Vokey and Major (Maj) Haytham Faraj, USMC, were detailed to represent Appellant. At the time of his detailing, LtCol Vokey was serving as the Regional Defense Counsel for the Western Region. Maj Faraj was the Senior Defense Counsel at Legal Team Echo, Camp Pendleton, California. Both officers were scheduled to retire from active duty on February 1, 2008.

Upon being detailed to the case, then-LtCol Vokey began to prepare Appellant's case for possible trial by court-martial. He and Maj Faraj interviewed witnesses, read investigation reports, consulted with experts, and prepared to visit the scene of the alleged offenses. LtCol Vokey conducted regular and frequent meetings with Appellant. LtCol Vokey also interviewed many witnesses. And he participated in representing Appellant at the Article 32 investigation hearing.

---

first page read, "Rejected as not a matter in controversy Before this court." *Id*.

On February 18, 2008, LtCol Vokey traveled along with Appellant and a videographer to Haditha, Iraq to investigate the case. LtCol Vokey – a former Marine Corps artillery officer and Operation Desert Storm veteran – walked through the town of Haditha and took pictures at the location of the firefight that led to the charges against Appellant. LtCol Vokey traveled by foot and vehicle along Routes Viper and Chestnut. He studied the terrain, visibility from the roads, distances to the houses, and environmental conditions. He entered and inspected the houses where the alleged offenses occurred. He deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses. Throughout the site visit and the conduct of the depositions, Appellant accompanied LtCol Vokey, providing him with key information and assisting him in his survey of the area and his witness interviews. LtCol Vokey is the only defense counsel for Appellant who has ever conducted such a site visit.

LtCol Vokey was also responsible for a sizable portion of the case preparation. He interviewed numerous witnesses who are located in the United States. And he spent literally hundreds of hours getting to know Appellant and his family to better understand his character and personality to enhance advocacy on his behalf.

B. The Government's denial of LtCol Vokey's request to remain on active duty to continue to represent Appellant

Trial in this case was originally set for early March 2008. Recognizing that their planned retirement dates would render them unavailable to serve as detailed defense counsel at trial, both LtCol Vokey and Maj Faraj requested to extend their active service until May 1, 2008, to allow sufficient time to complete the scheduled trial.

In February 2008, however, after the military judge quashed a subpoena seeking outtakes from an interview that the CBS television show 60 Minutes taped with Appellant, the Government filed an Article 62 appeal, resulting in an automatic stay of court-martial proceedings.

On June 20, 2008, the Navy-Marine Corps Court reversed the military judge's order quashing the subpoena to 60 Minutes. *United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App. 2008). Ten days later, Appellant submitted a petition to this Court seeking review of the Navy-Marine Corps Court's decision. *United States v. Wuterich*, 66 M.J. 498 (C.A.A.F. 2008). This Court heard oral argument in the case on September 17, 2008 and issued an opinion on November 17, 2008. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). That decision vacated the Navy-Marine Corps Court's decision while also reversing the military judge's quashal of the subpoena. While not formally

stayed during the proceedings before this Court, the trial did not resume during that appeal.

Because the prosecution appeal threatened to push Appellant's trial date past LtCol Vokey's and Maj Faraj's extended retirement dates, they each took steps to ensure that they would be able to continue their representation of Appellant as his military defense counsel. During the March to April 2008 timeframe, they both sought and were granted further extensions of their active duty time until June 1, 2008.

Maj Faraj subsequently sought and was granted another extension on his active duty time until August 1, 2008.

LtCol Vokey sought and was granted two additional extensions, resulting in a retirement date of November 1, 2008. But Col Patrick Redmon – the Deputy Director of Headquarters Marine Corps' Manpower section – warned LtCol Vokey that further requests for extensions would be denied. LtCol Vokey explained to Col Redmon that his extensions were necessary to allow him to continue to represent Appellant as he was required to do based on the Uniform Code of Military Justice and his obligations to his client established by his state bar's rules of professional responsibility. Col Redmon was not persuaded and directed LtCol Vokey to conduct a turnover with his relief. LtCol Vokey shared Col Redmon's response with Maj Faraj. Both LtCol Vokey and Maj

Faraj then ceased their efforts to obtain further extensions of their active duty retirement dates.

During the period when he remained uncertain as to how long he would be permitted to extend on active duty, LtCol Vokey sent his family to his home state of Texas. LtCol Vokey moved a towable trailer to a campground at Lake O'Neill aboard Camp Pendleton and lived in it as he awaited Appellant's trial. LtCol Vokey was devoted to representing Appellant and Appellant was wholly satisfied with that representation.

With Appellant as his sole client, LtCol Vokey devoted all his working hours to preparing the case. But after Col Redmon informed LtCol Vokey that any future extension requests would be denied, LtCol Vokey packed the remainder of his personal effects and left the Camp Pendleton area in August of 2008. He called Appellant to notify him that he was being forced to leave. Appellant was left wondering what happened to his lawyers, and voiced that concern.

Maj Faraj retired from the Marine Corps effective August 1, 2008. LtCol Vokey was officially retired on November 1, 2008.

Neither LtCol Vokey nor Maj Faraj appeared before any Court to be excused from their roles as Appellant's detailed military defense counsel. Nor did Appellant ever release them from serving in those roles. Nor has Appellant ever wanted to

release either of them. He continues to desire their representation as his detailed defense counsel.

Neither the current nor the former military judge has ever conducted an inquiry of Appellant regarding the excusal of his two detailed defense counsel.

C. LtCol Vokey's post-retirement representation of Appellant

After he was told that any future extension request would be denied, LtCol Vokey began looking for work in preparation for his upcoming retirement. He sent out approximately 300 resumes, but received only one job offer. It was from the law firm of Fitzpatrick, Hagood, Smith and Uhl, LLP; he began working there in October 2008. That firm represented Sgt Hector Salinas. Sgt Salinas was alleged to have shot at individuals in Haditha on November 19, 2005. Sgt Salinas was also the only Marine to witness a sniper firing from the vicinity of one of the houses in Haditha. It was at Sgt Salinas's recommendation that Appellant's platoon leader authorized the clearing of the Iraqi houses to the south of the site of the initial attack on the Marines.

LtCol Vokey has never engaged in active representation of Sgt Salinas.

On March 11, 2009 – after the Government's first Article 62 appeal but before its second – an Article 39(a) session was held to hear motions. During that session, Judge Meeks briefly discussed LtCol Vokey's status:

> MJ: All right. Also representing previously as a, I believe, detailed defense counsel was Lieutenant Colonel Vokey. My understanding is that Lieutenant Colonel Vokey has since retired from the Marine Corps, is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: There has been some discussion that he may be retained in this case in the capacity as civilian counsel, but that has not occurred, is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

Article 39(a) Excerpt at 2-3 (from the record in *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (en banc), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009)) (Appendix, Tab D).

During Article 39(a) sessions on May 13 and 14, 2010 – after the litigation concerning the second Article 62 appeal was complete – LtCol Vokey made an appearance as a civilian counsel though he did not actively participate. After that appearance, the defense team realized the imputed conflict that now existed between LtCol Vokey and Appellant.

D. The defense's litigation of the severance of attorney-client relationship issue

On August 26, 2010, the defense filed a Motion for Appropriate Relief to Dismiss All Charges and Specifications for Violation of Right to Detailed Counsel. The Government filed its opposition on September 13, 2010.

Appellee Judge Jones held an Article 39(a) session to receive evidence and hear argument on the motion on September 13 and 14, 2010.

In an e-mail to counsel with the subject "Ruling on Motion" dated October 22, 2010, 5:28:16 AM EDT, Appellee Judge Jones wrote: "The Defense motion seeking relief based on the violation of right to detailed counsel is DENIED. I will put the Ruling on the record when we meet for court on the morning of 2 November." On the following duty day – Monday, October 25, 2010 – Appellant petitioned the Navy-Marine Corps Court for extraordinary relief in the nature of a stay. The following day, Appellee Judge Jones sent an e-mail to counsel for the parties with findings of fact and conclusions of law subject to further revision. [Attached as Appendix Tab E.] The military judge made 21 findings of fact, including the following[2]:

> 1. Both Lieutenant Colonel Vokey and Major Faraj were "double-detailed" as counsel in this case; neither counsel represented the accused as individual military counsel (IMC). LtCol Vokey was detailed on 11 January 2007 and Major Faraj was co-detailed on 17 January 2007, both within 27 days of preferral of charges.
>
> 2. Within 21 days of being detailed to the case, LtCol Vokey submitted a request for voluntary retirement pursuant to 10 U.S.C. Section 6323. His initial request was approved and his retirement date was scheduled for 1 April 2008. Subsequently, LtCol Vokey requested that his retirement date be modified four times. All four of the requests were granted and he never requested further modification after the approvals. The changed retirement dates went from 1 April to 1 May 2008, 1 May to 1 June 2008, 1 June to 1 August 2008 and, finally, 1 August to 1 November 2008.

