WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES v. FRANK D. WUTERICH XXX XX 3312 Staff Sergeant U.S. Marine Corps	)	GENERAL COURT MARTIAL **DEFENSE MOTION FOR APPROPRIATE RELIEF TO DISMISS ALL CHARGES AND SPECIFICATIONS FOR VIOLATION OF RIGHT TO DETAILED COUNSEL** 26 August 2010

I. Facts.

The accused in this case was detailed two counsel, one was an active duty U.S. Marine Corps Lieutenant Colonel –LtCol Colby Vokey- and the other an active duty U.S. Marine Corps Major –Maj Haytham Faraj. Both officers had service time as ground combat officers before becoming attorneys.

LtCol Colby Vokey and Maj Haytham Faraj were detailed to the case on 11 and 17 January 2006 respectively. At the time of his detailing, LtCol Colby Vokey was in the billet of Regional Defense Counsel for the Western Region. Maj Haytham Faraj was the Senior Defense Counsel at Legal Team Echo, Camp Pendleton, CA. Both officers were scheduled to retire from active duty on February 1, 2008. As this case lingered with the development of issues that were appealed by the government to the NMCCA and higher. Both detailed counsel requested and extended their retirement dates until May 1, 2008. In April of 2008 both officers requested further extensions until August 1, 2008. Both officers desired to continue to represent their client, SSgt Wuterich. The extensions were, therefore, requested in order to continue representation. On August 1, 2008, Maj Faraj was retired and went into private practice. LtCol Colby Vokey requested another extension and remained as the sole detailed counsel on the case.

LtCol Vokey's request for an extension was approved until November 1, 2008, with an admonishment from Col Patrick Redmon that he would receive no more extensions. LtCol Vokey sought to persuade Marine Corps manpower that he was ethically and duty bound to remain on the Haditha case to represent his client. But he was told that he would receive no more extensions.

LtCol Vokey was a key member of the defense team and invaluable to the preparation of the defense in this case. He is the only attorney that traveled to Iraq to conduct a site visit. He walked through the houses where the alleged crimes occurred. He walked through the town of Haditha and took photos. He traveled by foot and vehicle along routes Viper and Chestnut. He studied the terrain, visibility from the roads, distances to the houses and environmental conditions. He also entered all the houses where the alleged unlawful shootings occurred. He deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses that were present but unknown. Throughout the period of the site visit and the conduct of the depositions, LtCol Vokey was accompanied by SSgt Wuterich who provided him key information and assisted him in his survey of the area and his interview of the witnesses.

LtCol Vokey also took on a sizable portion of the case preparation. He interviewed numerous witnesses who are located in the U.S. He spent hundreds of hours getting to know SSgt Wuterich and his family to better understand his character and personality so that he may genuinely advocate for his client.

When LtCol Vokey was denied his request to continue to represent SSgt Wuterich, and admonished his requests for extension would no longer be approved, he retired from the Marine Corps. Unsure of the status of his requested extensions he sent his family to his home state of Texas so that they may have some stability while he waited. With his family gone but with the

APPELLATE EXHIBIT XCIV
PAGE 2 OF 136

continuing desire to continue to represent SSgt Wuterich, LtCol Vokey moved a towable trailer to the camp grounds at Lake O'Neill aboard Camp Pendleton to live in as he awaited trial. LtCol Vokey was devoted to representing SSgt Wuterich and SSgt Wuterich was wholly satisfied with that representation. With SSgt Wuterich as his sole client, LtCol Vokey devoted all his working hours to preparing the case. He was in the process of turning the RDC billet over to his replacement, allowing him even more time to prepare the case.

When his last request for an extension was denied, out of time and without other options, LtCol Vokey packed the remainder of his personal gear and left the Camp Pendleton area in August of 2008. He called SSgt Wuterich to notify him that he was being forced to leave. SSgt Wuterich was left wondering what happened to his lawyers, and voiced that concern.

LtCol Vokey left Camp Pendleton and headed to Texas to join his family and to seek employment. He searched unsuccessfully for weeks because he neglected to prepare himself for his post military career as he dedicated all his time to preparing SSgt Wuterich's case. In October of 2008, Mr. Vokey was offered a position with the Law Firm of Fitzpatrick, Hagood, Smith and Uhl, LLP. This is the same firm that represented Sgt Hector Salinas. Sgt Hector Salinas is one of the shooters alleged to have fired on some of the people killed on November 19, 2005, facts that were the basis of the charges against the accused in this case. He was also the only Marine to witness the sniper firing from the vicinity of one of the houses soon to be cleared by him and his Marines. It was at Sgt Salinas's insistence that his platoon commander authorized the clearing of the Iraqi houses to the south of the site of the initial attack on the Marines.

