The Article 39(a) session was called to order at 0930, 14 September 2010.

MJ: The court is called to order. All parties present when the court recessed are once again present with the exception of Lieutenant Colonel Sullivan. He's been released by the court. His presence is not necessary here as a witness on this motion, and he has other duties to attend to so the court has released him for this session of court. All other parties remain the same.

In regards to Appellate Exhibit XCVIII, the court saw a need to release all of the documents contained in here and it looks like they've been marked as Appellate Exhibits CII and CIII. I appreciate that since I do not wish to open up what was previously sealed in Appellate Exhibit XCV. We'll just leave it sealed as I got it from the government.

But that copy at least that I received, I did release to the defense. I did find that it was necessary and relevant to the motion. Again the import of those documents will be argued by the parties. I will note that they were already blacked out of the medical information by Major Gannon. It was my understanding that prior to reading through this last night that the -- that one of the issues with the documents was that it contained personal information dealing with medical history, et cetera. And to the extent that it contains that, I'm releasing it to the parties. I'm sure you'll use good judgment and not release anything that does not need to be released, and Major Gannon blacked out portions of the medical document information on there anyway.

Major Gannon, you're standing?

TC (Maj Gannon): Yes. Good morning, Your Honor. We actually request a protective order of those materials; that you direct the defense directly to not release or publish online or reproduce those to any nonparty to this litigation, sir.

MJ: Defense.

CC (Mr. Faraj): We object to that, Your Honor. This is part -- this has been discovered on the defense. To the extent

that there is protective medical information, we will abide by that. But any information related to sanctuary, I intend to release to another team that is undergoing similar litigation. They've shared information with us and I'll be sharing it with them.

MJ: Okay. I'm going to issue a protective order at this time. Both parties indicated I did not need to do so in writing at the last session for the last protective order I issued and same with this one. I don't want people's personal information out there for the media. So I'm issuing a protective order for any of the information contained in here except that you may share it with any other defense team.

And obviously this is a public forum and you can reference anything you'd like to in this public forum. And if we have anybody listening or anything, that's fine too. So I certainly don't want to hinder you in this case. It's just that the personal nature of some of these documents I don't want released to the public at this point in time. So I'm going to issue you with that.

So you may share them of course with the other defense team.

Major Gannon?

TC (Maj Gannon): Your Honor, I apologize. And with respect to the court, that will undermine the efficacy of your order. If they can give it to a third party who's not subject to the order, that will undermine the efficacy of that order.

The government respectfully requests that due to the intensely personal nature of those documents that the court simply direct -- there's no interest in this body allowing the transfer of documents to another defense team, an unnamed party, an unnamed individual. We don't know who these people are, what the nature of the litigation is, et cetera.

So we respectfully request that you direct the defense not to reproduce or share these documents with anyone other than for the parties to this litigation, sir.

MJ: Okay. Let me ask -- let me ask then, if another -- if

there's another motion on this regard, what does it have to do with these documents, in particular with Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury if you're going to share these with another defense team?

CC (Mr. Faraj): It has to do exactly with the sanc -- the efforts the government took to ensure that the prosecution team remained in tact while not exercising any effort to keep defense counsel on the case. And that -- the documents that we have -- I don't care about the medical stuff. But the endorsements from general officers and officers along the chain of command are probative, relevant, and necessary and material to this litigation and to other litigation and they're not personal.

I mean, this is -- this is -- these were endorsements. They have -- they contain no personal information. If there's a protective order from this court, that certainly would apply to other litigation that is actually going on in this circuit. And so we can -- we understand our duties, and we can ensure that the other team understands that there's a protective order regarding any personal information that's included in here.

But I will tell the court, Your Honor, we have -- we do not intend to release any personal information of any sort. This is -- we wanted the endorsements. We've got the endorsements and that's what's important here.

MJ: But I guess my --

TC (Maj Gannon): May I be heard, Your Honor?

MJ: In just a moment.

TC (Maj Gannon): Yes, sir.

MJ: I guess my question is: What other case is out there that's pending?

CC (Mr. Faraj): *Hohman*.

MJ: I'm sorry?

CC (Mr. Faraj): *Hohman*. *U.S. v. Hohman* in this circuit.

TC (Maj Gannon): If there is, Your Honor, another case out there where these materials may or may not be relevant, then the parties to that litigation can file a discovery request with the government and then they can take that up in the normal course as we do in front of a military judge to make decisions, sir. That's -- that's the government's position.

MJ: Okay. So the *U.S. v. Hohman* case is not any case related to this particular set of facts, I guess is my question.

CC (Mr. Faraj): It is not, Your Honor. Well --

MJ: Okay. Because when you spoke earlier, I thought maybe I was missing that there was still another alleged coconspirator or coactor here that was involved.

CC (Mr. Faraj): *Hutchins* is still out there. There was a brief filed with the CAAF and I intend to send these documents to that team as well so that they're aware of it because I don't think they have those either.

TC (Maj Gannon): And again, sir, in the normal course of discovery, those respective teams -- the *Hutchins* team, the *Hohman* team -- they can file discovery requests; the government will respond. If they deny the materials, then the parties have -- can seek redress from the military judge detailed to those cases.

MJ: Okay. All right. I'm going to issue a protective order in writing so that it's clear. Let me think about this. When I spoke earlier, I was assuming that that was a companion litigation to this and I am aware now that it is not; that those cases are not related to this case.

That still doesn't get us around the point that Major Gannon stated which is valid which is each case should stand on its own. Why should I issue an order to somebody who's not even involved in this case. So let me take that on advisement. Please do not release anything until you receive notice from me, defense, and I will issue a protective order of some sort. At the same time I will be issuing one for what we talked about yesterday.

CC (Mr. Faraj): I'm not quite -- Your Honor, I'm not quite sure what that means, because we are certainly going to argue

today about information in the endorsements. It's a matter -- it's part of this motion now.

MJ: I expect you to. We're talking about the release of the documents --

CC (Mr. Faraj): Okay.

MJ: -- to third parties only.

CC (Mr. Faraj): All right. And does that -- does that mean that these endorsements can't be released either?

MJ: Everything that you received today --

CC (Mr. Faraj): I understand.

MJ: -- including the endorsements cannot be released to a third party until I take another look at it and issue a protective order where I will go through, page-by-page, and determine what needs to be released to who. I think that's going to be the best way to do it. I think some of the information may be generally accessible. It may not. I certainly would like to think about it. I understand the government's consternation. You don't want people's personal business out there. However, some of these documents may be discoverable on a broader range.

CC (Mr. Faraj): And I'm sure the court is aware, but I would like to make the court aware that as you go through this analysis, Your Honor, almost all the documents that you are going to review would be accessible through a simple FOYA request, not including ones with personal information.

MJ: Right. And I'm also aware that -- that Major Gannon in advance of us -- of me receiving it in camera and me releasing it to the defense took out social security numbers and pertinent medical information on these documents already. So I'd like to state that for the record. And I don't think Major Gannon misled the court earlier. I was just under the understanding that these documents contained those personal items of information. Obviously they contain personal items of information now, but I'm talking about particular medical facts and social security numbers, those kinds of things. And those were already blacked out.

So all right. Let me issue a protective order and I probably will take the liberty of the issuing in writing what we talked about yesterday on the record about doing orally just to be safe. So I will take that up then.

But in the mean time, all the parties are directed not to release any of these documents until you get an order from the court.

All right. With that in mind, then, I know I just want to state for the record that the trial counsel substituted out the motion that had been previously filed. There was some typos and just some minor issues. They were substituted out. The defense is aware of that. I received the new motion. Again, it does not substantially change anything other than some of the references and some minor typos from what I understand.

Okay. With that in mind, then, I did find good cause obviously to release all of the information that I did to the defense counsel. I did feel it was relevant and pertinent and necessary for the defense to be able to argue this motion. I gave the defense an hour continuance to incorporate any of these documents into their closing argument and so we're ready to hear that at this point. We concluded with all of the evidence yesterday and released Lieutenant Colonel Simmons today -- Sullivan. Excuse me. Lieutenant Colonel Sullivan today based on his -- not needing him as a witness.

So at this point, defense, you still have the burden of proof beyond a -- or by a preponderance of the evidence?

CC (Mr. Faraj): We continue to do -- to have that burden, Your Honor.

MJ: Okay. So you go ahead and argue first then.

CC (Mr. Faraj): We will argue first. I would like to -- before I start, Your Honor, I'd like to put the court on notice and government that we intend to file a UCI motion as a result of information that we received today. And I'm going to ask the court for at least two weeks to submit that motion.

MJ: What -- what is the basis of the UCI motion?

CC (Mr. Faraj): The basis of the UCI motion is the -- the convening authority -- the convening authority's actions in this case were disparate in that they treated the government -- or they assisted the government in ways that prejudiced the defense based on the endorsements that we've seen and the -- what I can only state as a Herculean effort to keep reserve officers who had no obligation to remain in the Marine Corps -- in fact law, end strength numbers require that they leave the Marine Corps -- received sanctuary when they clearly should not have; all to keep a team together to prosecute this case, while no effort was exercised by the government to keep the defense -- the defense team together. We believe that that raises the specter of unlawful command influence and I intend to file a motion seeking relief.

MJ: You wish to have how long to file the motion?

CC (Mr. Faraj): Two weeks, Your Honor.

MJ: Government, do you wish to be heard?

TC (Maj Gannon): Your Honor, the -- no, sir. I mean, two weeks is -- we got to see the pleading before we have any position, sir.

MJ: Okay. I'm going to give you two weeks. Today is the 14th. I'm going to give you till the 29th to file your motion. Please file it timely. The 29th of September. I realize all the deadlines for motions are long past; however, especially with a UCI motion, if you just received information that puts you on notice that you should file a motion for your client, then I'm going to hear the motion. So 29th of September, defense motion will be due.