[2] The quotation below omits findings of fact concerning the trial counsel; those findings are not relevant to the present writ appeal, which focuses on the violation of Appellant's right to continuation of an established attorney-client relationship.

LtCol Vokey retired on 1 November 2008 after 20 years, 7 months of active duty service.

3. LtCol Vokey never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. LtCol Vokey did meet resistance from manpower regarding the continual change of his retirement date a month at a time, but he never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case.

4. In October 2008, while still on active duty (albeit it [sic] terminal leave), LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP (hereinafter Fitzpatrick). Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings, to include in March 2010 and September 2010 in front of the present judge. Mr. Vokey continued to represent the accused while a member of the Fitzpatrick law firm, despite the firm already having established representation of former Sgt Hector Salinas, an alleged co-conspirator in the accused's case. Mr. Vokey was told, orally, upon his hiring, that Sgt Salinas did not have a conflict with the firm hiring Mr. Vokey, despite the fact that the accused's interests may be contradictory to the firm's interests of Salinas.

5. There is no evidence that the firm has a written waiver of Sgt Salinas, regarding this potential conflict of interest. Nor did Mr. Vokey, while on active duty or since retirement, ever secure a waiver from the accused concerning this conflict.

6. The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case. However, at the Article 39(a) sessions of 13 and 14 September, the defense team asked for an ex parte hearing with the judge regarding the continued representation of Mr. Vokey on the case, given the potential conflict involved. When the Military Judge had tried to sever this relationship with the accused's approval on the record, the judge was stymied by the defense. So, after hearing the defense's request, including the

desires of Mr. Vokey, the Court was constrained to release Mr. Vokey from further participation in this case, pursuant to R.C.M. 505(d)(2)(B)(3), based on an irreconcilable conflict of interest. (A record of this ex parte hearing will be sealed and attached to the record of trial.) Until being released at the September Article 39(a) session, Mr. Vokey had continued to represent the accused.

7. Within 31 days of being detailed to the accused's case, on 18 February 2008, Maj Faraj submitted his request to voluntary retire on 1 May 2008. He subsequently requested two modifications to the retirement dates, from 1 May to 1 June 2008 and from 1 June to 1 August 2008. Both requests were granted and Maj Faraj subsequently retired on 1 August 2008, after being on active duty some 22 years. Maj Faraj never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. Maj Faraj never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case (except for the extensions already discussed).

8. Immediately upon retiring in August 2008, Mr. Faraj entered private practice. He formed a partnership with Mr. Neal Puckett, one of the civilian attorneys who had already been representing the accused and with whom Mr. Faraj had worked with on the case. Mr. Faraj has never been released by either the Court, or his client, from his attorney-client relationship (hereinafter, ACR), and that ACR continues to exist.

9. Mr. Faraj indicated that he is not getting paid for his representation of the accused, but still represents him as his legal ethics and personal morals dictate that he must. But his law firm is getting paid, as the law firm continues to represent the accused. *See*, http://www.puckettfaraj.com. Mr. Puckett and Mr. Faraj continue to zealously represent the accused, along with another civilian counsel (Mr. Mark Zaid) and a detailed defense counsel (Major Meredith Marshall, USMC). The defense had not asked for a detailed defense counsel to be assigned to the case, but the Court insisted in March that a detailed defense counsel be assigned. At the beginning of July

2010, Major Marshall was appointed detailed defense counsel. She has been assisting the defense for almost four months.

10. Also representing the accused in the past, and having been properly relieved, have been LtCol Patricio Tafoya and Captain Nute Bonner. Therefore, until Mr. Vokey was released by the Court in September 2010, both detailed defense counsel became, in effect, civilian counsel of record and continued to represent the accused. Neither party, however, ever filed notices of appearance as civilian attorneys in the case. The accused never released either one of them from participation and neither had the Court until Mr. Vokey was released on 13 September 2010.

. . . .

15. It is clear that both LtCol Vokey and Maj Faraj wanted to continue to represent the accused. LtCol Vokey even moved his family to Texas and lived in a trailer to continue working on the case pending his retirement. But they also understood that there was no way to know when the case was going to be litigated for sure based on the extensive appellate litigation and appeals that were ongoing throughout 2008 and 2009. Eventually, both officers elected to retire and continue representing the accused as civilian attorneys. No one from the government stepped in to assist the two officers in securing extra time on active duty as the two officers did not petition the Court, the trial counsel, their Commanding Officer (with the exception of the extensions as noted) or the Convening Authority for relief to stay on active duty. The Court sincerely doubts that either officer would have been happy to remain on active duty for the two years it has taken this case to get to trial.

16. LtCol Vokey took an active role in the accused’s case (even appearing on 22 March 2010 at an Article 39(a)) until he was released in September 2010 by the Court, upon a motion from the defense, from further participation based on a finding of an irreconcilable conflict of interest. Prior to that time, he had done a site visit to Iraq with the accused and a videographer from the Puckett law firm (among other support staff); had interviewed numerous witnesses;

participated in the Article 32 hearing and bonded with the client. Mr. Faraj took the same active role, except that he did not physically go to Iraq for the site visit. Mr. Faraj is fluent in Arabic, which has and will assist the defense to no small measure. Both detailed defense counsel were sent to continuing legal education courses. The original trial date this case was scheduled for trial was early March 2008. However, the trial was continued once the appellate litigation started, which was during February 2008.

17. The previous judge in the case, LtCol Meeks, made no inquiry on the record regarding the excusal of the accused's two detailed counsel from active duty. SSgt Wuterich has never excused either counsel from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey ever made an application to the Court for excusal or withdrawal, nor did they ask that the proceedings be abated if they were not retained on active duty.

18. Mr. Faraj has taken, and continues to take the most active role of the defense counsel in representing the accused at pretrial hearings. Mr. Faraj acts as the lead attorney.

19. During the years this case has taken to get to trial, there has been equal access to witnesses, evidence and discovery. As illustrated by General Mattis' testimony during the unlawful command influence motion in March 2010, the Convening Authorities have sought to ensure a fair process for both the trial and defense teams in this case.

20. The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the fact that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience; 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) the defense team has had

> extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; and 7) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.
>
> 21. The Court is convinced that the previous "military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law." *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010).

Appendix, Tab E at 2-8.

VI.

Reasons Why this Writ Appeal Should Be Granted

A. Summary of Argument

Appellant's fundamental right to what the Navy-Marine Corps Court aptly called "the *continuation of an established attorney-client relationship*" has been violated. *United States v. Hutchins*, 68 M.J. 623, 627 (N-M. Ct. Crim. App.) (en banc), *certificate for review filed*, 69 M.J. 180 (C.A.A.F. 2010) (quoting *United States v. Baca,* 27 M.J. 110, 118 (C.M.A.1988)) (emphasis supplied by *Hutchins*).

Appellee Judge Jones' ruling below erroneously failed to find such a violation of Appellant's rights. That failure is inconsistent not only with military appellate case law, but also

with his own finding that the previous military judge and counsel acted based on a "misunderstanding of the facts and the law." Finding of Fact 21, *supra* (quoting *Hutchins*, 68 M.J. at 631). It is appropriate to issue extraordinary relief where the military judge finds that the previous military judge and counsel terminated an attorney-client relationship based on factual and legal misunderstandings, but nevertheless fails to conclude that any legal error occurred.

B. Extraordinary relief is appropriate in this case, which involves an accused's right to counsel

The Navy-Marine Corps Court denied Appellant's petition for a writ of mandamus entirely on the ground that the issue can be addressed during the normal course of appeals. Appendix, Tab B. But interference with the right to counsel is one of the rare instances that warrants interlocutory extraordinary relief.

Since *Clinton v. Goldsmith*, 526 U.S. 529 (1999), more than a third of the cases in which this Court has granted extraordinary relief[3] in the form of issuing a writ or remanding for further proceedings have involved interference with the right to counsel (other than ineffective assistance of counsel claims).[4] A case such as this — which, like *Nguyen* and *Shadwell*,

[3] *See United States v. Denedo*, 129 S. Ct. 2213, 2219-20 (2009) (defining "relief" in military writ practice context).

[4] *United States v. Wilson*, 54 M.J. 450 (C.A.A.F. 2001) (summary disposition) (granting writ appeal to allow current defense

involves questions concerning the severance of an established attorney-client relationship over the accused's objection — is demonstrably the type of rare case in which extraordinary relief is appropriate.