Recognizing the conflict between his previous representation of SSgt Frank Wuterich and employment with the law firm representing a witness who may be adversarial in the case, Mr.

Vokey discussed with SSgt Wuterich the fact that a conflict now existed. He explained that he would try his best to assist but that SSgt Wuterich had to understand that a conflict existed. Left without recourse as to representation, SSgt Wuterich accepted that initial assessment.

The case wallowed as issues were being appealed and re-appealed between CBS and the Government from February 2008 and December 2009.

In December of 2009, CBS relented and turned over the CBS 60 Minutes outtakes sought by the Government. On May 13 and 14 of 2010, both sides were back in court without a detailed counsel. Mr. Vokey made an appearance as a civilian counsel though he took no active participation. Subsequent to that appearance, the defense team began to prepare the case again and realized the conflict that now existed in having Mr. Vokey on the team.

Concurrent with the realization of the conflict, the defense team became aware of the NMCCA decision in the case of *U.S. v. Hutchins* which essentially rejected EAS as the basis for severing the attorney client relationship. Like the facts in Hutchins there was nothing extraordinary that would have prevented the government from continuing LtCol Vokey on active duty as he had repeatedly and forcefully requested. By contrast, the Government trial team kept two reserve judge advocates on active duty so that they may continue to work on the Haditha case –LtCol Paul Atterbury and LtCol Sean Sullivan. Both officers are reservists who were extraordinarily extended and allowed to reach sanctuary for the purpose of retirement.

By forcing the two detailed defense counsel off active duty, the defense lost the advantage of proximity to witnesses, the advantage of having an office space adjacent to the courthouse, the authority inherent to the rank of two field grade officers to request resources, witnesses and engage in trial negotiations, the irreplaceable impact the credibility, respect and command presence of an attorney in uniform decorated with numerous personal awards and

APPELLATE EXHIBIT XCIV
PAGE 4 OF 136

campaign ribbons would have on a panel of jurors, and the loss of ready access to the tens of thousands of documents located at offices adjacent to the courthouse. Both Mr. Vokey and Mr. Faraj live in different states than the state in which the court-martial is being held. The trial counsel wielded their governmental powers to delay the case by filing an appeal that yielded evidence of no additional prosecutorial value but that caused the loss to the accused of two detailed counsel. At the same time, trial counsel applied the same powers to delay transfers of trial counsel and make extraordinary extensions of active service of reserve prosecutors who reached retirement sanctuary just so they may remain on the case.

SSgt Wuterich was informed by both LtCol Vokey and Maj Faraj that they may be leaving active duty if the Marine Corps did not keep them on. SSgt Wuterich expressed his desire that both detailed counsel remain on his case as detailed counsel. He was told that although he has a right to continue his attorney-client relationship, discharge of the two officers from active duty would sever that A-C relationship with his detailed counsel. He was further assured by both officers that they would not abandon him but that the relationship would not be as detailed counsel. SSgt Wuterich was never informed that he had a right to object to the impending departure. Both his military lawyers explained to him that although that it is his right to have counsel of his choosing, the Government was refusing to continue to allow them to serve as his detailed counsel.

LtCol Vokey and Maj Faraj raised the issue in court on numerous occasions and submitted affidavits as part of the Defense' challenge to the jurisdiction of the NMCCA to hear the Article 62 appeal on the CBS outtakes issue because the delay would sever their attorney-client relationship with SSgt Wuterich which would prejudice his defense. *See United States v. SSgt Frank D. Wuterich*, Crim. App. No 200800183, P. 17 (dissenting opinion). In her dissenting

APPELLATE EXHIBIT XCIV
PAGE 5 OF 150

opinion Judge Ryan identifies and discusses the issue of the prejudicial impact delay will have on the defense through the loss of counsel that the Government also conceded in its oral argument before the Court of Appeals for the Armed Forces.

SSgt Wuterich did not request that his attorneys withdraw from the case. Furthermore, no good cause existed to sever the attorney-client relationship between SSgt Wuterich and his detailed counsel.

II. Discussion.

a. WHETHER AN ACCUSED'S RIGHT TO COUNSEL IS VIOLATED WHEN HIS DETAILED MILITARY COUNSEL, OVER THAT COUNSEL'S OWN OBJECTIONS, IS DISCHARGED FROM ACTIVE DUTY SEVERING THE ATTORNEY-CLIENT RELATIONSHIP WITHOUT THE EXPRESS CONSENT OF THE ACCUSED AND BARRING A SHOWING OF GOOD CAUSE FOR THE SEVERANCE OF THE RELATIONSHIP.