You can go ahead and have a seat, please.

And then the other issue is when we are going to litigate this. We talked about the defense not being able to start trial until 8:30 on the -- on November 2nd. So that will be the time that we will argue the motion.

I'm happy to hear from the parties, I guess, before I decide that. But I would anticipate, then, hearing that motion on 2 November and actually starting with the members -- assuming the motion is not granted, which we

always assume the motions are not going to be granted -- so we can plan for trial -- we would start the next day on 3 November, rather than having the members come at 1200.

That's what I would throw out at this point. I don't -- I believe that I should be able to -- based on reading the motions and then coming and hearing the evidence, I should be able to give a ruling in place, you know, or some time shortly after the motions. And if I need more time, then I'll take more time. But I would anticipate starting with the members then on Wednesday, November 3rd. But we'll be in here November 2nd at 8:30 to argue the motion.

Major Gannon, do you wish to be heard?

TC (Maj Gannon): Yes, Your Honor. I appreciate your offering me the opportunity to be heard.

A UCI motion obviously presents the government with some challenges; in that, there's a burden shifting event and subsequent to the burden shifting event, the government has to tailer a presentation of evidence to meet a beyond a reasonable doubt standard. And without sufficient foreknowledge of what the possibility of the burden shifting event may be, it's very difficult for us to plan in a single day to be able to present a beyond a reasonable doubt case in the wake -- if there is in the court's wisdom decides there was a burden shifting event.

I'm not disagreeing with the court's proposed course of action. However, I would seek leave of the court to at least seek to modify those dates if -- based on an assessment of the defense's pleadings, it appears that there are multiple bases upon which the burden could be shifted. And thus, rendering it very difficult for us to tailer any evidentiary presentation that's necessary by the shifting of a burden, sir.

MJ: Okay. I acknowledge that. I respect that. When we file -- when we did the original UCI motion back in March, I know that was one of the things the government asked for and rightfully so -- what has the burden shifted to and to what extent and when. And we had that preliminary ruling that I read into the record I think on Wednesday of that week, and then we continued the

trial. And I think Friday I made a culminating ruling on the motion.

So we'll do that. I would like to keep with the time schedule I've just described. If we do need to push something off or we need more time, I think we'll know after the motion is filed and we'll have an 802 conference and we'll discuss further scheduling. But I still want to stay with the original schedule to the greatest extent that we can.

Major Gannon, anything else?

TC (Maj Gannon): Yes, Your Honor. Cocounsel was whispering to me and he raises a valid point. We have to be -- the government respectfully requests that the court is -- obviously the court is going to do whatever the court needs to do and the government understands and supports that wholly. We just respectfully request that you take in to consideration the number of witnesses we're bringing in for this case and even minor modifications of the trial dates will have pretty significant impacts on people's schedules, witnesses' schedules. We've got deployed witnesses coming back, just in terms of reorienting the travel, et cetera. The court is well aware, far more aware than I of the administrative efforts that go into putting on a case of this magnitude. And thus, we request that you keep that in mind when we keep shifting the dates around, sir.

MJ: What would you suggest? I would like to have everybody come in here the week before trial. But we just had the defense indicate that they cannot because they're in another case in Washington D.C. And therefore, I had to put my trial from 1 November, Monday, to 2 November, yesterday.

TC (Maj Gannon): Yes, sir.

MJ: So -- otherwise, I would say let's come the week before and we'll figure this out.

TC (Maj Gannon): Perhaps when we explore the defense counsel's schedule to readjust the entire trial. The trial is such a big window that it necessitated that 1 November date and there was no flexibility for a three-week window. I can't envision this hearing being more than a couple of dates. Perhaps the defense counsel has some

flexibility. The government is more than willing to do it on a weekend in order to preserve the trial dates, et cetera, sir. We're very -- we'll do it at midnight if we need to. Not that this court would, but you understand, sir.

MJ: And the court is willing to work with the schedules. However, I'm coming from overseas so I'm willing to work and be in court on a weekend too. That's not a problem for me or anybody else.

Mr. Faraj, what -- you're looking at your calendar maybe perhaps on your BlackBerry which I'm sure is shut off and is not going to make any noise in my courtroom.

CC (Mr. Faraj): It will not, Your Honor. It's just a calendar.

MJ: But what would you suggest? Is there any way you can move this other case or get back earlier where we could take this motion a couple days before on the Thursday or Friday before this case starts?

CC (Mr. Faraj): Your Honor, I probably wasn't very clear and I apologize. I left you with the wrong impression. It's not a case. We have undertaken to sponsor the Marine Corps Marathon, paid a lot of money to do it, and we have to be in Washington, D.C., that weekend and that's the weekend of the marathon.

MJ: Okay.

CC (Mr. Faraj): So that's why we're asking to start a day later than we would normally. However, that said, I will be in town on -- for -- on another case doing other motions and I'll be available if we need to take some matters up.

MJ: I will -- if -- are you talking about some time in October?

CC (Mr. Faraj): The last week --

MJ: In other words, if we need to do this motion, I'm happy to fly back out here and do this motion any time. This case has precedence over any other case that I have.

CC (Mr. Faraj): I understand. But I've got other cases scheduled in the last week of October. So I'm literally going to

do the 39(a)'s, fly back to D.C., and then come back.

MJ: Right. But what about a time frame, for example, a month from now? Mid-October or something like that?

CC (Mr. Faraj): I have two trials going in mid-October.

TC (Maj Gannon): There's a -- 15 is a Friday and 16 is a Saturday, sir, that we could start on. If there's a Friday conflict, we could start on Saturday.

CC (Mr. Faraj): I literally have a trial the week before I'm preparing for the very next trial during that weekend. So unless one of those trials move, I would not be able to do it, Your Honor.

MJ: Okay. I'd like to discuss --

CC (Mr. Faraj): We can discuss schedules after if you'd like.

MJ: I'd like to discuss schedules off the record. There's no need to do any more of this on the record and then we'll come to a decision on when we're going to do it. I guess the preference would be that we do this about a month from now, which would put us, you know, about two weeks before the trial.

If you're going to be here doing another case, Mr. Faraj, we could do the motion during that time frame. I know Major Marshall certainly is in the area. I don't know Mr. Puckett's schedule. So we'll talk off the record and we'll try to come to a time of where we can do the motion.

I do appreciate the government's concern of getting everyone here and litigating a motion. I want to start this case at 8:30 on 2 November with the members in the afternoon with us taking care of preliminary matters in the morning. So everything I can do to make that happen, we're going to do that. And if that requires another flight out here for me, that's fine. We'll hear the motion at a different time.

I do -- because if we could start the motion on Monday, again, that still may leave problems to the government as they've indicated. So we'll discuss this off the record and I'll make a decision on that issue.

The deadline then is still the 29th of September for the defense motion due.

Do you need more than a week to answer?

TC (Maj Gannon): No, Your Honor.

MJ: 6 October then?

TC (Maj Gannon): Yes, Your Honor.

MJ: 6 October, the answer will be due by the government.

And then we will litigate this -- this motion some time between 6 October and 2 November, so that we start this trial on 2 November. We'll do that scheduling off the record. I'll make a decision and incorporate the decision on the record at the next session.

All right. With that in mind, then, Mr. Faraj, please.

CC (Mr. Faraj): Five-minute break, Your Honor.

MJ: I'm sorry?

CC (Mr. Faraj): Just a five-minute break.

MJ: Oh, you need a five-minute break before we start?

CC (Mr. Faraj): Yes.

MJ: Okay. Court will be --

CC (Mr. Puckett): Because we don't know how long it's going to go, sir.

MJ: Okay. The court will be in recess.

The Article 39(a) session recessed at 0950, 14 September 2010.

The Article 39(a) session was called to order at 0955, 14 September 2010.

MJ: The court will come to order. All parties present when the court recessed are once again present.

The court's prepared to hear closing argument on the motion.

Mr. Faraj, please.

CC (Mr. Faraj): Thank you, Your Honor.

MJ: Trial counsel, you can move if you need to see the --

TC (Maj Gannon): Thank you, Your Honor.

MJ: -- the presentation. You may sit in the deliberation box. That's fine.

TC (Maj Gannon): Thank you, sir.

CC (Mr. Faraj): This is new territory sort of. The *Hutchins* court even states it's an issue of first impressions. No one disagrees that the right to counsel is a right guaranteed by the constitution, but this is more nuanced. This is the right to a detailed counsel that has been afforded by the legislature to a military accused. And military case law is ripe with references to the rights of the accused to a detailed counsel, an individual military counsel -- which may excuse the detailed counsel -- and a civilian counsel. And a civilian counsel.

And, sir, when you go through your colloquy with the accused to inform him of his rights as *U.S., Johnson* requires -- *U.S. v. Johnson*. And really, it counts on the military judge to be the guardian of the accused's rights. Because it contemplates that military accused are different. Their job is different, the hierarchy that orders them is different, and the pressure they're under is different. And so it requires the judge, the military judge to be the guardian of the process.

And so you go through a lengthy colloquy with the accused to ensure that he understands his rights or she understands her rights. You go through a lengthy colloquy to understand that an accused is providently pleading guilty and understands the right not to plead guilty. And Article 38 requires you to ensure that he understands, he has a right to a detailed defense counsel and a civilian counsel.

And on that point, I'd like us to pause for a minute, because I racked my brain last night trying to think of whether Staff Sergeant Wuterich was ever asked when we came back into court whether he understood that his

detailed counsel are no longer at the table. Major Faraj and Lieutenant Colonel Vokey are no longer at the table. Mr. Faraj and Mr. Vokey were at the table, but his detailed defense counsel were never inquired in to.