Resolving a severance of counsel issue through the vehicle of an interlocutory writ is particularly appropriate given the difficulty of making a post hoc assessment of the effects of an improper severance. If such an improper severance is subject to a prejudice analysis (rather than being considered systemic

---

counsel to communicate with former defense counsel); *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (summary disposition) (granting writ appeal to allow continued post-trial representation by the accused's civilian defense counsel, who had previously represented the accused as an active duty Navy JAG Corps officer); *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003) (summary disposition) (ordering further proceedings to determine whether the accused's civilian defense counsel was disqualified from further representation because of a conflict of interest); *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004) (per curiam) (granting writ appeal to lift restrictions on an accused's communications with his counsel); *Lucero v. United States*, 61 M.J. 147 (C.A.A.F. 2005) (summary disposition) (remanding to determine whether petitioner is seeking to sever his attorney-client relationship); *Goodwin v. TJAG*, 60 M.J. 428 (C.A.A.F. 2004) (summary disposition) (remanding to determine whether petitioner is seeking to server his attorney-client relationship); *Young v. Commandant*, 60 M.J. 428 (C.A.A.F. 2004) (summary disposition) (remanding to determine whether petitioner is seeking to sever attorney-client relationship); *Taylor v. Commandant*, 60 M.J. 429 (C.A.A.F. 2004) (summary disposition) (remanding to determine whether petitioner is seeking to sever his attorney-client relationship); *Lovett v. United States*, 64 M.J. 232 (C.A.A.F. 2006) (summary disposition) (granting mandamus petition to order the Judge Advocate General of the Air Force to provide appellate defense counsel "to represent Petitioner for the purposes of review of his court-martial under Article 67a, UCMJ").

error or warranting a presumption of prejudice), it is difficult to know what would have been done differently had the missing counsel participated in the litigation. This is particularly true here, where the missing counsel possesses greater knowledge of the alleged crime scene and a better understanding of the events at issue than any other counsel. *Cf. United States v. Eason*, 21 C.M.A. 335, 45 C.M.R. 109 (1972) (holding that denial of a continuance to allow the accused's detailed defense counsel to participate in the court-martial was error because, among other factors, the detailed defense counsel had inspected the alleged crime scene in Vietnam while the civilian defense counsel never went to Vietnam, resulting in the detailed defense counsel having "unique knowledge of the case which no one else on the defense team possessed").

If LtCol Vokey does not participate in Appellant's trial, no one will ever know what contributions he would have made. As a result of his extensive on-site investigation of the case, LtCol Vokey knows facts that Appellant's other counsel do not. He has first-hand knowledge of the terrain, the alleged crime scene and the witnesses, all informed by his background as a Marine Corps combat arms officer. This knowledge makes him unique among Appellant's counsel and Appellant's remaining counsel cannot know when, where, how — or even if — their ignorance of facts known only to LtCol Vokey will affect the

case. Similarly, the Navy-Marine Corps Court and this Court also lack LtCol Vokey's unique knowledge and will therefore be unable to determine post hoc the impact his presence would have had on the trial.

Finally, a unique circumstance further justifies reaching the merits of this interlocutory petition for extraordinary relief. The law in the area of continuity of counsel is being actively considered by this Court in *United States v. Hutchins*, No. 10-5003/MC – a case in which this Court heard oral argument on October 13, 2010. *Hutchins* may change the law before trial on the merits of Appellant's case begins – or even in the midst of trial or shortly after its conclusion. It would be a waste of judicial resources to hold a trial only to learn during that trial or after its conclusion that a new decision warrants a different resolution of Appellant's severance of counsel motion. In light of this Court's active consideration of the issue of continuity of counsel in *Hutchins*, it is appropriate for this Court to address the merits of Appellant's claims now.

Because interlocutory extraordinary relief is peculiarly appropriate to address interference with an accused's attorney-client relationship, this Court should proceed to consider the merits of Appellant's claims.

C. Appellant's right to the continuation of an established attorney-client relationship has been violated

Appellant was represented for years by LtCol Colby Vokey, USMC (Ret.). Appellant wants to continue to be represented by LtCol Vokey. Yet almost four years after charges were preferred in this homicide case, the military judge severed Appellant's attorney-client relationship with LtCol Vokey (Ret.). That severance violates military appellate case law recognizing a fundamental right to the continuation of an established attorney-client relationship.

The military judge below failed to find that Appellant's right to continued representation was violated. But that failure was a consequence of the military judge's erroneous focus on the actions of Appellant's previous defense counsel and their interactions with various Marine Corps officials. The right to the continuation of the established attorney-client relationship belongs to Appellant, not to his former counsel. To Appellant, it does not matter whether his established attorney-client relationship with LtCol Vokey (Ret.) was violated because LtCol Vokey did or did not request to withdraw his retirement application, make a fifth request for extension on active duty, or ask the convening authority to intervene with Headquarters Marine Corps on his behalf. To Appellant, what

matters is that he is now being required to go to trial without a counsel who has unique knowledge concerning his case.

Two distinct legal bases exist to find that Appellant's right to the continuation of his established attorney-client relationship was violated. The first basis looks at the military judge's September 13, 2010 ruling severing Appellant's attorney-client relationship with LtCol Vokey (Ret.). The second looks at the termination of LtCol Vokey's status as detailed military defense counsel on November 1, 2008.

1. Good cause did not exist to sever Appellant's attorney-client relationship with LtCol Vokey on September 13, 2010

The military judge erroneously severed Appellant's attorney-client relationship with LtCol Vokey, USMC (Ret.) on September 13, 2010. Military appellate case law required that rather than ordering the severance of Appellant's attorney-client relationship, the military judge should have ordered effective relief to preserve that relationship. See *United States v. Iverson,* 5 M.J. 440, 442-43 (C.M.A. 1978). And such effective relief was available. Among the possible remedies, the Government could have simply recalled LtCol Vokey to active duty, thereby allowing him to continue in his previous role as Appellant's detailed military defense counsel — a role from which he was never properly relieved. *See* 10 U.S.C. § 688

(2006) (authorizing recall to active duty of a "retired member of the . . . Regular Marine Corps").

As this Court has held, "Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level." *Iverson,* 5 M.J. at 442-43. In contravention of that case law, the military judge severed the existing attorney-client relationship between Appellant and LtCol Vokey even though means to continue that relationship, such as placing LtCol Vokey in a retired recalled status, were readily available. *See* 10 U.S.C. § 688. Recalling LtCol Vokey to active duty would have successfully vindicated Appellant's fundamental right to the continuation of his established attorney-client relationship. To the extent that the military judge concluded that LtCol Vokey must withdraw from this case because of the imputed disqualification arising from his law firm's representation of Sgt Salinas, that justification for disqualification would evaporate if LtCol Vokey were to be recalled to active duty. He would no longer remain in the status that creates the imputed disqualification and would therefore be permitted to represent Appellant. *See generally* Navy Rule of Professional Conduct 1.10, JAGINST 5803.1C (9 Nov 2004).

2. Appellant's right to the continuation of an existing attorney-client relationship was violated on November 1, 2008 when LtCol Vokey ceased representing Appellant without complying with the regulatory requirements to excuse or change a detailed defense counsel

Regardless of the propriety of the military judge's September 13, 2010 ruling, Appellant's rights had already been violated when LtCol Vokey ceased representing Appellant on November 1, 2008 without satisfying regulatory requirements to be relieved as Appellant's counsel.

From January 11, 2007 until his retirement on November 1, 2008, LtCol Vokey was Appellant's detailed defense counsel. Rule for Courts-Martial 505(d)(2)(B) provides:

> After an attorney-client relationship has been formed between the accused and detailed defense counsel . . ., an authority competent to detail such counsel may excuse or change such counsel only:
>
> (i) Under R.C.M. 506(b)(3);
>
> (ii) Upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or
>
> (iii) For other good cause shown on the record.

Rule for Courts-Martial 505(d)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Yet LtCol Vokey ceased representing Appellant in the absence of compliance with any of R.C.M. 505(d)(2)(B)'s requirements.

The Judge Advocate General of the Navy's Rules of Professional Conduct highlight the violation of Appellant's right to continuation of his established attorney-client

relationship with LtCol Vokey (Ret.). Comment 2 to Rule 1.16 provides:

> [A] covered USG attorney appointed or detailed to represent a client shall continue such representation until properly relieved by competent authority. Who is 'competent authority' will differ with the circumstances. For example, in a trial by court-martial, the authority originally appointing or detailing the covered USG attorney would be competent authority prior to trial; *the military judge would be competent authority once trial begins.*

Navy Rule of Professional Conduct 1.16, comment (2), JAGINST 5803.1C (9 Nov 2004) (emphasis added).

Appellee Judge Jones himself noted that inadequate steps were taken to deal with the disruption in Appellant's representation. He concluded that during the summer of 2008,

> when it appeared that [the Article 62 appeal] litigation was dragging on and there was no end in sight for when the case might be tried, all parties should have made known to the Court of the impending retirements of the two detailed defense counsel. Then, the previous military judge should have held a hearing to determine whether good cause existed or not to release the two attorneys as detailed defense counsel for cause or by getting the accused's permission. Absent good cause, the officers, perhaps, would have remained on active duty.