The Sixth Amendment to the United States Constitution affords a Defendant the right to be represented by counsel in a criminal proceeding and recognizes a qualified right to choose that counsel. *United States v. Swafford*, 512 F.3d 833, 839 (6th Cir. 2008) (internal citations omitted). Where no factors exist to lead the court to believe that representation by a certain attorney will have an adverse impact on the integrity of the proceeding, a court commits a fundamental constitutional error that can never be harmless by denying a defendant his or her attorney of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149-51 (2006) (holding that district court erred in denying *pro hac vice* motion of defendant's counsel of choice and reversing defendant's conviction).

The right to counsel of one's own choosing is a settled issue under the Sixth Amendment to the United States Constitution barring extraordinary circumstances. "The right to effective

APPELLATE EXHIBIT XCIV
PAGE 6 OF 136

assistance of counsel and *to the continuation of an established attorney-client relationship is fundamental* in the military justice system." *United States v. Hutchins*, NMCCA 200800393 at 7(En Banc)(Emphasis in original) (*Citing United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988)) (internal citations omitted). Whether an established attorney-client relationship is properly severed is a question of law which we review *de novo*. *United States v. Allred*, 50 M.J. 795, 799 (N.M.Ct.Crim.App. 1999). When the Government decided to take an interlocutory appeal on an evidentiary matter in this case, it had an obligation not to disturb the status quo of the defense team representing SSgt Wuterich. Instead, it went to extraordinary lengths to *maintain* the status quo of the trial counsel team *who are all fungible* and *refused to extend detailed counsel* on active duty so that they may continue to represent SSgt Wuterich.

SSgt Wuterich had an absolute right to keep his detailed counsel once that relationship was formed. Although a military accused does not have a right to select a detailed counsel of his choosing, once counsel is detailed and A-C forms an accused has an inviolable right to keep that attorney. When SSgt Wuterich was arraigned he was explained his rights by the Military Judge he was told "SSgt Wuterich, you have the right to be represented by LtCol Vokey and Maj Faraj, your detailed military defense counsels. They are provided to you at no expense to you." *See* DA PAM 27-9 at 2-1-1. The notification of rights provided by the judge at an arraignment originates under Article 27 of the Uniform Code of Military Justice and is enabled through R.C.M. 506(a) which grants an accused a right to counsel or an individual military counsel. Once an attorney-client relationship forms, a detailed counsel may only be excused upon request of the accused under R.C.M. 505(d)(2)(B)(ii), or upon a showing of good cause. R.C.M. 505(d)(2)(B)(iii). The unanimous *en banc* decision by the NMCCA in *United States v. Hutchins*,

APPELLATE EXHIBIT XCIV
PAGE 7 OF 136

definitively rejects a detailed counsel's end of active service, and by extension retirement, as good cause to sever the attorney-client relationship.

Permitting the Government to discharge military counsel, thereby terminating an accused's right to detailed counsel, would render the right to detailed counsel meaningless. If the relationship could be severed by governmental actions, such as severance of the attorney-client relationship through an involuntary discharge or even a voluntary discharge of detailed counsel, it would give the Government the unhindered power to take certain actions that would inevitably result in the release of counsel. Reassignments, deployments, delays, transfers, and discharges would all enable the Government to manipulate the process to rid itself of effective defense counsel. Even if the Government did not act with a nefarious purpose, the appearance of impropriety would cast grave doubt on the military justice system. *See United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), aff'd, 33 M.J. 209 (C.M.A. 1991). Permitting such an outcome from Governmental action eviscerates the right to detailed counsel. Government counsel and Convening Authorities unhappy with a vigorous defense, as was happening in this case and as previously occurred in the Hamdaniya[1] case of *U.S. v. Trent Thomas*, could simply file interlocutory appeals, delay trials to await defense counsel's discharge or cause the transfer of defense counsel to sever the attorney client relationship.

Throughout early 2008, LtCol Vokey and Maj Faraj recognized that their pending discharges raised a problematic matter with respect to the A-C relationship in the case and requested delays to their retirement. They were both extended a few months but were then sternly warned that no further extensions would be granted. *See Exhibit*_____.

[1] Mr. Faraj represented Cpl Trent Thomas in a murder trial arising out of events in Hamdaniya Iraq. That case was tried against the same trial team which demonstrated visible consternation when the members returned findings and a sentence favorable to the defense.

APPELLATE EXHIBIT XCIV
PAGE 9 OF 136

The denial of the requests of defense counsel to extend on active duty not only ended the attorney client relationship, it had effects that went far beyond those immediately obvious. The defense team in this case was assigned a file room in the defense building to store and organize their case files. They were also assigned a defense clerk, an NCO whose sole duty was to keep files organized and manage the case file. When both detailed counsel left the case, the clerk assigned to the case was also reassigned. The case file was left in the file room to be taken over by a new detailed counsel who was not assigned until July of 2010, who is located at a base about 30 miles away, and who was assigned to satisfy the military judge's constant inquiries of the government as to why no detailed counsel was yet assigned as late as May of 2010. The files have since been moved; some have disappeared, and what remains lack any sense of organization.