I'm going to argue later -- and this is not -- you know, Judge Meeks didn't know any better either, because the law wasn't solidified. But when myself and Colonel Vokey left active duty, there should have been a session at court to inquire if this accused, if he understands what was going on. Sort of like Colonel Meeks did in the *Hutchins* case. Well, we never even had that. That was the last gate before *Hutchins*. It was accepted that an EAS or by analogy a retirement would excuse counsel.

Now, something deep down inside me -- and you heard from Colonel Vokey -- felt wrong about it, about walking away from the case. It just didn't feel right. I never signed a contract with Staff Sergeant Wuterich. He never hired me. He never gave me any money. The Marine Corps detailed me. And because of my employment contract with the Marine Corps and because of my state bar rules, I was required to work this case. When my employment contract with the Marine Corps ended, according to the Marine Corps at the time, I was no longer required to work this case.

And you heard testimony about it from Redmond. Just go. Or based on what colonel -- or Mr. Vokey said. But there was something there that would not allow me to just walk away. You can call it state bar rules. You can call it an obligation. You can call it perhaps a relationship that I built with this man and I came back. But I didn't know what I was -- what capacity I was coming back in. I was a lawyer, but I certainly wasn't a detailed lawyer anymore.

MJ: I'm going to interrupt you a couple of times, Mr. Faraj. The first question I have for you is another happenstance of this case, however, is that you left active duty and at some point secured employment with Mr. Puckett, who was representing the accused already, correct?

CC (Mr. Faraj): Right.

MJ: So what about that obligation? It's the firm's obligation to represent him, correct? You said you have

not been paid, but I'm sure Mr. Puckett has a contract with the accused.

CC (Mr. Faraj): He does have a -- they certainly had a contract when they first began representation. And perhaps you could argue that part of my duties as a member of that firm, that that obligation would extend to me. That's not the argument here though, Your Honor, because my focus is on the detailed counsel piece.

For example, the law -- if I may, your ruling is going to have an impact on other cases or may have an impact on other cases. For example, if that were allowed to stand, then essentially the government will be divorced of their obligation to continue to represent detailed -- or military accused, because they could argue, Well, the obligation continues after active duty because of state bar rules. In this case it continued because -- by happenstance. I happen to work for the same person that -- that represented Staff Sergeant Wuterich. But what if I did not? I would still be here, because I'm required to be here by my state bar rules. But *Hutchins* says differently and that's what we're going to discuss today.

Again, that was the last gate before *Hutchins*. *Hutchins* sort of validated what I sort of felt and I think what Colonel Vokey felt at the time and that is it doesn't terminate it. You have to continue to come back. There has to be more. And all *Hutchins* stands for is a simple principle. The regular happening of an instance in the military in the life of every person in the military and that is exiting active duty is not good cause without more. So simply leaving the military does not rise to the level of the good cause required to sever the attorney/client relationship. There could be more, but that in and of itself is not sufficient. Certainly, it's not good cause when the client isn't even informed of it. And they go through some analysis, but at its core, that's what the court is saying in *Hutchins*.

MJ: But if we take the -- if we take that rationale to its extreme and we read that, that that's what the *Hutchins* case court is saying, does that mean then that as soon as somebody is appointed as a defense counsel, on day one of becoming a judge advocate, they might never -- they should just be told right away, you'll never be a prosecutor. You can never be a prosecutor, because you

might take a case right now that could go through the appellate process for the next eight years. So you're not going to be a government counsel. You're not going to be an SJA. You'd better sit there in the defense counsel. That's where you're likely going to be.

And if you have a four-year contract and you're going to leave active duty, well, maybe you won't be leaving active duty either. So to what extent does the accuseds' rights trump the right of the organization and the military to be able to let people be relieved from active duty, et cetera. Don't we still just have to look at a good cause basis?

CC (Mr. Faraj): The CAAF has answered that question. Not an extensive -- not -- not -- and I don't have all the answers, but for example in *U.S. v. Spriggs*, it says the accused doesn't have a right to the same counsel at a -- at the appellate level. And so they have the right to that counsel during the trial level, but it severs at the conclusion of that trial.

Now, that may be the case, Your Honor. It may be that a defense counsel appointed and they remain on that case for their entire career and that's unfortunate. But that's supported by Supreme Court case law. *Gonzales v. Lopez* says you cannot sever that relationship, again, unless there is good cause.

MJ: And here you're saying there's no good cause.

CC (Mr. Faraj): There is no good cause -- your Honor, I want to be clear. There's no good cause simply by EAS. I mean, for example, there's -- the court doesn't say you can't sit down with a client, explain what is going on, explain the hardships that the defense counsel may be undergoing because they have to leave, do a good turnover, allow the client to have an informed consent, then come in front of a judge who makes the inquiry and then gets released. That's okay. But simply severing without going through the judge -- in fact, the only place you can sever that relationship is in front of a judge, Your Honor. And in this case, there was a severance of the ACR in the Summer of 2008. The detailed ACR. And it's distinguished for the military.

There are two spaces in which we exist: In a detailed realm and in the civilian realm. And in courts-martial

under Article 38, the judge is required -- is the only person permitted once the court-martial's convened to sever that relationship, period. It has to be in front of the judge. And that did not happen in this case.

Hutchins makes sense. *Hutchins* makes sense. And it makes sense perhaps in hindsight because of what we have gone through in this case. I'm still embarrassed that my motions are late to you. I can't say I was always on time, but I was never two or three or four weeks late. We are still laboring under the pressure of having to work other cases in order to be able to afford to come here and do this case essentially *pro bono*.

MJ: But would you -- would you agree though that a court can force you to continue representing a client who fails to pay?

CC (Mr. Faraj): Certainly. But that is the court -- the reason the court can do that is because the court contemplates that you entered into the contract freely. I did not have that -- that free will.

In any event, under in CJA, the Criminal Justice Act, federal courts are authorized by the Supreme Court to pay attorney's fees when client no longer are able to pay. And that is another remedy that has contemplated the problematic nature of compensation-free representation, Your Honor.

Now, this is not the prosecutor's fault. We're not saying Captain Gannon did anything wrong. He wasn't required to --

MJ: Major Gannon.

CC (Mr. Faraj): I'm sorry. Did I say captain? I apologize. Major Gannon. Hopefully soon Lieutenant Colonel Gannon.

That's not the issue here. When I write "government" in my motions, I'm talking about the big "G" government. The government that is required to guard the record of trial. The government that produces witnesses and funds the prosecution and affords the accused detailed counsel. Not the military judge. You have no control over those. You can order it, you can abate it, but in the end the government makes those -- makes those decisions.

What happens if the relief we seek is not granted in this case? Well -- and I'll tell you I considered this. To force the judge to grant me relief, I should not show up. That wouldn't be appropriate. You could even argue that that would be a violation of my state bar ethics rules. But essentially, I'm put in a bind. By showing up and demanding that my client get relief based on his right to detailed counsel, I must show up.

And so that gives the government the opportunity to argue, They're here, Your Honor. They're representing him. They're effective. It's not an effectiveness argument -- and I'll get to that in a little bit. This is not a *Strickland* prong argument for effectiveness of counsel. This is a *Gonzales, Lopez* argument or -- yeah, *Gonzales, Lopez* argument or a *Baca* argument. This is not about effective assistance. This is about what the legislature contemplated when they afforded the accused the right under Article 38.

So I could not show up and then you would be forced to grant the type of relief that we seek, either to abate the proceedings or dismiss the charges. Of course, it would allow -- it would allow the government to get around their obligations to ensure that detailed counsel remain on cases, because there's an escape mechanism. And of course, detailed counsel would be forced to come back into these courtrooms and to work without compensation after they exit active duty service.

I'm going to analogize to a public defender. If a public defender were assigned to a case, that public defender would certainly not be expected to continue to work the case without compensation. Now there's some Supreme Court case law on this, and it basically says that there is no right to a defendant -- and I'll give you the citation here in a little bit, Your Honor. I'll give you the cite later, Your Honor. The Supreme Court --

MJ: Is it in your motion?

CC (Mr. Faraj): It's not in my motion.

MJ: Okay.

CC (Mr. Faraj): They basically said there is no right to continued representation by a public defender. But it

also contemplates a turnover and a relief on the -- release on the record. Again, similar to our rules. But Article 38 requires more. It requires a continuation of a detailed counsel. Once -- once that detailed counsel is assigned, he must remain except for good cause or release on the record by the accused.

And again, we're -- detailed counsel are not the same as a civilian counsel. What -- the government cites to *Wykeman* in their -- in their brief, and they go on and on in *Wykeman*. I want to distinguish *Wykeman*. First of all, *Wykeman* ended up in a guilty plea. The accused in *Wykeman* waived his rights to many appellate issues. But here's what's important:

Wykeman actually works to assist my argument, because the court said in *Wykeman*, they found error in the convening authority interfering with the second detailed counsel. They said there's no difference between an assistant detailed counsel and the actual detailed counsel. They're only talking about detailed counsel in that case. But they reaffirm the inviolability of the right to detailed counsel. And they say we're going to find it harmless because they did a prejudice test. And they say although the convening authority interfered with the detailed counsel, detailed counsel continued to do their work. It was a guilty plea and so we don't find harm. The harm analysis -- in my opinion, a harm analysis is not merited in this case. We don't get to harm. Just like the *Hutchins* court said we don't get to harm.

Spriggs. This court's -- our court has been vigilant in protecting the relationship between a service member and his or her military counsel. We have emphasized that defense counsel are not fungible. *Spriggs*, 52 M.J. at 239.

And then in the case of *Howard*, *U.S. v. Howard* at 47 M.J. 107 -- the threshold should be low enough if an appellant makes some colorable showing of possible prejudice. We will give the appellant the benefit of the doubt and we will not speculate as to whether there should have been a different outcome. They don't -- they don't go into testing for prejudice. It's difficult to do and court's will not go into that exercise of testing for prejudice.