Finding of Fact and Conclusions of Law at 13.

On March 11, 2009, Judge Meeks was actually told that LtCol Vokey (Ret.) had retired and was not representing Appellant at that time. It should have been apparent to Judge Meeks that LtCol Vokey could not have been properly relieved as Appellant's detailed defense counsel, since Judge Meeks himself was the

proper authority to relieve LtCol Vokey (Ret.) of his duty to represent Appellant and he had not done so. *See* Navy Rule of Professional Conduct 1.16, comment (2).

Appellant's regulatory right to the continuation of his attorney-client relationship with LtCol Vokey was violated. An attorney-client relationship between an accused and a detailed defense counsel may be terminated only in narrowly prescribed ways. Here, Appellant did not consent to the excusal of LtCol Vokey as his detailed military defense counsel. Nor did any military judge authorize LtCol Vokey to be excused as Appellant's detailed defense counsel. LtCol Vokey's termination of representation of Appellant in 2008 therefore did not satisfy R.C.M. 506(c). Nor did it satisfy R.C.M. 505(c) since none of Rule 506(c)'s requirements was satisfied, Appellant did not request LtCol Vokey's excusal, and no good cause was shown on the record. Those justifications for excusal are exclusive; if none exits, excusal is not authorized. R.C.M. 506(c). Additionally, Comment 2 to Navy Rule of Professional Conduct 1.16 was also violated because LtCol Vokey ceased his representation of Appellant without the military judge's authorization after trial had begun.

Thus, Appellant's regulatory rights to the continuation of his attorney-client relationship with LtCol Vokey were violated on November 1, 2008. And that violation proved enormously

prejudicial, since LtCol Vokey entered into employment creating an imputed disqualification during the period (November 1, 2008 through at least March 11, 2009) when he had ceased representing Appellant in violation of the governing regulations.

This situation is reminiscent of that in *Hutchins*, where the Navy-Marine Corps Court observed that "the fact that no one person or entity [is] entirely responsible for the inappropriate severance of the attorney-client relationship ... does not alter the fact that a wrongful severance has occurred." *Hutchins*, 68 M.J. at 631. The same is true here; a wrongful severance of Appellant's attorney-client relationship with LtCol Vokey occurred on November 1, 2008. While that attorney-client relationship was revived at some later point only to be severed again on September 13, 2010, the violation of Appellant's rights that occurred on November 1, 2008 directly prejudiced Appellant by depriving him of LtCol Vokey's representation at that point and setting the stage for the military judge's later severance ruling.

The military judge's ruling on the motion below focused on what the two original detailed defense counsel could have done to maintain their original status:

> Although the two detailed defense counsel wanted to continue to represent the accused, they did not seek redress from the Court, the Convening Authority (LtGen Mattis, who was very amenable to assist the defense, as shown in the UCI motion), their Commanding Officers

> or the Officer in Charge of the Legal Services Support Section. Neither defense attorney availed himself of the provisions of paragraph 2004.8(c), of MCO P1900.16F. Clearly, their ACR with the accused would fall under the regulation's criteria for granting modifications and cancellations of retirement.

Findings of Fact and Conclusions of Law at 17. The military judge did not appear to recognize that these failings created prejudice to Appellant rather than curing it. Where all of these means existed to maintain Appellant's relationship with his two detailed military defense counsel *as detailed defense counsel*, he was prejudiced all the more when he was not informed that he could object to their excusal or change in status and prevent it.

The military judge also erred by reasoning that "[w]hen an ACR persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel." Findings of Fact and Conclusions of Law at 14. In this case, as the record of the March 11, 2009 Article 39(a) session makes clear, the attorney-client relationship between Appellant and LtCol Vokey did not "persist[]." Rather, it was severed no later than November 1, 2008, and that severance continued until at least March 11, 2009. The military judge's denial of Appellant's motion below was thus influenced by a clearly erroneous belief that

Appellant's attorney-client relationship with LtCol Vokey "persist[ed]" from before to after LtCol Vokey's retirement.

D. The military judge erroneously concluded that Appellant would not be prejudiced by his loss of LtCol Vokey's representation

In *Hutchins*, the Navy-Marine Corps Court presumed prejudice where the accused lost the services of a counsel who had "participated in nearly a year of defense consultation and planning efforts" during which he "participated in the ongoing development of trial strategy, contributed to the decision-making process which defined the anticipated contribution of each counsel, and earned the appellant's trust." 68 M.J. at 629. Here, the severed counsel's importance is far greater to the defense team. LtCol Vokey had represented Appellant for much more than "nearly a year"; he had represented Appellant for more than a year and 10 months before his retirement and he represented Appellant for some additional period after his retirement before the military judge severed the attorney-client relationship on September 13, 2010. As the military judge's factual findings indicate, LtCol Vokey was the first counsel to form an attorney-client relationship with Appellant. And his service to Appellant was not merely temporally long, it was also vitally important. For example, LtCol Vokey was the only defense counsel to travel to the site of the alleged offenses, view the alleged crime scene, and interview key witnesses.

There is no substitute for the kind of detailed knowledge that such a "crime scene" visit provides. Issues could pop up at any time during the trial that could render first-hand knowledge of the location of the alleged offenses outcome determinative. Without LtCol Vokey at counsel table, the defense would be unable to effectively handle such moments — in fact, they may be unaware that they are even occurring. None of the nine reasons that the military judge marshaled for concluding that LtCol Vokey is expendable constitutes an adequate substitute for a defense counsel at trial who has conducted an in-depth analysis of the purported crime scene. *See* Findings of Fact and Conclusions of Law at 14-15.

The military judge's conclusions of law also seek to reduce Appellant's arguments to absurdity. *Id*. at 16-17. The military judge writes:

> Taking the defense position to the extreme, a senior defense counsel should never detail a young officer to a general court-martial if that officer wanted to leave active duty after one tour, because, potentially, the court-martial could be appealed for years and that officer could never be released while the litigation was ongoing.

Id. at 16. Of course that is not the law and Appellant never suggested anything so preposterous. Military case law provides that a trial defense counsel's representational duties terminate upon the designation of and commencement of representation by appellate defense counsel. *See, e.g., United States v.*

Palenius, 2 M.J. 86, 93 (C.M.A. 1977). Appellant's argument is neither based on nor leads to the fanciful scenarios that the military judge suggests. Rather, his argument is based on a plain, direct application of military case law, including this Court's decision in *Iverson*.

The military judge mistakenly ruled that "[a]bating the proceeding does nothing to assist the accused or the government because there is nothing to cure, and nothing to wait for." Findings of Fact and Conclusions of Law at 18. There is the severance of Appellant's attorney-client relationship to cure. And there is the implementation of an effective remedy to await.

This Court should declare that Appellant's right to the continuation of his established attorney-client relationship with LtCol Vokey was violated. *See* 28 U.S.C. § 2201(a). It should then order an effective remedy. And such an effective remedy is readily available. This Court can and should order that proceedings be abated until the Government has restored Appellant's attorney-client relationship with LtCol Vokey (Ret.). Recalling LtCol Vokey to active duty is one way that this could be done. Other means no doubt also exist. But this Court need not dictate how the Government should restore Appellant's attorney-client relationship with LtCol Vokey. Rather, it is sufficient that it simply abate the proceedings until the Government does so. The Government can then choose

the optimal method to restore Appellant's attorney-client relationship with LtCol Vokey.

Alternatively, after issuing the requested declaratory relief, this Court could remand the case to Appellee Judge Jones to fashion an appropriate remedy.

VII.

Appellees' Addresses and Telephone and Facsimile Numbers

Appellee Judge Jones' mailing address is:

Navy-Marine Corps Trial Judiciary
Western Pacific Judicial Circuit
Okinawa District, PSC 557
PO Box 955
FPO, AP 96379

Appellee Judge Jones' telephone number is:

81-611-745-7287

Appellee Judge Jones' facsimile number is:

81-611-745-2035

Appellee United States is represented by the Navy-Marine Corps Appellate Government Division. The Navy-Marine Corps Appellate Government Division's mailing address is:

Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374

The Navy-Marine Corps Appellate Government Division's telephone number is:

(202) 685-7682

The Navy-Marine Corps Appellate Government Division’s facsimile number is:

(202) 685-7687

Respectfully submitted,

Dwight H. Sullivan, Colonel, USMCR
CAAF Bar No. 26867
Appellate Defense Division
112 Luke Avenue, Suite 343
Bolling AFB, DC 20032-8000
(202) 767-8885

/s/
Kirk Sripinyo, Major, USMC
CAAF Bar No. 34753
1254 Charles Morris Street, S.E.
Bldg. 58, Suite 100
Washington, DC 20374
(202) 685-7093

/s/
Neal Puckett
CAAF Bar No. 26121
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039
Email: Neal@puckettfaraj.com

/s/
Haytham Faraj[5]
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

Counsel for Appellant

[5] Appearing pursuant to C.A.A.F. R. 38(b).