Continuity on the prosecutor's side, on the other hand, continued undisturbed. The same Trial Counsel remain on the case supported by an army of assistants. They continue to be located at the same building aboard the same base with access to witnesses and evidence. Although the defense has no access to their files, one can only imagine that after two years, their case file would be even more organized and their trial preparations complete.

b. WHETHER THE IMPROPER SEVERANCE OF THE ATTORNEY CLIENT RELATIONSHIPS PREJUDICES THE ACCUSED'S STATUTORY RIGHT TO COUNSEL SO THAT THE ONLY REMEDY TO THE GOVERNMENTAL ACTION IS DISMISSAL OF THE CASE.

The right to counsel is inviolate under the Sixth Amendment to the U.S. Constitution. Amend. Sixth, U.S. Constitution. *See Scott v. Illinois*, 440 U.S. 367 (1979). Article 27 of the U.C.M.J. and R.C.M. 506(a) incorporate those constitutional rights and extends them to military defendants. The President went further in providing military defendants with counsel rights by

APPELLATE EXHIBIT XCIV
PAGE 9 OF 136

mandating that each military accused benefit from the representation of detailed counsel regardless of indigency. *Id.* The right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system." *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988). In *U.S. v. Hutchins*, the Navy Marine Court of Criminal Appeals addressed the propriety of the severance of an attorney client relationship for good cause 68 M.J. 623 (N.M.Ct.Crim.App. 2010). Finding that end of active service can never be good cause to sever an attorney-client relationship, the court set aside the findings and sentence. *Id.* In this case, the attorney client relationship was severed despite a herculean effort to continue representation by the detailed counsel - namely LtCol Colby Vokey. He submitted numerous requests to extend his retirement date so that he may continue to represent SSgt Wuterich. He moved into a trailer located at a camp ground. He made calls, pleading his case to manpower, to persuade the decision-maker to allow him to remain on active duty to represent his client but to no avail. Release of a defense counsel from active duty should occur only with the approval of the military judge for good cause, or with the "express consent" of the accused. *United States v. Hutchins*, 68 M.J. 623, 628 (N-M.C.C.A. 2010). "Good cause" is defined to include, "physical disability, military exigency, and other extraordinary circumstances which render the . . . counsel . . . unable to proceed with the court-martial within a reasonable time." 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life. *Id.* at 628-9. (citing Rule for Court-Martial 505(f), Manual for Courts-Martial, United States (2005 ed.). There can be no greater example of normal conditions of military life than the commonality of an end of service of a military member. All military members eventually end their military service. The majority join with the knowledge of an exact day of when their service will end. The military services know exactly when members

APPELLATE EXHIBIT XCIV
PAGE 10 OF 136

are scheduled to be discharged or retired. Accordingly, such an event is common, regular and countenanced as a part of everyday military life. Defense counsel in this case recognized that their ending service would interfere with their obligation to represent their client. They notified the Government and requested extensions. Instead of assisting the defense lawyers in extending their retirement dates so that they may continue to represent their client, the government impeded any further extentions. Meanwhile, trial counsel were extended in their assignments even though the prosecution has no right to any particular counsel. One reservist trial counsel in the same rank as the senior detailed defense counsel was extended on active duty until he reached sanctuary for retirement - an event so rare that it only happens in the most extraordinary of circumstance because it disrupts the statutory limits on the number of officers each military service may have on active duty under Title 10 of the United States Code. Going to such extraordinary lengths to keep the prosecution team together while ignoring the case law counseling that excusal for good cause be authorized "only in cases where there exists 'truly extraordinary circumstance[s] rendering virtually impossible the continuation of the established relationship." *Hutchins*, 68 M.J. 629. (Quoting *United States v. Iverson*, 5 M.J. 440, 442-443 (C.M.A. 1978).

The circumstances in this case, on the other hand, were quite *ordinary*. The Government had advance warning and a compelling reason to act. But even in the absence of warning of the impending separations, they were still required to act. Instead, they failed to act, causing the severance of the attorney client relationship while going to unusual lengths to overcome statutory hurdles to keeping reserve officers on active duty when the actions served the interests of the Government. Such astonishing efforts in service of the prosecution and to the detriment of the defense in violation of the accused's fundamental statutory right to the same detailed counsel he

APPELLATE EXHIBIT XCIV
PAGE 11 OF 136

was assigned and whom he desired to continue to represent him calls for a remedy worthy of the violation and the misconduct. Moreover, in light of the *Hutchins* decision that clearly defined the "good cause" requirement for governmental severance of the attorney-client relationship, the only remedy available to this court is dismissal of the charges with prejudice because that relationship can now never be restored.

c. WHETHER THE HARM OR PREJUDICE RESULTING FROM THE GOVERNMENTAL ACTION IN IMPROPER SEVERING THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN ACCUSED AND DETAILED COUNSEL IS REMEDIED WHEN THE SAME COUNSEL CONTINUES REPRESENTATION AS A CIVILIAN.