In the *Hutchins* case -- I'm sorry. *Hutchins* also does not test for prejudice and they say we presume it. We're not going to try and determine what value Captain Bass would have added. It's sufficient that he was detailed and they -- and even though they did a *DuBay* hearing, they do not go into that analysis.

I think I've established the right to his detailed counsel and this is where I get to your colloquy. The colloquy that never took place here. We never got on the record after 2008 where he was asked you are represented by your detailed defense counsel, Major Faraj and Lieutenant Colonel Vokey. Do you wish to let them go? That never took place. And so we have an error that's already built into this record.

MJ: Mr. Faraj, how do you explain two different facts from the *Hutchins* case. The first fact is that I think the court was perturbed that the judge misstated the law on counsel. And second of all, that the person who left the active duty, Captain Bass, was somebody who had worked on the case to an extreme amount and then got kicked off the case, basically, two weeks before the trial started. How do you distinguish that from the facts of this case?

CC (Mr. Faraj): Well, we would -- we would be required to go through that if we did a prejudice analysis. And I've prepared this for you, Your Honor: These are the similarities and differences. And it's interesting. I'm actually going to bring in some of the endorsements. I'd like to refer to some of the endorsements from -- the government's endorsements to the prosecutor's request to remain on active duty. But in *Hutchins*, Captain Bass worked on a case for a year. We're on our fifth year. But at the time Vokey and I left active duty, it had been about two years.

MJ: Why do you have three and a half years on there?

CC (Mr. Faraj): It's been three and a half -- we've --

MJ: You've got three and a half now?

CC (Mr. Faraj): A total -- a total amount of three and a half years.

MJ: Okay.

CC (Mr. Faraj): Yes, he was released two weeks before trial which in *Hutchins*, the court says the good cause runs on a spectrum. You can add other factors. So I would argue certainly that three weeks before trial would be more prejudicial than a longer time before trial. And the further you go back, the less prejudicial it may be. But again, I argue the court says it's not enough. It's not sufficient by itself to be good cause given some of the factors. So for example, if he were released three weeks before trial and a quick turnover had taken place the way they argued on the record, that still wasn't enough because three weeks isn't enough to prepare. But had there been a voluntary release of counsel two years before trial, counsel works up, and the court can argue, Well, you know, we don't -- we think that is good cause enough. That's -- we accept that. So that's the difference there.

Severance by the government. Both our counsel in this case and in *Hutchins* were severed by the government. It wasn't severed by explicit government action. They didn't say -- they didn't come out and say we're going to end your contract. But *Hutchins* distinguishes it. Was it an action taken by the appellant or the defendant or was it something else? And that's how -- that's how they distinguish. Was it an action by the defendant or something else. And the something else is, of course, the end of EAS -- or the EAS or the retirement.

Both counsel in this case and in the *Hutchins* case abandon the client. Now, what does that mean? It means we left without further communication with the client. Now we continued to assist and work. I'm not -- I'm not going to speculate on what Captain Bass did, but from our end we did abandon the client because there was nothing else going on. But then we contacted the client again to see how we can assist and eventually we're here. And in neither case did the client release. The client did not make a voluntary release of the detailed defense counsel. There was no motion to withdraw from the case in either case.

And *Hutchins* -- the EAS was actually addressed on the record by Judge Meeks. The NMCCA decides that that's not good enough because the lawyer was already gone. That never happened in this case. We are never -- we've never addressed the release of the two detailed counsel on the record.

Captain Bass is a one-tour attorney though he did quite a bit of work it sounds like from the record on the PTSD issue. Well, Colonel Vokey at the time had 18 years of service; I had 20 years of service. The government endorsements go on and on and on and on about the combat experience of Lieutenant Colonel Sullivan. Well, I had a lot of combat experience and I served 16 years in the infantry. And if anybody understands how to present the tactics and procedures and the issues involved in this case, I would have. And I would have done it in uniform and so would have Colonel Vokey and the credibility that comes with that. We don't get to do that anymore.

So that's how we -- that's where the two cases are similar. If there is a distinguisher, it's the three -- three weeks before vice a couple years before trial.

This severance was a result -- was not a result of any action by the appellant. And the *Hutchins* case says -- or quoting, "In cases involving service of an existing attorney/client relationship by someone other than the appellant or the defense team, CAAF has consistently opined that due to the unique nature of defense counsel, appellate courts will not engage in those calculations as to the existence of prejudice." They're quoting *Baca*, 27 M.J. at 119.

Severance was not by this accused. It was a result of government action or inaction. And I think this is a good time to segue into what the government actions were for the prosecutors. And you can kind of understand why. This is a complex case. There is institutional knowledge in the heads of Major Gannon and perhaps Lieutenant Colonel Sullivan. Certainly Major Gannon. I understand why -- I didn't understand it yesterday, but I understand why Major Gannon attacked, attacked, attacked Colonel Vokey's actions in remaining on active duty, because he knew what was in those packets.

And shame on you for not turning those over yesterday, because you know they're relevant. And they are relevant.

Everyone knew we were retiring. He came to my retirement ceremony. I think the judges got invited also, but they didn't show up because judges don't come to those things. But everyone knew we were retiring.

We discussed abandoning this case. I asked for an extension and so did Colonel Vokey. And when Colonel Vokey testified yesterday about how Colonel Redmond spoke to him when he asked for an extension, the sense that I got is -- from the cross-examination's questions -- is he shouldn't be believed. But he should be believed, because when you read the correspondence from Colonel Redmond, it is sarcastic, it is challenging, and it refuses to accept the prosecutor's arguments.

This is from Colonel Redmond: "None of the endorsements discuss active structure for which to place this officer against -- this officer against should he be granted sanctuary. Despite anything else, Lieutenant Colonel Sullivan has resounding endorsements from General Mattis, Lieutenant General Helland, Brigadier General Walker. Not sure what to think of Brigadier General's comment."

And in quotes, "I have tried to replace him from the active duty judge advocates, but I do not have available active duty judge advocates with his skill set, but he should plan on finding an active duty requirement."

"Our T/O requirement for lieutenant colonel, 4402 officers is 49. Our inventory is 90. With only eight with 2009 retirement dates giving us 33 more than T/O requires." Colonel Redmond.

So he is flippant and he is sarcastic and he is resistant to requests to continue on active duty. And that's what Colonel Vokey got and that's when he stopped asking. Because the end strength numbers are important for the Marine Corps. They're the law. And Colonel Redmond is required to manage those numbers, so he doesn't violate the law. And even when presented with an endorsement from General Mattis, Lieutenant General Helland, Colonel Jamison, Brigadier General Walker, he's not persuaded, because we're so much over on lieutenant colonels.

And so when Colonel Vokey says -- or Mr. Vokey says, I tried. I stopped trying because Colonel Redmond wasn't having any of it. And then you heard the government focus, Well, they granted you the last request. Well, he told you why he got the last request. And you know, the same thing -- the same thing happened to me. I

bumped against my EAS date literally a day or two before and I asked them for a couple of months just to be able to go on leave and travel. And that's what Colonel Vokey told you he did. I mean, that's the situation in 2008.

With respect to the appellate process and what he should have known and what he should have not have -- what he should not have known -- I guess I'm giving you some facts now -- we didn't know what was going on. I still don't understand the process. We thought it was going to be denied. Judge Ryan in the CAAF opinion goes on and on on why it should have been denied, the Article 62 appeal. And why we should be right back in court, because there's a right to a speedy trial. And that's what we thought was going to happen. And we didn't have that decision at the time. But everything rested on the likelihood of the government being denied this and then we're right back in court.

I don't know if you've read the Appellate Exhibits CIII and CIV -- or CIV and CV, I think.

MJ: CII and CIII?

CC (Mr. Faraj): CII and CIII.

MJ: These are the things I released to you?

CC (Mr. Faraj): Yes, Your Honor.

MJ: I have read through them. I read quickly through the individual endorsements that talked about Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury, but I've looked at every page of the documents.

CC (Mr. Faraj): The government went to great lengths to ensure they kept the trial team together. They violated Marine Corps statutory end strengths. Colonel Redmond talks about O-5 lieutenant colonels having to work in O-4 jobs, because we have so many lieutenant colonels in the 4402 OCC specialty. And yet they continued in their efforts to keep these prosecutors on this case, because they thought it was important.

I've heard you say it time and time again and other judges, prosecutors are fungible. Just give me another prosecutor. I've never heard you say that about a

defense counsel or a detailed counsel. Prosecutors are fungible. This case as lieutenant -- or General Mattis refers to it is one -- is one of the most important cases since the Vietnam war. It's important enough for the government to keep their prosecutors on it, because they have the institutional knowledge and they get endorsements from general officers up and down the train to persuade Manpower to keep Lieutenant Colonel Sullivan on active duty and Lieutenant Colonel Atterbury.

Major Gannon is on active duty, but we all understand the Marine Corps. And you understand that he's still here because of this case. I don't have any evidence to prove that to you, but officers of his rank and his experience would have normally moved on to other billets to do other things. But they've kept him here -- the convening authorities have kept him here because he has in his mind the institutional knowledge to try these cases. It's that important. None of that -- I would argue we required an equal effort to be expended to keep us on this case, but there was no effort by the government to ensure Staff Sergeant Wuterich continued to enjoy the -- the representation of his two detailed counsel.

Now, it would be disingenuous of me to say we bore no responsibility. We had some. But the responsibility based on -- based on the UCMJ lies with the government. They're the ones that are responsible for ensuring that he has detailed counsel, the record is protected, and he's afforded his rights. But there is some responsibility by -- by counsel. Well, what did we do? I worked through my boss at the time. He knew where I was at. I belonged to the same command. He spoke to Colonel Favors. Colonel Favors worked for General Walker. Please consider the endorsement from General Walker and Lieutenant Colonel --

TC (Maj Gannon): Objection. I'm not aware of any evidence that there was a conversation with Colonel Favors from Major Faraj's boss, if we can focus on that. Otherwise, my objection is facts not in evidence.