Certificate of Compliance with Rule 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 7,781 words.

2. This brief complies with the typeface and type style requirements of Rule 37 because it has been prepared in monospaced typeface using Microsoft Word's Courier New font, size 12.

Dwight H. Sullivan
Colonel, USMCR
Attorney for Appellant
November 5, 2010

APPENDIX

TAB A

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Frank WUTERICH Staff Sergeant (E-6) U.S. Marine Corps Petitioner v. UNITED STATES Respondent	NMCCA NO. 200800183 PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A STAY OF COURT-MARTIAL PROCEEDINGS 10/27/10 O R D E R

On 25 October 2010, the Petitioner filed a petition for extraordinary relief in the nature of a stay of court-martial proceedings. The Petitioner seeks to stay proceedings of his court-martial pending issuance of the military judge's findings of fact and conclusions of law concerning the military judge's denial of Petitioner's motion for appropriate relief arising from a claimed severance of his attorney-client relationship with detailed military counsel. The Petitioner also seeks a stay to permit filing of a petition for extraordinary relief challenging that denial. On 27 October 2010, Petitioner filed a motion for leave to file a motion to attach the military judge's findings of fact and conclusions of law.

After consideration of the entire pleadings filed to date, it is, by the Court, this 27 day of October 2010,

ORDERED:

The motion for leave to file a motion to attach the military judge's findings of fact and conclusions of law is GRANTED.

The petition for extraordinary relief in the nature of a stay is DENIED without prejudice to the Petitioner's ability to petition for relief from the military judge's denial of the motion for appropriate relief.

In light of our action, the Government's 26 October 2010 request for expedited review or for an immediate stay pending resolution of the Petitioner's petition for extraordinary relief is DENIED as moot.

For the Court

For R.H. TROIDL
Clerk of Court

27 Oct 2010

Copy to:
NMCCA (51.3)
Petitioner (via U.S. mail)
45
46 (B.K. Keller)
02

TAB B

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Frank W. Wuterich **Staff Sergeant (E-6)** **U. S. Marine Corps** **Petitioner**	**NMCCA NO. 200800183** **PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS**
v.	
LtCol D.M. Jones, USMC **Military Judge**	
and	**O R D E R**
UNITED STATES **Respondents**	

On 28 October 2010 the petitioner filed for extraordinary relief in the nature of a writ of mandamus. Specifically, the petitioner seeks a declaration from this court that the attorney-client relationship between the petitioner and a former detailed defense counsel was improperly severed. Additionally, the petitioner seeks an abatement of the trial, scheduled to commence on 2 November 2010, until such time as the former detailed defense counsel, now retired, is restored as defense counsel, or the Court remands this case to the military judge for appropriate relief.

Having considered the petition and supporting brief, it appears that the military judge severed the attorney client relationship having found good cause shown on the record, i.e., "an irreconcilable conflict of interest." *See* RULE FOR COURTS-MARTIAL 505(d)(2)(B)(iii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This matter seems to fit squarely in the normal course of review under Article 66, UCMJ, if necessary.

Accordingly, it is, by the Court, this 29th day of October 2010,

ORDERED:

That the petition is denied without prejudice to the right to raise the matter during the ordinary course of appellate review.

For the Court

R.H. TROIDL
Clerk of Court
29 Oct 2010

Copy to:
NMCCA (51.2)
LtCol Jones (via e-mail)
45 (Maj Sripinyo)
46
02
05
52

TAB C

Maj Bruning

IN THE UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

OCT 2010
RECEIVED
NMCCA

Frank D. Wuterich, Staff Sergeant (E-6) United States Marine Corps, Petitioner	)	MOTION TO COMPEL PRODUCTION
v.	)	Case No. 200800183
David M. Jones Lieutenant Colonel, United States Marine Corps, (in his official capacity as Military Judge), Respondent.	)	

Rejected OS NOT A matter in Controversy Before this COURT 10/28/10 FOR

10/28/10 FOR

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

COMES NOW Petitioner Staff Sergeant (SSgt) Frank D. Wuterich, United States Marine Corps, by and through his undersigned counsel, and pursuant to Rule 23.9 of this Court's Rules of Practice and Procedure files this motion to compel production of verbatim transcripts of the Article 39(a) sessions that covered Petitioner's motion to dismiss for improper severance of counsel (hereinafter "Hutchins Motion") held in the court-martial below.

Statement of the Case

On 25 October 2010, Petitioner SSgt Wuterich filed a petition for extraordinary relief asking this Court to stay proceedings in his court-martial until the military judge issued findings of fact and conclusions of law and Petitioner had a

chance to file a petition challenging that ruling. On 26 October 2010, the government moved this Court to stay proceedings in the court-martial case or expedite its review of Petitioner's request for extraordinary relief. That same day, the military judge issued his findings of fact and conclusions of law in the case.

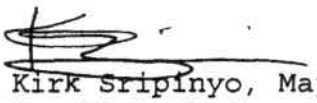
Argument

This Court should grant this motion and issue an order compelling the production of verbatim transcripts of all the Article 39(a) sessions relevant to the military judge's decision regarding the Hutchins Motion. These transcripts, along with the military judge's findings of fact and conclusions of law, which Petitioner has provided this Court in a separate motion, are necessary for Petitioner to prepare and file a Petition for Extraordinary Relief addressing the merits of the improper severance of attorney-client relationship issue. Accordingly, they should be produced.

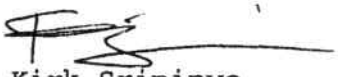
Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his motion and compel production of a verbatim transcript of the Article 39(a) sessions held below.

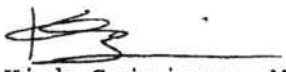
Respectfully submitted,



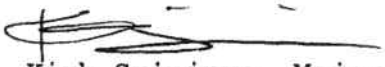
Kirk Sripinyo, Major, USMC
Appellate Defense Counsel
Signing for
Dwight H. Sullivan
Colonel, USMCR
Appellate Defense Counsel
112 Luke Avenue, Suite 343
Bolling Air Force Base, DC 20032-8000
202-767-8885
dwight.sullivan@pentagon.af.mil



Kirk Sripinyo
Major, USMC
Appellate Defense Counsel
1254 Charles Morris Street, S.E.
Bldg. 58, Suite 100
Washington, DC 20374



Kirk Sripinyo, Major, USMC
Appellate Defense Counsel
Signing for
Neal Puckett
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039
Email: Neal@puckettfaraj.com



Kirk Sripinyo, Major, USMC
Appellate Defense Counsel
Signing for
Haytham Faraj
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

Counsel for Petitioner

Certificate of Service

I certify that this document was delivered to the Court, the Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on 27 October 2010.

Kirk Sripinyo
Major, USMC
Appellate Defense Counsel
1254 Charles Morris Street, S.E.
Bldg. 58, Suite 100
Washington, DC 20374

TAB D

United States	)	
	)	
vs.	)	ARTICLE 39(a)
	)	EXCERPT
WUTERICH, Frank D. Staff Sergeant U.S. Marine Corps	)	

Excerpt of an Article 39(a) session, held at Marine Corps Base, Camp Pendleton, California on 11-12 March 2009.

PARTIES PRESENT

MILITARY JUDGE:	LtCol J. G. Meeks, USMC
TRIAL COUNSEL:	LtCol D. J. Erickson, USMC
TRIAL COUNSEL:	Maj D. J. Plowman, USMC
TRIAL COUNSEL:	Capt N. L. Gannon, USMC
CIVILIAN COUNSEL:	Mr. C. Benedetti, CBS
CIVILIAN COUNSEL:	Mr. Puckett, Defense
DEFENSE COUNSEL:	LtCol P. A. Tafoya, USMC
COURT REPORTERS:	Sgt M. H. Doyle, USMC Sgt K. C. Myers, USMC

The Article 39(a) session opened at 0916, 11 March 2009.

MJ: This court is called to order. All parties present before the court last recessed are again present with the following exceptions: In the prior session of court, Staff Sergeant Cherry [sic] sat as court reporter. She has been relieved and has been replaced by Sergeant Doyle, who has previously been sworn.

Present today representing the government is Lieutenant Colonel Erickson, Major Plowman, and Captain Gannon, who has previously made appearances on this case before the court.

Present today representing the defense is a new counsel, Lieutenant Colonel Tafoya.

Lieutenant Colonel Tafoya, would you please state your legal qualifications, status as to oath, and by whom you have been detailed.

DC (LtCol Tafoya): Yes, sir. I have detailed myself to this case in my capacity as the Regional Defense Counsel for the Western Region. I'm qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. I have not acted in any disqualifying manner in this case.