The only appropriate remedy in the case is dismissal of the charges. *See United States v. Hutchins*, 68 M.J. 623 (N.M. Ct. Crim. App. 2010). The continued service of previously detailed counsel in a civilian capacity is insufficient to satisfy the requirement established by Article 27 of the U.C.M.J. and R.C.M. 506(a). The Rule specifically affords a right to civilian counsel *and* detailed counsel. SSgt Wuterich was detailed counsel. Those counsel were LtCol Vokey and Mr. Faraj. Once the two detailed counsel formed an attorney client relationship with the client, their dismissal could only be effectuated through the client or by a showing of good cause before a military judge. R.C.M. 505(d)(2)(B). Good cause has already been discussed, *supra*. Improper governmental action or inaction resulted in severing the A-C relationship between detailed counsel and the accused. The Government should not be permitted to benefit from an action that was in clear and direct contravention of the law. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (holding that whatever remedies are available would be insufficient because the government's objective of unseating the military judge had been achieved thus requiring a dismissal of the charges with prejudice).

APPELLATE EXHIBIT XCIV
PAGE 12 OF 130

Even if R.C.M. 506(a) permitted replacement for a detailed counsel with a civilian counsel with the consent of the accused, continued representation of the accused by LtCol Vokey is prohibited under JAGINST 5803.1B and Title 18 U.S.C. 203. The regulation and the statute in essence prohibit a reserve or retired officer from representing a client for compensation if representation began while the officer was in government service. The only way for LtCol Vokey to continue to represent SSgt Wuterich is to do so without collecting compensation. And although the JAGINST authorizes compensated representation if the officer seeks permission from the JAG beforehand, Government counsel in this case accused the former detailed counsel in the case of United States v. Hoeman of ethical violations and solicitations of a federal offense when the civilian counsel in that case suggested the government pay the former detailed counsel an hourly retainer to resolve an improper severance of an attorney-client relationship.

There is no adequate remedy available in this case except a dismissal of the charges. The Government has achieved its objective of severing the client from the effective representation of two experienced detailed counsels. The two detailed counsel were senior in rank to the most of the trial counsel. They wielded the authority inherent to their field grade ranks. They had little or no additional duties but preparing for this case. They had access to resources, witnesses, the case file, and enjoyed the credibility associated with appearing in a uniform before members. SSgt Wuterich will never have the benefit of such representation even if both lawyers continued to represent him as civilians. SSgt Wuterich has been irreparably prejudiced by the Government's improper conduct which may only be ameliorated by dismissal of the charges with prejudice.

Finally, if the destruction of SSgt Wuterich's defense team is not prejudicial, why then did the Government keep their trial team together? LtCol Sullivan has been kept on active duty

APPELLATE EXHIBIT XCIV
PAGE 13 OF 136

even though he is a reservist, specifically to prosecute this case. And Major Gannon has been kept in the same location for over four years to also prosecute the case. These facts alone concede the prejudice of breaking up a defense team because the government refuses to allow the break-up of the prosecution team.

III. Evidence.

Exhibits

a. Email to Ltcol Vokey dtd May 16, 2008, denying request to extend

b. *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct. Crim. App. 2010)

c. Government brief regarding loss of counsel in the case of *United States v. Hohman.*

d. CAAF decision in United States v. Wuterich, CAAF No. 086006; Judge Ryan M. Dissenting opinion; *CBS Broadcasting Inc. v. Navy Marine Corps Court of Criminal Appeals et al. and In re Frank Wuterich*, No. 08-0821/MC

e. LtCol Vokey C. and Maj Faraj H. Affidavit to the Court of Appeals for the Armed Forces *CBS Broadcasting Inc. v. Navy Marine Corps Court of Criminal Appeals et al. and In re Frank Wuterich*, No. 08-0821/MC.

IV. Relief Requested.

Wherefore, the accused, by and through undersigned counsel, requests that all charges and specifications be dismissed with prejudice for violation of the accused right to counsel under the Sixth Amendment to the U.S. Constitution and Article 27 of the UCMJ as implemented by R.C.M. 506(a)

V. Oral Argument.

Respectfully requested.

APPELLATE EXHIBIT XCIV
PAGE 14 OF 136

By: /S/
Haytham Faraj
Attorney for Plaintiff
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

26 August 2010
Date

APPELLATE EXHIBIT XCIV
PAGE 15 OF 136

CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon government counsel on August 26, 2010.