CC (Mr. Faraj): Lieutenant Colonel Vokey --

MJ: Okay. Hold on a second. Your response?

CC (Mr. Faraj): Lieutenant Colonel Vokey testified that he spoke

to the CDC, Colonel Favors.

MJ: That he spoke to the CDC. But the objection is that the CDC spoke to the SJA. Do we have evidence of that? The SJA to the Commandant, excuse me.

CC (Mr. Faraj): I don't have evidence of that. That's okay.

MJ: Okay. The objection's sustained.

Go ahead.

CC (Mr. Faraj): Very well. The CDC works for the SJA to the Commandant of the Marine Corps, Brigadier General Walker. Brigadier General Walker wrote an endorsement and put it in a package for Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury. They were aware.

Do I have a smoking gun of Brigadier General Walker denying the extension? I don't. But I know how the Marine Corps works and so does this court.

The packages before you are clear that the government was aware of this issue, they're aware of Haditha and Hamdaniyah and then they make it clear in their endorsements. This was a big deal. They were aware enough to ensure that the prosecutors remain on the case, and it would stand a reason that they should have been aware that the defense counsel also had -- or they had a duty to the accused to ensure that his defense counsel remained on the case.

I'm about to wrap up, but I want to make sure that we're not confusing the 6th Amendment right to counsel or the Article 38 right. R.C.M. 505 and 506 speak to the right of a detailed counsel. *Spriggs*, *Baca*, *Iverson*, and now *Hutchins* read together make it clear that detailed counsel may not set -- detailed counsel may not sever their relationship with the accused except for good cause and end of service is not good cause. And even if they were going to present good cause, it must be done in front of a military judge who excuses the detailed counsel. That did not happen here, Your Honor.

The government in their brief goes on and on. But in totality, they're talking about effective assistance of the counsel. That's under the Stickland analysis and that is not the issue here. The issue is a statutory

right that perhaps bleeds over into a 6th Amendment right. But your analysis must begin at the statutory level before you reach the constitutional level. But if you do reach the constitutional level, that you must look to the prejudice of the loss of these two counsel.

And I get emotional when I talk about the prejudice. They can talk about Colonel Tafoya being available and Major Marshall. That's great. They don't know this case. I know this case. And so did Colonel Vokey. And we had resources and access that we don't now have, with or without compensation. We just don't have those types of resources that we did when we were in uniform at this base calling from a 763 or a 725 number to a command saying send us a witness; or going to a meeting and letting them know that we're short something or we need something. It's different. And that's prejudice that this court can never -- not can never -- would be challenged to try and encapsulate it and analyze. That's at the 6th Amendment, if you reach the 6th Amendment analysis. But I think this case is made at a statutory level, because he is denied his right to detailed counsel.

When you read those packages that the government provided, you will see the tension between Colonel Redmond trying to manage numbers to ensure that they stay below a certain end strength. And so in order to keep one, they have to lose something else. And it just leaves me wondering why it is that Lieutenant Colonel Sullivan and Lieutenant Colonel Atterbury won out in the end with respect to end strength numbers over Lieutenant Colonel Vokey who was guaranteed by statute and perhaps Constitution to continue to represent Staff Sergeant Wuterich. I may not have articulated that as well as it came out -- as it was in my mind. But the point is, they let Lieutenant Colonel Sullivan go, but kept the prosecutors who are fungible.

MJ: Lieutenant Colonel Vokey.

CC (Mr. Faraj): I meant Lieutenant Colonel Vokey. Yes. They kept lieutenant -- they sent Lieutenant Colonel Vokey home, kept Lieutenant Colonel Sullivan; when Staff Sergeant Wuterich had the statutory and constitutional right to continue to have Lieutenant Colonel Sullivan and myself represent him -- lieutenant Colonel Vokey and myself represent him.

MJ: You don't -- do -- you don't draw any distinction between the fact that two people were talking about sanctuary and with Lieutenant Colonel Vokey and yourself -- well, Mr. Vokey now and yourself were talking about retirement dates?

CC (Mr. Faraj): There is no distinction. In fact, it works in our favor. The Marine Corps' -- you heard from Mr. Yetter when he talks about how challenging, how difficult it is to reach sanctuary and what is required, and now they have boards that they institute and make sure it's a fair process. I mean, there's no evidence in the record of this, but I didn't reach an end of service obligation. When I put in my retirement request, I had -- I didn't contemplate a case going for four or five years. In fact, and -- when the case supposed to go in March of 2008, I would have been well within that time period. And a few months extension would have solved the problem. So all those are red herrings.

But even if I could draw a distinction, even if it were easier to extend them on active duty, statutorily the government was required to keep Colonel Vokey and myself on active duty to continue to represent Staff Sergeant Wuterich.

I don't have any more in my presentation, Your Honor, but I'll be happy to answer some questions for you. And I've got some case law that I'd be happy to -- it's not in my brief and they're little paragraphs, but I can send those to you.

MJ: Okay. If it's simply cases and cites, you can offer those up to the court. We don't necessarily need to put them in the record. I do want them to be given to the government obviously.

CC (Mr. Faraj): I will do that, Your Honor.

MJ: Okay. I do not have any further questions at this point. I asked you a couple of questions during your argument. Thank you.

CC (Mr. Faraj): I guess I should tell you what remedy we want.

MJ: I think in your motion you argued about dismissal with prejudice of all charges and specifications.

CC (Mr. Faraj): Well, that's not the only remedy. I mean, there's -- the court may dismiss without prejudice if you find that -- we think that the government's actions and continue -- and because they were aware of this as demonstrated by the evidence you got today, that it merits dismissal of prejudice. But if you find that that doesn't rise to the level of dismissing with prejudice, then dismissal without prejudice is available to you.

So is -- this is an issue for the government. The government has to solve this issue. And I think post-*Hutchins*, especially if CAAF -- if CAAF endorses the finding, doesn't vacate or reverse, then the government is going to have to do something to fix this problem. And another -- so another option would be to abate until the government can decide how they're going to handle these kinds of cases.

We on the defense -- we on the defense side do not have a solution. I can't -- I can't institute a remedy to fix what -- what has taken place. The government may be able to and they have the resources to do so. It may take some mental gymnastics to figure it out, but it's going to have to be solved.

MJ: Thank you.

Major Gannon.

TC (Maj Gannon): Your Honor, can we take a 10- or 15-minute recess?

MJ: Take a ten-minute recess.

The court's in recess.

The Article 39(a) session recessed at 1039, 14 September 2010.

The Article 39(a) session was called to order at 1049, 14 September 2010.

MJ: The court is called to order. All parties present when the court recessed are once again present.

Major Gannon, please.

TC (Maj Gannon): Thank you, Your Honor.

Good morning, sir. The trap the court has to avoid in hearing Mr. Faraj's eloquent argument about the sacredness of counsel and the attorney/client relationship -- which the government agrees it is sacred. The problem with the argument is that there has been no severance event with respect to Mr. Faraj and there has been no severance event until yesterday with Mr. Vokey. I counted the times that Mr. Faraj actually went the whole way and said attorney/client relationship, ACR. And he said it about three times in his entire argument. He kept calling it, this, it, that, the relationship, the detailed counsel. And the court does have to be careful not to conflate what *Hutchins* stands for. *Hutchins* stands for the severance of an attorney/client relationship, not the dismissal of a detailed defense counsel or even the dismissal of an IMC. In fact, if I remember correctly, Captain Bass was an IMC. He was not a detailed counsel.

The ACR, the attorney/client relationship which is what the *Hutchins* opinion is all about, it's what the 6th Amendment and the interpretation thereof in that respect is about and it survives and it's alive and it's well here today with respect to Mr. Faraj. There were -- before yesterday, there were two entities on the planet that could sever the ACR with respect to Mr. Vokey: The accused and this honorable court. And after engaging in a 29-minute *ex parte* communication with the defense, this court in its wisdom decided to do a 506(c) good cause analysis and found good cause to sever the attorney/client relationship between Mr. Vokey and the accused.

Interestingly and from the government's perspective in an informative way despite repeated attempts by the government to ascertain Staff Sergeant Wuterich's feelings on this matter -- the matter being severance of the ACR, not the detailed relationship, but the ACR -- every attempt, every request the government has made, Your Honor, ask the accused. Let's have a colloquy. Let's determine first what his position is before we even talk about *ex partes* or severance or 506(c). Every effort the government made was frustrated by an unwillingness by the defense to allow us to explore via the appropriate mechanism, a colloquy by a military judge, what the accused's feelings were.

And, sir, that brings me to the point of the problem at

least from the government's perspective with the *Hutchins* case. It's not so much the *Hutchins* case per se, but it's the application of the *Hutchins* case. *Hutchins* is clearly designed to be a shield. It's designed to be a holding that protects the sacred 6th Amendment rooted attorney/client relationship. But here the defense seeks to use it as a sword. One fundamental distinguishing feature of the *Hutchins* case that we're not addressing here today is that *Hutchins* was a post-trial case. The actual members were impaneled, jeopardy attached when the government put in its first piece of evidence, and the analysis was built around the notion that they were deprived the assistance of Captain Bass at trial in this very courtroom with members in this very box. We're not there yet. And even in what the court very aggressively worded in their opinion, especially Judge Maxim's concurring opinion, very aggressively worded opinions -- even under those circumstances -- which clearly the court found very troubling -- even under those circumstances, they authorized a rehearing. They authorized the government to try Sergeant Hutchins once again. That's a telling and important point, because the defense seems to be approaching this scenario with this notion that, Hey, where we're at is fatal. You've got to dismiss. Whether it's with prejudice, without prejudice, you've got to dismiss because it's fatal. Well it wasn't fatal in *Hutchins*, because the government was authorized to do a hearing and retry Sergeant Hutchins.