MJ: Very well. Now, previously present in the court appearing to represent Staff Sergeant Wuterich was Captain Bonner as the individual military counsel.

What is the status of Captain Bonner?

DC (LtCol Tafoya): Sir, Captain Bonner to my knowledge is still the individual military counsel for Staff Sergeant Wuterich.

MJ: Okay. He is not present here today.

DC (LtCol Tafoya): He is not present in the courtroom today.

MJ: All right. Also representing previously as a, I believe, detailed defense counsel was Lieutenant Colonel Vokey. My understanding is that Lieutenant Colonel Vokey has since retired from the Marine Corps; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: There has been some discussion that he may be retained in this case in the capacity as civilian counsel, but that has not occurred; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: Also, not present here today is Mr. Zaid and Mr. Faraj. What are their status today?

DC (LtCol Tafoya): They are not present in the courtroom today, sir.

MJ: Okay. And telephonically present is Mr. Neal Puckett, the senior of the civilian counsel; is that correct?

Mr. Puckett, you can chime in if you are here.

Mr. Puckett?

CC (Mr. Puckett): Still here, sir.

MJ: Okay. Now, Staff Sergeant Wuterich, normally -- you can sit down, and you can remain seated at all times unless I specifically tell you to rise.

ACC: Aye, aye, sir.

The accused did as directed.

MJ: Normally, you have the right to have all of your attorneys to be present prior to proceeding in this trial here today. Now, I will note that we had some discussions previously before going on the record where I was informed that the counsel who are not present are going to be excused because you are giving them the permission to be excused. However, I haven't talked to you about that. So I'm going to go over your rights with you right now on that.

You have the right to have all of your counsel be present with you during the presentation of your case. If your counsel aren't here, normally I would stop the proceeding until they could be here. Of course, we would also have the alternative problem the court directing a date for the counsel to be here and the counsel not being here, we would have to deal with that

TAB E

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
v.	)	**MOTION TO DISMISS FOR VIOLATION OF RIGHT OF DETAILED COUNSEL**
FRANK D. WUTERICH STAFF SERGEANT, USMC	)	**26 OCTOBER 2010**

The defense moves that all charges and specifications against the accused be dismissed, with prejudice, for violation of the accused's right to detailed counsel under the Sixth Amendment to the Constitution and Article 27 of the UCMJ. In the alternative, the defense argues for an abatement of the proceedings to "allow the Government to fashion a remedy." The Court has considered the documentary evidence presented, the testimonial evidence, the argument of counsel and has made all judgments of credibility of witnesses.

STATEMENT OF THE CASE

Charges were preferred against the accused on 21 December 2006 and referred on 27 December 2007 for actions relating to his conduct on 19 November 2005 in Haditha, Iraq. The charges allege violations of the UCMJ: Article 92 (dereliction of duty), 119 (voluntary manslaughter), 128 (aggravated assault) and Article 134 (reckless endangerment and obstruction of justice). 10 U.S.C. Sections 892, 919, 928, and 934.

As a result of rulings by a previous military judge regarding the release of CBS outtakes, the case has been appealed twice by the government pursuant to Article 62, U.C.M.J. *See United States v. Wuterich*, 66 M.J. 685 (C.A.A.F. 2008), vacated, *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52

(2009); and *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.), *certificate for review dismissed*, 68 M.J. 404 (C.A.A.F. 2009). The particular appellate court rulings do not bear on the issues before the Court in the present motion. However, the delay in the proceedings due to the appellate litigation is relevant. Due to the time involved in litigating and appealing issues relating to this case, both original detailed defense counsel, LtCol Colby Vokey, USMC, and Major Haytham Faraj, USMC, retired from active duty.

ISSUE PRESENTED

Whether a change in defense counsels' status from a detailed defense counsel to a civilian defense counsel is a violation of the accused's Sixth Amendment right to counsel, or a violation of the accused's Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels' transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

FINDINGS OF FACT

1. Both Lieutenant Colonel Vokey and Major Faraj were "double-detailed" as counsel in this case; neither counsel represented the accused as individual military counsel (IMC). LtCol Vokey was detailed on 11 January 2007 and Major Faraj was co-detailed on 17 January 2007, both within 27 days of preferral of charges.

2. Within 21 days of being detailed to the case, LtCol Vokey submitted a request for voluntary retirement pursuant to 10 U.S.C. Section 6323. His initial request was approved and his retirement date was scheduled for 1 April 2008. Subsequently, LtCol Vokey requested that his retirement date be modified four times. All four of the requests were granted and he never requested further modification after the approvals. The changed retirement dates went from 1 April to 1 May 2008, 1 May to 1 June

2008, 1 June to 1 August 2008 and, finally, 1 August to 1 November 2008. LtCol Vokey retired on 1 November 2008 after 20 years, 7 months of active duty service.

3. LtCol Vokey never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. LtCol Vokey did meet resistance from manpower regarding the continual change of his retirement date a month at a time, but he never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case.

4. In October 2008, while still on active duty (albeit it terminal leave), LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP (hereinafter Fitzpatrick). Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings, to include in March 2010 and September 2010 in front of the present judge. Mr. Vokey continued to represent the accused while a member of the Fitzpatrick law firm, despite the firm already having established representation of former Sgt Hector Salinas, an alleged co-conspirator in the accused's case. Mr. Vokey was told, orally, upon his hiring, that Sgt Salinas did not have a conflict with the firm hiring Mr. Vokey, despite the fact that the accused's interests may be contradictory to the firm's interests of Salinas.

5. There is no evidence that the firm has a written waiver of Sgt Salinas, regarding this potential conflict of interest. Nor did Mr. Vokey, while on active duty or since retirement, ever secure a waiver from the accused concerning this conflict.

6. The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case. However, at the Article 39(a) sessions of 13 and 14 September, the defense team asked for an ex parte hearing with the judge regarding the continued representation of Mr. Vokey on the case, given the potential conflict involved. When the Military Judge had tried to sever this relationship with the accused's approval on the record, the judge was stymied by the

defense. So, after hearing the defense's request, including the desires of Mr. Vokey, the Court was constrained to release Mr. Vokey from further participation in this case, pursuant to R.C.M. 505(d)(2)(B)(3), based on an irreconcilable conflict of interest. (A record of this ex parte hearing will be sealed and attached to the record of trial.) Until being released at the September Article 39(a) session, Mr. Vokey had continued to represent the accused.

7. Within 31 days of being detailed to the accused's case, on 18 February 2008, Maj Faraj submitted his request to voluntary retire on 1 May 2008. He subsequently requested two modifications to the retirement dates, from 1 May to 1 June 2008 and from 1 June to 1 August 2008. Both requests were granted and Maj Faraj subsequently retired on 1 August 2008, after being on active duty some 22 years. Maj Faraj never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. Maj Faraj never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case (except for the extensions already discussed).

8. Immediately upon retiring in August 2008, Mr. Faraj entered private practice. He formed a partnership with Mr. Neal Puckett, one of the civilian attorneys who had already been representing the accused and with whom Mr. Faraj had worked with on the case. Mr. Faraj has never been released by either the Court, or his client, from his attorney-client relationship (hereinafter, ACR), and that ACR continues to exist.

9. Mr. Faraj indicated that he is not getting paid for his representation of the accused, but still represents him as his legal ethics and personal morals dictate that he must. But his law firm is getting paid, as the law firm continues to represent the accused. *See*, http://www.puckettfaraj.com. Mr. Puckett and Mr. Faraj continue to zealously represent the accused, along with another civilian counsel (Mr. Mark Zaid) and a detailed defense counsel (Major Meredith Marshall, USMC). The defense had not asked for a detailed defense counsel to be assigned to the case, but the Court insisted in March that a detailed defense counsel be assigned. At the beginning of July 2010,

Major Marshall was appointed detailed defense counsel. She has been assisting the defense for almost four months.

10. Also representing the accused in the past, and having been properly relieved, have been LtCol Patricio Tafoya and Captain Nute Bonner. Therefore, until Mr. Vokey was released by the Court in September 2010, both detailed defense counsel became, in effect, civilian counsel of record and continued to represent the accused. Neither party, however, ever filed notices of appearance as civilian attorneys in the case. The accused never released either one of them from participation and neither had the Court until Mr. Vokey was released on 13 September 2010.

11. The prosecution team has consisted of, primarily, LtCol Sean Sullivan, Major Don Plowman and Major Nick Gannon. Major Plowman retired in May 2010 and has been released from all further participation in the case. LtCol Sullivan, a reservist, applied for sanctuary, meaning that he submitted a request for 3-year orders so that he could retire with a full pension. He did this on 4 March 2009, some five to seven months after Mr. Faraj and Mr. Vokey had retired.