By: /S/
Haytham Faraj
Attorney for Plaintiff
1800 Diagonal Road
Suite 210
Alexandria, VA 2314
Tel 888-970-0005
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

26 August 2010
Date

APPELLATE EXHIBIT XCIV
PAGE 16 OF 136

Marshall Maj Meridith L

From: Colby Vokey [vokeycc@yahoo.com]
Sent: Wednesday, August 25, 2010 10:02 PM
To: Marshall Maj Meridith L; Neal Puckett; Haytham Faraj
Subject: Fw: Request for modification of retirement

----- Forwarded Message ----
From: Vokey LtCol Colby C <colby.vokey@usmc.mil>
To: vokeycc@yahoo.com; Vokey LtCol Colby C <colby.vokey@usmc.mil>
Sent: Sat, June 21, 2008 11:57:32 PM
Subject: FW: Request for modification of retirement

patrick.redmon@usmc.mil
703-784-9300
sheila.arritt@usmc.mil
703-784-9325/6
Andre.a.robinson@usmc.mil
760-763-5071
-----Original Message-----
From: Redmon Col Patrick L
Sent: Monday, May 19, 2008 4:59
To: Arritt GS09 Sheila A; Vokey LtCol Colby C
Cc: Robinson GS06 Andre A
Subject: RE: Request for modification of retirement

Sheila:

Roger below. Like I said last week, I don't want to get into a situation where we (USMC collectively) are bumping this retirement date out "30 days at a time" all summer long.

LtCol Vokey: 1 August is your official retirement date. You need to make sure you pass on the all the details to your relief. You need to understand the "hoop jumps and drama" that results from changes to your retirement date. In fact, I'll guess that your pay has been/will be somewhat jacked up between now and Christmas...

V/R

Col Patrick Redmon
DSN 278-9300

-----Original Message-----
From: Arritt GS09 Sheila A
Sent: Monday, May 19, 2008 7:21 AM
To: Vokey LtCol Colby C; Redmon Col Patrick L
Cc: Robinson GS06 Andre A
Subject: RE: Request for modification of retirement

Col Redmon,

Based on our conversation on Friday and below email I will run LtCol Vokey mod approval for 1 Aug 08 vice 1 Jul 08.

Sheila

-----Original Message-----
From: Vokey LtCol Colby C
Sent: Saturday, May 17, 2008 2:16
To: Arritt GS09 Sheila A; Redmon Col Patrick L
Cc: Robinson GS06 Andre A
Subject: RE: Request for modification of retirement

APPELLATE EXHIBIT XCIV
PAGE 67 OF 136

Mrs. Arritt,

Thank you for taking the time to speak with me today and letting me know that my retirement extension was granted. As you know, I am delaying my retirement so that I may complete my Haditha court-martial as a defense counsel. While it is still uncertain as to when the trial will begin, it seems likely that it won't begin until at least mid-June. As such, I believe that a 1 July retirement date is no longer sufficient.

As a result, I request that my retirement date be moved to 1 August instead. Given the current situation, I believe that a 1 August retirement date will allow sufficient time for me to complete the case prior to departing.

Thank you for your patience and understanding regarding my situation.

V/R
LtCol Vokey

Lieutenant Colonel Colby C. Vokey, U.S. Marine Corps Regional Defense Counsel, Western Region P.O. Box 555240 Camp Pendleton, CA 92055-5240
(760) 725-3744
(760) 725-4162 (fax)
(760) 213-4982 (cell)
colby.vokey@usmc.mil

-----Original Message-----
From: Arritt GS09 Sheila A
Sent: Friday, May 16, 2008 11:03
To: Vokey LtCol Colby C
Subject: Request for modification of retirement

LtCol Vokey

At your convenience can you give me a call to discuss your retirement date.

Mrs. Sheila Arritt
Asst Supervisor
Officer Retirement Branch, HQMC
Comm (703) 784-9324/5/6
DSN 278-9324/5/6
email: sheila.arritt@usmc.mil

FOR OFFICIAL USE ONLY (FOUO): This document may contain Protected Personal Information (PII) covered by the Privacy Act of 1974. This information must be protected from unauthorized access/disclosure. When retention of this document is no longer required, it must be properly destroyed by shredding or burning, and will not be disposed of in trash or recycling containers.

APPELLATE EXHIBIT XCIV
PAGE 14 OF 130

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.

Before
THE COURT EN BANC

UNITED STATES OF AMERICA

v.

LAWRENCE G. HUTCHINS III
SERGEANT (E-5), U.S. MARINE CORPS

NMCCA 200800393
GENERAL COURT-MARTIAL

Sentence Adjudged: 3 August 2007.
Military Judge: LtCol Jeffrey Meeks, USMC.
Convening Authority: Commanding General, U.S. Marine Corps Forces Central Command, MacDill Air Force Base, FL.
Staff Judge Advocate's Recommendation: LtCol G.W. Riggs, USMC.
For Appellant: Capt Jeffrey Liebenguth, USMC; Capt S. Kaza, USMCR.
For Appellee: Capt Mark Balfantz, USMC; Mr. Brian Keller, Esq.