The primary, single most important point that is undisputed here today is that the attorney/client relationship for both Mr. Faraj and Mr. Vokey, until yesterday, survives. *Wykeman* is a case that we cited in our brief. I believe it's 67 M.J. 495. And we relied on *Wykeman* because it's very clear that that case is applicable to these facts. As the court is aware from looking at the case, the convening authority denied detailed status of one of the counsel. And the court found importantly -- the court found importantly that where -- even where there's error in the failure of a convening authority to acknowledge the detailed counsel's status, where the ACR survived and the counsel continued to work on the case, the error was harmless.

Now, in addressing some of the concerns that Mr. Faraj articulated with respect to what amounts to an argument that there was disparate treatment between government

counsel and defense counsel. Acknowledging that the ACR survived and then the government -- so the government's fundamental position is we don't even get to that analysis because the ACR survived. There's no issue. That's the point. ACR survived; we move on. But I will address and distinguish some of the issues that Mr. Faraj brought to your attention with respect to this argument that there was some sort of disparate treatment between the government and defense counsel.

There are three factors that separate and distinguish the situation between the two sides. You cannot make a comparison, Your Honor, between the trial counsel and the defense counsel in this case because they differ in status, they differ in conduct, and they differ in time. What do I mean by that? Status. As the court indicated when you were questioning Mr. Faraj during his argument, the two differing status because they were looking for and requesting two fundamentally different things. In this case with a preferral event that took place in December of '06, subsequent detailing of counsel on 11 January 2007 and 17 January 2007 for Mr. Faraj and Mr. Vokey respectively, so about two, three weeks later, detailed counsel. Here you have the defense counsel seeking release from active duty by way of voluntary retirement. Neither Mr. Vokey nor Mr. Faraj had reached any sort of statutory limitations; neither were 2-P'd. They didn't have to go. They requested it. It's characterized under Chapter 2 of the MarCorSepMan as a voluntary retirement; i.e. they got to request it and the government then will approve it.

Status. I want to retire. That's the status of the defense counsel. Very, very, very radically different concept from specifically Lieutenant Colonel Sullivan's position. In fact, it's really the opposite. I want to stay on active duty. That's what a sanctuary package amounts to. I want to stay. The two sides differ in status.

Conduct. Not only do the two sides differ in status, but they differ in conduct as well. With respect to the defense counsel as I mentioned a moment ago less than a month after being detailed to this case, they requested retirement. Now during -- during your colloquy with Mr. Faraj or the court's questioning of Mr. Faraj, I believe the court mentioned, Well, what if we took *Hutchins* to its extreme? What does that mean? It could

mean a couple of things. Theoretically it could mean, if I'm an OIC of an LSSS, I may be tempted to assign only brand new judge advocates to the defense bar, because I know I've got them for three years. What's the outcome of that? Brand new judge advocates in the defense bar. In addition to that, think about how potentially an unscrupulous detailing authority could potentially sabotage a case. Imagine if you have someone with detailing authority who decides to detail counsel to a case that they know are going to retire or they know are going to EAS; and there's a big murder case and that person's detailed to the case. The system is turned on its ear if *Hutchins* is taken to its logical extent -- or to its extreme extension. Not its logical but its extreme extension. So here we have the defense counsel, both Mr. Faraj and Mr. Vokey, less than a month after being detailed to this case requesting retirement. The government's not put on notice of that. The trial counsel isn't put on notice of that. I guarantee if we look through this record in the infancy of this case, I don't believe anybody mentioned, Hey, we've requested retirement. So no one put the military judge on notice. Certainly -- and I'll get to this later -- but certainly when there was a denial event on a modification of the retirement date, no one brought that to the military judge's attention. But you have defense counsel requesting to retire less than a month after being detailed to the case, both of whom received a 1 April date for retirement.

Ultimately Mr. Vokey retired voluntarily after 20 years and 7 months of service. And Mr. Faraj after 22 years and 2 days of honorable active service. And again, to emphasize that they hadn't reached any statutory limitations. As evidenced by the several modifications that both Mr. Faraj and Mr. Vokey sought. Mr. Vokey sought a modification in February of 2008 seeking to modify his date from May to June. In April of 2008, seeking to modify the date from June to July '08. In May of 2008, seeking to modify the date from July to August. And on 21 July, to modify in date from 1 May to 1 June. Mr. Faraj requested two modifications. One in February of 2008 requesting that his modify date go from 1 May to 1 June. And one in April of 2008 requesting that the modified date be moved from 1 June to 1 August.

Your Honor, the record shows that what we've presented to the court in terms of paper, every single one, all

six of those modifications were approved. Every single one of them. And those six modification requests were predicated at least by the records we have on the need to continue to represent the accused in this case.

Now, very briefly, the reason why we put together a timeline for your analysis, sir, is to help you put into perspective some of the events and where this case was knowing that the military judge now detailed to the case wasn't always a part of this case. And it's important to note and look into the reasonableness of some of those modification requests. Because the defense, number one, is seeking 30-day continuance -- excuse me, modification requests. 30-day increments with the exception of Lieutenant Colonel Vokey's 23 July request which was from August to November. We've got to look at what was going on when these 30-day requests were being made. For some of these requests, for most of these requests, we were in an appellate litigation phase. And yesterday I had some back and forth with Mr. Vokey on this point and I felt -- while at times it got tedious, I felt it was important to demonstrate that the modification requests -- not only because they were only of 30-day durations -- and this goes to the conduct argument -- are unreasonable because of where we were at in the case. But it was also unreasonable because these defense counsel through picking up a telephone could have availed themselves of a very, very, very complete, relatively accurate and concise analysis and estimate of what was going to happen in this case. At Enclosure (8) to our motion, I've submitted to the court a posting from CAAF log drafted by Colonel Sullivan who is the detailed -- one of three -- detailed appellate defense counsel to this case, where he -- it's entitled an Article 62 timeline. And in it, Colonel Sullivan talks --

MJ: Hold on. Hold on one moment.

Mr. Faraj.

CC (Mr. Faraj): Your Honor, I've objected to things that are not part of the record. Frankly, I didn't know what CAAF log was until about a couple of months ago. I found out that it was a blog. That's not part of military practice and there's no evidence to suggest that anyone read CAAF log or was aware of CAAF log. I mean, he's aware of it, but nothing should be attributed to the

defense unless they have some evidence that we looked at CAAF log and knew what was going on.

MJ: The objection's overruled. It's been admitted into evidence. It's fair argument on the -- or it's a fair argument on the evidence as it's been presented.

Go ahead.

TC (Maj Gannon): It was posted on 5 July 2008. And it's important not because someone referenced the CAAF Log, but it's important to demonstrate that the defense team, writ large, the appellate defense team and the trial defense team in early July had a pretty darn good understanding of the timeline attendant to appellate litigation that necessitated attacking the military judge's ruling on R.C.M. 703 grounds at the CCA, on R.C.M. 703 grounds, again, at the CAAF, and then on the existence of a news gathering privilege again at the CCA level. Three levels, layers, or attempts at appellate litigation. This defense team was well aware of the timeline attendant to that effort, and yet we're seeing 30-day modification requests.

In fact importantly when both Mr. Faraj -- Major Faraj and Lieutenant Colonel Vokey left active duty pursuant to their voluntary retirement requests, the CAAF hadn't even issued its opinion yet. In fact, in Mr. Vokey's case -- excuse me, in Major Faraj's case -- and Major Faraj is right. I did go to his retirement ceremony and I enjoyed it. In August of 2008, the oral argument at the CAAF had happened 13 days previous. And with respect to Lieutenant Colonel Vokey's departure from active duty on 1 November, CAAF hadn't even issued its opinion yet which ultimately was issued on November 17, 2008. So we have a departure by defense counsel in this case from their active status during the pendency of this litigation -- this appellate litigation and that they were certainly on notice of or at a minimum could have availed themselves of a much more complete analysis of the timeline that would be needed to complete the appellate litigation.

The record that we have, that we've submitted to the court, documenting Mr. Faraj or Major Faraj, his two attempts to modify his retirement date, we have no denial event for Mr. Faraj. There's no evidence before this court that any entity ever said, Major Faraj, no.

From a documentary perspective, all four of Lieutenant Colonel Vokey's retirement requests, modifications were approved. Lieutenant Colonel Vokey -- Mr. Vokey testified that he had a conversation with Colonel Redmond and Colonel Redmond told him orally on the phone no. Having known Lieutenant Colonel Vokey for a very long time and known him to be an aggressive advocate, I have to believe that he at least considered in the wake of this oral telephonic conversation that he at least considered seeking redress elsewhere. Because there certainly were avenues he could have followed in an attempt to seek redress of an oral decision by a Marine O-6. And the fact is -- again, conduct. The fact is, is that the defense never did it. They never availed themselves of any of the remedies that could have at least questioned, analyzed, taken a second look at the decision that Colonel Redmond communicated to Mr. Vokey.

That's why -- going back to status and conduct -- the two sides differ. Because importantly, sir, I believe it's at Enclosure (2) of our motion on Page 2-8, which is the MarCorSepMan, Chapter 2. It says very clearly that modification requests are required via separate correspondence and have to be in writing. So even when the defense -- and Mr. Vokey testified that he was doing all oral modification attempts and requests. Even if you want to ascribe the best efforts to the defense counsel, they were still failing to comply with the rules governing modification attempts. There has -- I guess the point -- the sum total of this argument is that there has to be a point where the court says, Look, defense. You've got to do -- you've got to do a better job. You've got to do a better job of sending up the red flag. Again -- and that's forgiving for a moment that the ACR survived in Mr. Vokey's case until yesterday and continues to this very moment in Mr. Faraj's case.