12. Undoubtedly, the primary reason for LtCol Sullivan's sanctuary request was personal, as the granting of sanctuary would allow him to immediately secure the vesting of his pension. But the reason for the approval was, to some extent, tied to the letters written to Manpower by General Officers (and others), requesting that LtCol Sullivan be granted sanctuary so that he could assist in the Haditha cases, including the accused's case. There was nothing improper about LtCol Sullivan's request for sanctuary or the government's approval of it. Retaining LtCol Sullivan on active duty did not occur at the expense of the active duty slots available for LtCol Vokey or Maj Faraj to continue on active duty because they applied at different times and under different statutes and administrative procedures.

13. LtCol Paul Atterbury, mentioned in the defense motion as a prosecutor, never made an appearance in court, so evidence of his role in the case is of very minimal

relevance, if it is relevant at all. Major Gannon was allowed to continue on as a prosecutor in the Haditha cases despite his staying at the legal team in excess of what would normally be expected. There was no disparate treatment of the prosecution team and the defense team. The circumstances between the individuals was completely different; LtCol Sullivan was trying to achieve sanctuary, Maj Faraj and LtCol Vokey were retiring and Maj Gannon was simply left in place at this duty station to work on Hamdaniyah and Haditha cases. There was no intent by the government to undermine the integrity of the defense team while simultaneously making a herculean effort to keep the trial team intact. All of these actions occurred in the normal course of governmental business. Retaining LtCol Sullivan on active duty did not occur at the expense of active duty slots available for LtCol Vokey or Maj Faraj; the officers were not in competition for slots because they applied for retention at different times, under different statutes and administrative procedures. The situations between LtCol Sullivan and the accused were divergent in status, conduct and time.

14. The government was not seeking to improperly influence the accused's right to counsel by the voluntary retirements of his two detailed defense counsel. Although it is true that Manpower did not perhaps fully understand the impact of the two attorneys retiring (as evidenced by Col Redmon, Deputy Director of Manpower), no one at Manpower, or for that matter the government as a whole, improperly influenced the right of the accused to his counsel. Col Redmon was frustrated of dealing with LtCol Vokey's constant change in retirement plans, to be sure, but his actions cannot be imputed as bad faith on behalf of the government. In fact, despite the letters submitted on behalf of LtCol Sullivan's package in March 2010, Col Redmon recommended against granting LtCol Sullivan sanctuary.

15. It is clear that both LtCol Vokey and Maj Faraj wanted to continue to represent the accused. LtCol Vokey even moved his family to Texas and lived in a trailer to continue working on the case pending his retirement. But they also understood that there was no way to know when the case was going to be litigated for sure based on

the extensive appellate litigation and appeals that were ongoing throughout 2008 and 2009. Eventually, both officers elected to retire and continue representing the accused as civilian attorneys. No one from the government stepped in to assist the two officers in securing extra time on active duty as the two officers did not petition the Court, the trial counsel, their Commanding Officer (with the exception of the extensions as noted) or the Convening Authority for relief to stay on active duty. The Court sincerely doubts that either officer would have been happy to remain on active duty for the two years it has taken this case to get to trial.

16. LtCol Vokey took an active role in the accused's case (even appearing on 22 March 2010 at an Article 39(a)) until he was released in September 2010 by the Court, upon a motion from the defense, from further participation based on a finding of an irreconcilable conflict of interest. Prior to that time, he had done a site visit to Iraq with the accused and a videographer from the Puckett law firm (among other support staff); had interviewed numerous witnesses; participated in the Article 32 hearing and bonded with the client. Mr. Faraj took the same active role, except that he did not physically go to Iraq for the site visit. Mr. Faraj is fluent in Arabic, which has and will assist the defense to no small measure. Both detailed defense counsel were sent to continuing legal education courses. The original trial date this case was scheduled for trial was early March 2008. However, the trial was continued once the appellate litigation started, which was during February 2008.

17. The previous judge in the case, LtCol Meeks, made no inquiry on the record regarding the excusal of the accused's two detailed counsel from active duty. SSgt Wuterich has never excused either counsel from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey ever made an application to the Court for excusal or withdrawal, nor did they ask that the proceedings be abated if they were not retained on active duty.

18. Mr. Faraj has taken, and continues to take the most active role of the defense counsel in representing the accused at pretrial hearings. Mr. Faraj acts as the lead attorney.

19. During the years this case has taken to get to trial, there has been equal access to witnesses, evidence and discovery. As illustrated by General Mattis' testimony during the unlawful command influence motion in March 2010, the Convening Authorities have sought to ensure a fair process for both the trial and defense teams in this case.

20. The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the fact that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience; 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) the defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; and 7) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

21. The Court is convinced that the previous "military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law." *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010).

SUMMARY OF THE LAW

Rule for Court-Martial 506(c) states:

(c) *Excusal or withdrawal*. Except as otherwise provided in R.C.M. 505(d)(2) and subsection of (b)(3) of this rule, 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.

Regarding changes of detailed defense counsel, Rule for Court-Martial 505(d)(2)(B) states:

(B) *After formation of attorney-client relationship*. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under R.C.M. 506(b)(3);

(ii) Upon request of the accused of application for withdrawal by such counsel under R.C.M. 506(c); or

(iii) For other good cause shown on the record.

R.C.M. 505(f) states:

(f) *Good cause*. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the…counsel…unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.

The case of *United States v. Hutchins*, the Navy-Marine Corps Court of Criminal Appeals stated the following: "The Uniform Code of Military Justice provides an accused with rights to counsel that exceed Constitutional standards…" and that "release of a defense counsel in situation such as this occur only with the approval of the military judge for good cause, or with the 'express consent" of the accused." 68 M.J. 623, 628 (N-M. Ct. Crim. App. 2010).

Further, "[g]ood cause must be based on a 'truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship.'" *Id.*, quoting *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978).

Without the accused's consent of release of counsel, or approval of an application of withdrawal by the defense counsel, severance of the relationship can only be proper when good cause is shown on the record. *United States v. Allred*, 50 M.J. 795, 799-800.

Convenience of the government is not a sufficient basis to establish good cause. *Id.*, at 800, (citing *United States v. Murray*, 42 C.M.R. 253, 254).

Although an accused is not absolutely entitled to the defense counsel of his choice, he is entitled to retain an established relationship with the counsel in the absence of demonstrated good cause. *United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988).

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009).

A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463.

The core of the Sixth Amendment right to counsel "has historically been, and remains today, the "opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial." *Id.*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, __ U.S. __, 129 S.Ct. 1841 1844-45 (2009).

"Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians…But these broader rights are the creations of statute and regulation, not of the Constitution." *Id.*, at 465.

Paragraph 2004.8 of MCO P1900.16F, Modification or Cancellation of Requests states in pertinent part:

a…Approval will be based on the following criteria:

(1) Bona fide humanitarian or hardship circumstances.

(2) A critical need exists for the officer's grade and MOS.

(3) Needs of the service.

(4) Selection for promotion.

c. Modification of any duration may be requested; however, as a general rule, the effective date of the requested modification should not exceed 14 months from the date of the submission of the original request…

ANALYSIS / CONCLUSIONS OF LAW

The issue is whether a change in defense counsels' status from a detailed defense counsel to a civilian defense counsel is a violation of the accused's Sixth Amendment right to counsel, or a violation of the accused's Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels' transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

The defense relies heavily on the case of *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010). This recent Navy-Marine Corps Court of Criminal Appeals case ruled that in the absence of the accused's consent or an approved application for withdrawal by defense counsel, severance of the attorney-client relationship can only be proper when good cause is shown on the record. *Id.*, at 628. Further, the Court found that the detailed defense counsel's departure from active duty did not constitute good cause for severing the attorney-client relationship when the counsel was replaced a mere five to six weeks before the murder trial and he had participated extensively in the trial preparation. *Id.* Lastly, the Court attached the presumption of prejudice to the wrongful severance.

The case at bar, however, is markedly different than the *Hutchins* case. First, the attorney-client relationship (hereinafter ACR) in Hutchins was severed by the defense attorney leaving active duty. In this case, that ACR survived the retiring of both LtCol Vokey and Major Faraj as they both continued to represent the accused at court sessions after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey continued to represent the accused from his retirement until he petitioned relief for good cause from the Court in September 2010. After their retirements, they continued to maintain the ACR for around two years since their retirement. Unlike the counsel in *Hutchins*, Mr. Vokey and Mr. Faraj have not abdicated their professional responsibility in this case despite failing to seek redress from the Court at an earlier time. They are to be commended for their professionalism.