22 April 2010

PUBLISHED OPINION OF THE COURT

GEISER, S.J., delivered the opinion of the court in which REISMEIER, C.J., MITCHELL and CARBERRY, S.JJ., and PERLAK, J., concur. MAKSYM, S.J., filed a concurring opinion joined by BEAL, J. BOOKER, S.J., filed an opinion concurring in the result. PRICE, J., filed an opinion concurring in part and dissenting in part.

GEISER, Senior Judge:

A general court-martial with enlisted representation convicted the appellant, contrary to his pleas, of conspiracy, making a false official statement, unpremeditated murder, and larceny, in violation of Articles 81, 107, 118, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 907, 918, and 921.

The approved sentence was for reduction to pay grade E-1, confinement for 11 years, and a dishonorable discharge.

The appellant raised three assignments of error.[1] After reviewing the record and considering the parties' pleadings, this court specified two additional issues and requested briefing by the parties.[2] On 20 May 2009, after supplemental briefing by the parties, this court ordered a *DuBay*[3] hearing into the court's first specified issue involving the appellant's representation by Captain (Capt) Bass. The ordered *DuBay* hearing was conducted 18-20 August 2009. This court received the authenticated record of the hearing, to include the military judge's Findings of Fact and Conclusions of Law, on 5 November 2009. The parties were provided time to submit additional briefs.

We have considered the record of trial, the various pleadings of the parties, and the record of the *DuBay* hearing. For the reasons cited below, we conclude that the military judge erred when he permitted proceedings to continue after Capt Bass ceased representation of the appellant without either the appellant's knowing release or a finding of good cause by the military judge. Under the specific facts of this case, we find that any attempt to assess specific prejudice arising from Capt Bass' unauthorized departure would be speculative. We will, therefore, presume prejudice. We do not reach the issue of whether another set of facts and circumstances would permit a non-speculative assessment of prejudice. We will set aside the findings and sentence in our decretal paragraph and return the

---

[1] I. WHETHER THE MILITARY JUDGE ERRED WHEN HE REFUSED TO INSTRUCT THE MEMBERS THAT THEY COULD CONSIDER THE IMPACT OF THE OPERATIONAL ENVIRONMENT ON THE APPELLANT'S STATE OF MIND AND PERCEPTIONS FOR THE CHARGE OF VOLUNTARY MANSLAUGHTER, WHERE APPELLANT WAS SUFFERING FROM POST-TRAUMATIC STRESS DISORDER, ACUTE SLEEP DEPRIVATION, WAS IN A STATE OF CONSTANT PROVOCATION, AND HIS CHAIN OF COMMAND CREATED A CLIMATE OF ACCEPTANCE TOWARDS VIGILANTISM AND ABUSE OF SUSPECTED INSURGENTS.

II. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE CHALLENGE FOR CAUSE AGAINST A MEMBER WHO HAD BEEN IN CHARGE OF PRE-DEPLOYMENT URBAN WARFARE TRAINING FOR THE APPELLANT AND HIS ALLEGED CO-CONSPIRATORS, WHERE THE QUESTION OF APPROPRIATE TACTICS IN URBAN WARFARE WAS AN ESSENTIAL ISSUE AT TRIAL.

III. WHETHER THE MILITARY JUDGE ERRED WHEN HE DENIED THE DEFENSE MOTION TO SUPPRESS THE APPELLANT'S CONFESSION, WHERE THE APPELLANT HAD PREVIOUSLY TERMINATED AN INTERROGATION AND REQUESTED THE ASSISTANCE OF COUNSEL, BUT WAS INSTEAD KEPT IN SOLITARY CONFINEMENT FOR SEVEN DAYS WITHOUT ACCESS TO COUNSEL AND THEN RE-INTERROGATED.

[2] IV. WAS THE APPELLANT'S RELEASE OF CAPTAIN BASS FROM FURTHER REPRESENTATION VALID, AND IF NOT, DID GOOD CAUSE EXIST FOR TERMINATING THE ATTORNEY-CLIENT RELATIONSHIP IN THE ABSENCE OF RELEASE? IF A VALID RELEASE OR GOOD CAUSE DOES NOT EXIST, WHAT IS THE PREJUDICE TO APPELLANT?

V. DID THE MILITARY JUDGE ERR BY CONDUCTING A CLOSED SESSION OF COURT WHEN THE GOVERNMENT HAD NOT ASSERTED A CLAIM OF PRIVLEGE PURSUANT TO MIL. R. EVID. 505? IF SO, WHAT IS THE PREJUDICE TO THE APPELLANT?