MJ: Do you believe their actions would have been different if the *Hutchins* case was already in effect at the time that they were contemplating retirement?

TC (Maj Gannon): Your Honor, from Colonel Redmond's perspective in all candor, I don't know that it would have been. I honestly don't know. But I certainly can say this: Had it been brought to the court's attention, had the issue been brought to the convening authority's attention, had the issue been brought to the OIC of the LSSS's

attention, had it brought to the trial counsel's attention, I can guarantee that there would have been -- especially in the wake of the *Hutchins* decision -- there would have been a different outcome. Colonel Redmond, I can't say. And that's why I asked Colonel Vokey yesterday -- Mr. Vokey on the stand about the only person from whom he sought any relief was a lay person. A person who's not necessarily -- I don't know anything about Colonel Redmond but I have to assume he's not an attorney and he's not going to understand what the nature of the ACR is. What the nature and scope and breadth of an ACR is.

CC (Mr. Faraj): That misstates the evidence. He clearly said he spoke to Colonel Favors. Colonel Vokey said he spoke to Colonel Favors about the issue.

MJ: Okay. I understand the objection. I think it's misplaced. I think you were arguing about Colonel Redmond. And you're speaking of Colonel Favors.

CC (Mr. Faraj): He said the only person he spoke to was a lay person and that's not true.

MJ: That objection's sustained then. He also spoke with Colonel Favors.

TC (Maj Gannon): And so -- I'll deviate briefly from the argument and let's assess that. He spoke with Colonel Favors and apparently the testimony I heard yesterday was that Colonel Favors and Lieutenant Colonel Vokey did not enjoy a very good relationship. Because apparently, according to his testimony, Colonel Favors relieved Lieutenant Colonel Vokey from the RDC position. Interestingly, and in the wake of that, the convening authority in this case or then, General Mattis, apparently personally called Lieutenant Colonel Vokey, asked him for his version of events, and subsequent to that telephonic conversation between a three- or four-star general depending on if General Mattis had been promoted at that point and a lieutenant colonel -- in the wake of that conversation, he was reinstated. So Colonel Vokey may have spoken to Colonel Favors; but again, when we're talking about the reasonableness with which defense counsel are conducting themselves. And the natural and probable success rate of their conduct, perhaps, the government submits, that Colonel Favors may not have been the best source of a remedy. And here,

again in terms of conduct, the trial counsel associated with this case, Lieutenant Colonel Sullivan, he simply put in an AA form, sought endorsements, received endorsements, and submitted the package up to Headquarters Marine Corps. I was intrigued when during argument Mr. Faraj said that the fact that Colonel Redmond had negatively endorsed both Lieutenant Colonel Atterbury's package and Lieutenant Colonel Sullivan's package, I was intrigued by that line of argument of because had there been a positive endorsement by Colonel Redmond on both packages and apparently this -- not apparently. The conversation that Mr. Vokey testified to, that would seem to create maybe some disparate treatment. But the fact is there's continuity and consistency. Colonel Redmond, apparently his job is to say no and he did to everybody.

Again, Your Honor, the trial counsel in this case simply put together an administrative request, sent it up through the chain of command, reached out, got endorsements, submitted that to higher. Conduct. The defense did not.

Mr. Faraj continually and repeatedly emphasizes this notion that the government went to extreme measures to protect the integrity of the trial team, while simultaneously at every turn and attempt to undermine the continuity of the defense team. But, sir, that's just not accurate. Lieutenant Colonel Atterbury hasn't been associated with this case in over a year. He's --

MJ: That was one of my questions -- excuse me for interrupting -- is I got on this case late obviously. What was Lieutenant Colonel Atterbury's role and when did he leave?

TC (Maj Gannon): Lieutenant Colonel Atterbury was a member of Legal Team Charlie and he was assigned exclusively to what we call the reporting cases. He actually did the *Grayson* trial and was intimately involved in Lieutenant Colonel Chessani's courts -- efforts to try to prosecute him for court-martial for 92, for dereliction, and then subsequently his BOI.

MJ: So he did the BOI?

TC (Maj Gannon): He did, along with Colonel Sullivan and I believe Colonel Jamison.

MJ: Okay. And he has had no participation in this case for over a year?

TC (Maj Gannon): It's 2010. I believe he's been in Afghanistan -- he's on a 13-month deployment in Afghanistan currently and he's been there for several months, sir. He went back to the MEF some time ago and I don't have a date for the court.

MJ: That's okay. Go ahead.

TC (Maj Gannon): Another member of the trial team who has made an appearance -- and, again to emphasize, Colonel Atterbury -- Lieutenant Colonel Atterbury has never made an appearance in this case. But one of the members of the trial team who did make an appearance in this case, Major Donald Plowman, who is much more similarly situated to Mr. Faraj and Mr. Vokey. He did retire. He retired in May of 2010. The government didn't go to extraordinary lengths to keep him on active duty. The government didn't do any of those things. He retired. He's gone. He's off of the trial team. So of the four individuals that they sought -- or that they accused the government of maintaining this integrity -- the trial team: Myself, Lieutenant Colonel Sullivan, Lieutenant Colonel Atterbury, and Major Plowman. Two of those are gone. And as evidenced by my materials that were turned over to the defense in terms of my PCA to base. There's no smoking gun. There's nothing untoward. I even gave -- put in my wish list package and it clearly says all the little places that I was looking to go. Nothing there, sir.

But the fact is that the government has kept me on this case and has kept Lieutenant Colonel Sullivan on this case and there's no arguing that the institutional knowledge is something that the government is benefiting from. There's no doubt about that. But that same institutional knowledge exists right now as we sit here in this courtroom on the defense side as well.

MJ: And if anything -- and if any institutionalized knowledge was lost through Lieutenant Colonel Vokey, I guess the point was that that was the court's doing.

TC (Maj Gannon): Absolutely, sir. The severance that took place was the court's doing and not the government's doing. Otherwise, why did we do a 506(c) analysis yesterday --

why did the court conduct a 506(c) analysis and make a specific finding that it was releasing Lieutenant Colonel Vokey for good cause just as the *Hutchins* case requires.

Conduct -- status, conduct, and time. So we've talked about how the status is different. One's seeking to leave; one's seeking to stay. We've talked about the conduct of the two sides which differentiate them and render any comparison in terms of disparate treatment inapplicable to these facts. But perhaps the most compelling aspect of the difference between the two parties is time.

Mr. Faraj and Mr. Vokey left active duty in November of 2008. November of 2008 -- excuse me. Mr. Faraj left in August of 2008; Mr. Vokey left in November of 2008. So in August and November of 2008, they've departed. They're in civilian practice. Mr. Faraj is working with Mr. Puckett at the Puckett, Faraj law firm. And Mr. Vokey is with Mr. Haygood in Dallas. They've left active duty. They're gone.

Lieutenant Colonel Sullivan didn't even initiate his sanctuary package until March of 2009, so this notion that the way the argument comes across, the way the pleading presents the issue, it seems as if that in near simultaneous time, you've got these two sides looking to stay on active duty. You've got the defense and the government competing at the same time. And the argument is that the government, you know, had these endorsements and got to stay and the defense didn't. But that's not -- that's not what happened. What happened was during February of 2007, they asked to go. In April, March -- in April and May of 2008, they requested to stay a couple of times. And in August and November, they left active duty. All in 2008.

And again, Lieutenant Colonel Sullivan didn't even initiate the sanctuary request until 4 March 2009. So the entire episode with the defense teams or the two members of the defense team attempt to stay on active duty and postpone their retirement through these 30-day modification requests, that had all taken place. It was done, it was complete, it was over before the trial counsel even initiated a sanctuary package request.

Status, conduct, and time render these two in -- or not

comparable. And additional evidence, obviously the court is well aware of that when Lieutenant Colonel Vokey appeared in 22 March of 2010 -- this goes back to the notion that the ACR is alive and well, he represented on the record, "I continue to represent Staff Sergeant Wuterich." And that representation was severed yesterday by this honorable court.

The -- I'm looking at my notes of a couple of the points I wanted to address from Mr. Faraj's argument, and there's one that merits some comment. Time and time again during argument or otherwise or in pleadings, the defense has argued about the time attendant to the 62 appeal, and it was a long time. But it's important to note, Your Honor, that in enclosure -- at Enclosure (9) of our pleading, the defense completely and totally waived all delay attendant to the appellate process. And the government was chomping at the bit to get back into court after the CAAF opinion. The government was making every effort. We've got several 802 conferences that are on the record now where the government was saying, We've had a ruling from CAAF, we want to go back into court. And the military judge frankly, Lieutenant Colonel Meeks, and the defense wanted to see the appellate litigation run its course before we did any of that. And hence, we drafted this document and said, Well, we want you to sign off on this, and basically waive all speedy trial governing -- you know, authorities, Article 10 -- even though not applicable here. But we wanted it clear to make a record that the defense made a decision during the pendency of that litigation to wait it out. That's important that the court consider that.

The fact is, is that as we find ourselves here with this issue before the court, the admonishments of the *Hutchins* court have attached, have had purchase, and this court has acted on them. And what I mean by that, Your Honor, is that when the appropriate time came, this honorable court conducted an R.C.M. 506(c) analysis. And after evaluating the basis, the nature, and the scope of the good cause, the court elected -- the court elected pursuant to the rule to sever the attorney/client relationship between the accused and Mr. Vokey. And as I've said repeatedly, it survives here today with Mr. Faraj.

Your Honor, that's all I've got as far as argument.

Does the court have any questions?

MJ: I do not.

TC (Maj Gannon): Thank you, Your Honor.

MJ: Thank you.

Mr. Faraj, a brief rebuttal, please.