Second, the issue of the attorney's status as civilian vs. military counsel is entirely distinct from the counsel in *Hutchins*, who was altogether removed from the case by his terminating his active service. The attorney in the *Hutchins* case did not continue to do anything on the case after he left active duty, taking with him any knowledge he had of the case. Again, in the accused's case, both detailed counsel continued to represent the accused. The *Hutchins* case never addressed losing detailed counsel, but continuing to have those counsel represent you in a civilian capacity. Rather, the case was one of losing the experienced attorney close in time to the actual

trial. Therefore, the facts at bar are distinguishable from not only the *Hutchins* case, but also from *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); and *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978).

Third, in *Hutchins*, the military judge gave a misstatement of the law by indicating that after the attorney left active duty, there was no way the accused was entitled to keep him on as his attorney. The military judge in *Hutchins* effectively severed the accused's ACR by misinforming the accused and then getting an unintelligent waiver. No misstatement of the law occurred in the instant case by the military judge. There was no misinforming, misleading, or flawed legal or factual logic. Rather, there was simply a lack of due care by all concerning getting a waiver from the accused or releasing the attorneys for good cause shown.

Both Mr. Vokey and Mr. Faraj stopped submitting requests to modify their retirement dates in the summer of 2008, which was well before there was any appellate rulings regarding this case. In essence, the case at the trial level was in limbo, waiting out the appellate litigation. At this point, when it appeared that litigation was dragging on and there was no end in sight for when the case might be tried, all parties should have made known to the Court of the impending retirements of the two detailed defense counsel. Then, the pervious military judge should have held a hearing to determine whether good cause existed or not to release the two attorneys as detailed defense counsel for cause or by getting the accused's permission. Absent good cause, the officers, perhaps, would have remained on active duty.

But none of that was done in this case. And then to further compound the error, Mr. Vokey secured employment at a firm who was representing one of the other alleged shooters in the incident. He did so without securing a waiver from the accused regarding this potential conflict of interest. Evidently, no one thought there would be issues with this course of action and Mr. Vokey continued to represent the accused for almost two years from his hiring. Now, however, on petition from the defense, the Court released Mr. Vokey from all further participation in this case approximately

seven weeks before the trial. Errors by both the trial and defense teams by not petitioning the Court for redress have led us to where we are now regarding Mr. Vokey. However, he shares some blame by knowingly hiring on with the Fitzpatrick law firm where he was told about a potential conflict of interest and then failing to get a waiver of this issue from the accused. Regardless, the unfortunate outcome is that he is now conflicted from representation of the accused.

The core of the Sixth Amendment right to counsel "has historically been, and remains today, the "opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial." *Wiechmann*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, __ U.S. __, 129 S.Ct. 1841 1844-45 (2009). "Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians…But these broader rights are the creations of statute and regulation, not of the Constitution." *Id.*, at 465. When an ACR persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel.

It is true that because the government and the defense were asleep at the switch in seeking redress from the Court for this issue. As a result, Mr. Vokey is now unable to participate in the trial because of his choice of employment. It is unfortunate that it took the defense so long to ascertain that there really was a conflict in this case between Mr. Salinas and the accused. However, because the Court found good grounds to release Mr. Vokey, there can now be no further representation by him at the court-martial.

The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the facts that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience (again, see Mr. Puckett's website,

http://www.puckettfaraj.com); 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) The defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; 8) the Court will allow Mr. Faraj to read into the record all of his personal awards for the members and explain to them that he was on active duty when this case started; and 9) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009). A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463. There is a strong presumption that an error is not structural. *Id.*, at 634 (Senior Judge Booker concurring) (citations omitted).

There is no structural error in the accused's situation and, therefore, no proof of prejudice is required. There is no doubt in the Court's mind that the accused can receive a fair trial and that the criminal trial can reliably serve its function as a vehicle for determination of guilt or innocence. The Court, as the gatekeeper, may take whatever measures it deems necessary to ameliorate any affect of the accused now losing the services of Mr. Vokey on the defense team, to include: relaxing the rules of evidence, if necessary, for the admission of items garnered during Mr. Vokey's trip to

Iraq. The *Hutchins* Court specifically noted that "our determination to presume prejudice is very fact specific. Another case with other facts might well be more amenable to a reasoned prejudice analysis." *Id.*, at 631. Looking at both specific and general prejudice, (*Id.*, at 637) this Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and that he will not be unduly prejudiced by the removal of LtCol Vokey as counsel.

Although all of the parties (to include the previous military judge) should have been alerted as to the fact that counsel who plan on leaving active duty need to be properly released by the Judge, it is worth noting that the Navy-Marine Corps Court of Criminal Appeals ruling in *Hutchins* came more than a year and a half after Mr. Vokey and Mr. Faraj retired.

The defense seems to believe that the *Hutchins* ruling means that a Court can never sever an ACR for an attorney who is retiring or leaving active duty. This is an unnecessary and overbroad reading of the case. The *Hutchins* Court had issues with the military judge's (and everyone else's) conclusion that just because the defense counsel was leaving active duty, that action constituted good cause in severing an ACR during an ongoing trial. The *Hutchins* Court meant what it said: "severance of the relationship can only be proper when good cause is shown on the record." *Hutchins*, at 628. But again, in this case, the ACR was never severed for the two detailed defense counsel until Mr. Vokey was removed at his own behest in September 2010.

Taking the defense position to the extreme, a senior defense counsel should never detail a young officer to a general court-martial if that officer wanted to leave active duty after one tour, because, potentially, the court-martial could be appealed for years and that officer could never be released while the litigation was ongoing. Or, using another example, the Officer in Charge of the Legal Services Support Section may never wish to put an attorney to work in defense unless that attorney signs a paper indicating that he or she will agree to stay on each court-martial case, regardless of

personal circumstances, for however long it takes, even if it is years. Of course, this is absurd and the *Hutchins* Court never endorsed this view.

The *Hutchins* Court did say that "good cause" must "be assessed on a sliding scale which considers the contextual impact of the severance of the client." *Id.*, at 629. After an ex parte hearing requested by the defense, this Court found that Mr. Vokey's excusal in this case was for "truly extraordinary circumstances which rendered "virtually impossible the continuation of the established relationship." *Id.*, quoting *United States v. Iverson*, 5 M.J. at 442-443.

Like in the *Hutchins* case, "[t]he multiple errors and inattention leading to deprivation of counsel in this case reflect something of a perfect storm." *Id.* Although the two detailed defense counsel wanted to continue to represent the accused, they did not seek redress from the Court, the Convening Authority (LtGen Mattis, who was very amenable to assist the defense, as shown in the UCI motion), their Commanding Officers or the Officer in Charge of the Legal Services Support Section. Neither defense attorney availed himself of the provisions of paragraph 2004.8(c), of MCO P1900.16F. Clearly, their ACR with the accused would fall under the regulation's criteria for granting modifications and cancellations of retirement. With no end in sight for the appellate litigation, the defense counsel assumed they had to retire and continue representing the accused.

Next, Mr. Vokey secured employment at a law firm whose interests ran counter to his client. Further, the government counsel stood by watching, with no meaningful intervention on behalf of the two detailed defense counsel. By the time the appellate litigation finished, the two detailed defense counsel were retired. But the bottom line is that both detailed defense counsel continued to represent the accused for almost two years after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey was removed for "good cause" by the Court.

Practically speaking, what is the appropriate remedy for the missteps at this point in the process? Abating the proceeding does nothing to assist the accused or the government because there is nothing to cure, and nothing to wait for. Due to Mr. Vokey's ill-advised hiring at the law firm of Fitzpatrick, et. al., sans a waiver from the accused, he is now conflicted out of the case. As previously mentioned, if the Court felt the defense needed more time to prepare, the Court would grant it. But the unspoken reality is that the parties have had plenty of time to get ready for trial and the trial has been delayed long enough. The Court knows that Mr. Faraj is a very able attorney. He has practiced in front of this judge many times in the past and, in fact, effectively litigated the first contested case of the Hamdaniyah cases, Cpl Thomas, in front of this judge (one of Sgt Hutchins' co-conspirators).

Dismissal of the charges in this case is a windfall for the accused and is not warranted based on the actions and inactions of both the trial and defense teams. The accused has not been "irreparably prejudiced" as the defense claims in their motion. This Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and receive very fine representation from Mr. Faraj, Mr. Puckett, Mr. Zaid, and Major Marshall, USMC. The Court will fashion whatever remedy it deems appropriate during trial to ensure both the accused and the government receive a fair trial.

RULING

The defense MOTION is DENIED.

D. M. JONES
LtCol, USMC
Military Judge

CERTIFICATE OF SERVICE

I certify that this document was delivered electronically to the Court, and that copies were delivered electronically to the Appellate Government Division, the Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and Respondent LtCol David L. Jones on November 5, 2010.

/s/
KIRK SRIPINYO
Major, U.S. Marine Corps
Bar No. 34753
Navy-Marine Corps Appellate Review Activity
Appellate Defense Division
1254 Charles Morris St., SE
Suite 100
Washington, D.C. 20374-5124
(202) 685-7093