CC (Mr. Faraj): I'm going to try to take it just as a rebuttal, step-by-step, Your Honor.

Major Gannon began with talking about jeopardy attaching courts have -- do not make that distinction. Detailed counsel, once detailed, remain on the case until good cause based on R.C.M. 506. And that's what Article 38 guarantees. And that can't be broken. That can't be broken unless voluntarily or with good cause, *U.S. v. Palenius*, 2 M.J. 86 at 91 discusses that. *U.S. v. Andrews* requires an informed waiver. Once that detailing occurs, once that relationship forms, the ACR forms, for a detailed to be severed, *U.S. v. Andrews*, 44 C.M.R. at 222.

Major Gannon talked about the *Wykeman* case as argument or a case that should compel you to decide that there is no severance of the ACR. That case is really distinguishable. It was a guilty plea. It had two detailed counsel. One detailed counsel would not be accepted by the convening authority. The court decided that appropriate regulations gave the authority to the detailing authority to detail that counsel to the case even though as an assistant. And therefore, he should have been allowed to work the case.

The court then considers whether the assistant and detailed counsel were able to work the case and they decided that if there was harm, it was harmless. However -- this is the important part of the case -- interference with either detailed counsel -- we're not even talking about severance. There was severance here. Interference was determined to be a violation of Article 38(a). And that's at 67 M.J. 456.

I spoke to you earlier during my initial argument about the right to military counsel being greater than the civilian counterpart and I distinguished it from the

right of a civilian counterpart to a public defender. The Supreme Court makes that distinction at -- in *Morris v. Slappy* at 461 U.S. 1.

MJ: I'm sorry. Would you say the site again.

CC (Mr. Faraj): *U.S. v. Slappy*, Your Honor. 461 U.S. 1.

MJ: Thank you.

CC (Mr. Faraj): And in our -- our Court of Military Appeals sounds off on that in *U.S. v. Gnibus* or *Gnibus* -- perhaps the "G" is silent -- G-N-I-B-U-S, 21 M.J. at 8. And they say the congressional mandate that service members are entitled to more than the minimum that the constitution requires cannot be questioned by this court. And they go on to say the attorney/client relationship may not be severed without good cause.

Major Gannon argued on and on and on that the ACR did not sever. And I want to, again, distinguish it from 6th Amendment right to counsel, the general lay type of right to counsel and the type mandated by the UCMJ. It's a greater right. It's a right to a detailed counsel and a civilian counsel. And it simply is not -- the government does not meet it's obligation by simply having the counsel available or the person available. It must be a detailed counsel available.

Major Gannon argued about their case in *Hutchins* was not the -- the decision of the court was not fatal to the charges. The *Hutchins* case -- the *Hutchins* court dismissed the charges. They authorized a rehearing, but they dismissed the charges. They didn't send it back for resentencing. They didn't send it back for some other -- they dismissed the charges. That is the most extreme remedy they have and that's what they did. Now they authorized a rehearing and they get to do that. And that's important for you to consider in this case.

The government, if you hold for the defense in this case, may appeal; probably will appeal. And the courts will sound off on it, and you'll probably be right; but even assuming you're wrong, we get to do this over again. If we move forward without a remedy and there's a conviction, this man may find himself in jail for several years before he is availed of whatever legal right the court decides that he should have. We don't

get a right to appeal. We don't have a right to an interlocutory appeal of your decision. They do.

Major Gannon went on and on and on to argue something that I believe is a red herring. This is an Article 38 issue that is clarified by the case law on what is good cause. This issue about reasonableness of the defense counsel's conduct, status, conduct, and time is really a red herring. We asked to remain on active duty. We didn't have a red telephone to Lieutenant General Mattis or perhaps to the immediate supervisors that led to General Mattis, but we took the measures that we understood necessary to extend on active duty. The 30-day extensions -- remember those happened about two to three months before we got to those dates in anticipation of getting back into trial. Redmond's correspondence is revealing. It supports what Colonel Vokey said all along in which Major Gannon now attacks.

In any event, this isn't about -- this isn't about what Lieutenant Colonel Sullivan did and what myself and Lieutenant Colonel Vokey did. This is about where the government wound up after four and a half years of litigation and where we're at. They continue to have their trial team intact. This defense team is no longer intact. And if it is intact to the extent that Major Gannon is arguing that the ACR survives, it is not -- it is not intact as a detailed counsel and civilian counsel. And that's what Article 38 requires.

The fact that Lieutenant Colonel Sullivan requested to remain on active duty in March of 2009. Well, I don't know why he did it then, but it probably -- it's probably because he came to the end of his tour or whatever it was, whatever period that he was called to active duty for. When we submitted our request for retirement 14 months out, who -- who would have known that we were going to be here in 2010? Most cases don't take that long. Even complex cases, you know, you're done within a year. We were 14 months out and we got another 4- to 5-month extension on top of that.

So that's a red herring and there is nothing in the -- in the case law that supports the argument as to reasonableness of the defense counsel. Defense counsel have obligations, requirements. They're required to show up in court. That's what *Hutchins* talks about and they admonished Captain Bass for not coming. We're

here. We're here to argue. And that shouldn't be held against us or held against our client because we decided to show up and represent the client in this case.

In the entire argument about unscrupulous detailing authorities detailing people at the end of their careers or at the end of their tours or junior counsel, I think we have faith and trust the Marine Corps officers to do the right thing when they're -- when they have a job to do. And again, it's -- I find that to be an unreasonable argument.

We went on and on about Lieutenant Colonel Atterbury. The correspondence in Lieutenant Colonel Atterbury's package clearly states that he is on the Haditha and Hamdaniyah case. And that's all we've argued. We didn't argue that it was specifically for this case. These cases were considered in totality as a whole, and they decided to keep a trial team on the cases for their institutional knowledge and that's what this is about.

And I didn't -- I didn't understand the whole thing about the speedy trial. We waived our right to a speedy trial a long time ago. But this has nothing to do with speedy trial. This has to do with Article 38 rights that are supposed to be afforded to Staff Sergeant Wuterich by detailing of his detailed counsel. And one issue that was not addressed by Major Gannon -- and I want to reinforce it -- and he talked about you wanted to -- you should have asked Staff Sergeant Wuterich who he wants to be represented by -- or whether he wants to be represented by Lieutenant Colonel Vokey. That's not the colloquy. The colloquy that never took place is the one where you, sir, would ask him -- well, you'd ask the detailed counsel, Now is anyone else detailed to this case? And there is. It was Lieutenant Colonel Vokey and Major Faraj, and they've never been released.

And so that's the -- that's the heart of the issue that the -- that this court has to deal with; but more importantly, that the government has to deal with.

The landscape has changed. *Hutchins* created a problem that the government must now solve. One of the remedies is to dismiss this case and start over again and that would solve the problem. He gets new detailed counsel, and we begin litigation again.

But if you find -- and I don't think the government's argument as to reasonableness of the conduct of defense counsel. But even if that were a consideration for you, then I'd ask you to consider what we did to remain on this case. And I can't prove a negative. I can't prove what discussions that happened or who I should have talked to and who I should have talked to and who I should have -- did not talk to. I submitted correspondence. I seem to recall that the process to withdraw a retirement was much different than they -- but I don't have evidence. I don't have a memory from two years ago.

But here's what's more important, what's really important: The duty is on the government. The government recognized that Haditha was going on. Colonel Jamison was right across the grinder. He was aware that Vokey and Faraj was leaving. He was aware that we were retiring. He was aware Haditha litigation was ongoing. And at the time -- and I'm not blaming him for anything -- at the time, no one grasped, no one understood that release from active duty is not good cause. We now know it's different. That's -- that's the issue here, Your Honor. Unless you have questions, I'm done.

MJ: I do not. Thank you.

CC (Mr. Faraj): Thank you.

MJ: Okay. As I see it now then, what we need to discuss is the next time that we get on the record. We'll do that off the record after we get done here, and we'll talk about the date of when we will hear the UCI motion.

Anything else from counsel?

TC (Maj Gannon): Your Honor, the only thing the government would say is -- it has to do with Mr. Faraj's argument. It's one sentence. Dismissal without prejudice, this case will reach the statute of limitations on November 19, 2010. I just wanted to bring that to the court's attention.

CC (Mr. Faraj): Is that a consideration for the court, Your Honor?

MJ: I just wrote it down, so I don't know if it's a

consideration or not. But if you would like to rebut that, you may.

CC (Mr. Faraj): Well, I don't have any case law but based on practice in this court and in other courts in this circuit, judges make decisions based on law of the case and not whether a crime was committed or not committed, whether the accused is innocent or not innocent; but based on the law before the court and the facts before the court. And so that would be our position.

MJ: I understand that completely. Thank you.

All right. Nothing further then, the court's in recess.

The Article 39(a) session recessed at 1137, 14 September 2010.

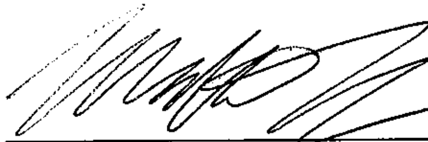
AUTHENTICATION OF THE RECORD OF TRIAL

in the case of

Staff Sergeant Frank D. Wuterich, XXX XX 3221, U.S. Marine Corps, Headquarters Battalion, 1st Marine Division, Marine Forces Pacific, Camp Pendleton, California 92055.

TRIAL COUNSEL CERTIFICATION

In accordance with R.C.M. 1103(i)(1)(A), I have examined the record of trial in these proceedings and caused those changes to be made which are necessary to report the proceedings accurately.



M. R. BROWER
Captain
U.S. Marine Corps
Trial Counsel

20101221
Date

MILITARY JUDGE AUTHENTICATION

D. M. JONES
Lieutenant Colonel
U.S. Marine Corps
Military Judge

Date