[3] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

APPELLATE EXHIBIT YCIV
PAGE 20 OF 136

record to the Judge Advocate General with a rehearing authorized. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant was charged and found guilty, *inter alia*, of conspiring with Marines in his squad to kidnap and murder an Iraqi man in Hamdaniyah, Iraq, in April 2006. The appellant was also charged and found guilty, along with several of his squad members, of carrying out the murder on 26 April 2006.

Assignment of Counsel

In June 2006, pursuant to the convening authority's standing policy of detailing two trial defense counsel for all courts-martial involving a murder charge arising from this incident,[4] the appellant was detailed Capt G. Bass, USMC, and Lieutenant Colonel (LtCol) Smith, USMC.[5] The appellant was ultimately arraigned on 7 December 2006. After the initial session of court, trial proceeded on 27-28 February 2007, 26 March 2007, 11-13 June 2007, 11-12, 23-27, 30-31 July 2007, and concluded on 1-3 August 2007. Capt Bass did not represent the appellant after 25 May 2007 when he began a terminal leave period. Record at 454. His terminal leave ended upon his release from active duty on 1 July 2007.

Prior to the 11 June 2007 session of court, Capt Bass had not been properly released from representing the appellant. At an Article 39(a) session the following discussion occurred:

> MJ: . . . Captain Bass is currently not present. I have been informed by counsel that he arrived at his Expiration of Active Service in the Marine Corps, and has been discharged from the Marine Corps and has been relieved as detailed defense counsel in this case; and has been replaced by Lieutenant Colonel Cosgrove.
>
> . . . .
>
> ADC: Yes, sir. Captain Bass reached the end of his obligated service. He has been relieved of representation of Sergeant Hutchins.

Record at 449. The military judge then asked Trial Defense Counsel (TDC) when Capt Bass left active duty. The remaining detailed counsel indicated that he was "not sure of the exact date, Your Honor. I know that he was - - executed orders to - - on terminal leave some time around the - - before the Memorial

[4] Declaration of Regional Defense Counsel of 17 March 2009 at 2, filed on 18 March 2009 with Appellant's Consent Motion to Attach, which Motion was granted on 27 March 2009; Record at 453.

[5] The appellant also hired a civilian counsel.

APPELLATE EXHIBIT XCIV
PAGE 21 OF 136

Day holiday. I know that, sir. Some time probably around the 25th of May; that could be off a few days one way or the other." *Id.* at 454.[6]

The Military judge then explained to the appellant that the he had:

> MJ: . . . the right to [be represented by] all of your detailed defense counsel including Captain Bass; however, once Captain Bass leaves active duty, there's no way that the Marine Corps can keep him on as your detailed defense counsel. Do you understand that?
>
> ACC: Yes, I do, sir.
>
> MJ: Have you discussed this issue with [your civilian defense counsel] and Lieutenant Colonel Smith?
>
> ACC: In detail, sir.
>
> MJ: Okay. Do you have any objection to proceeding at this point?
>
> ACC: No, I do not, sir.

Id. at 454-55.

After the initial pleadings were submitted to this court, we concluded that a post-trial hearing into the facts and circumstances involved in the apparent severance of the attorney-client relationship between the appellant and Capt Bass was warranted. A *DuBay* hearing was ordered, at which the presiding military judge heard the testimony of Capt Bass, his co-counsel, and the (Regional Defense Counsel (RDC) associated with the case. The military judge made written findings of fact and conclusions of law,[7] and authenticated the record. The following findings of fact contained in Appellate Exhibit CL are supported by the record and we adopt them as our own.

"Captain Bass was detailed on 13 July 2006." AE CL at 2-3, *DuBay* Hearing Record.

"On 31 Aug 2006 ... Captain Bass tendered a request to resign his commission for an effective date of 1 July 2007. The request was approved." *Id.* at 5.

---

[6] The Government characterizes the TDC's vague and unsure response as clarification for the military's judge's misconception that Capt Bass was already at the end of his obligated service. Government's Answer to Supplemental Brief of 16 Apr 2009 at 5. However, when read in context of what the military judge said immediately thereafter to the appellant, we do not share the same view of the import of the TDC's response.

[7] Appellate Exhibit CL, *DuBay* Hearing Record.

APPELLATE EXHIBIT XCIV
PAGE 28 OF 130

"The initial trial dates that had been ordered were before Captain Bass was approved to leave active duty; however, the defense team moved for, and was granted, a continuance of trial dates until July 2007 – beyond Captain Bass' approved date to leave active duty." *Id.*

"In the second defense continuance request, the defense team articulated Captain Bass' departure from active duty as one of the bases to justify the request." *Id.*

"Although Captain Bass had submitted his resignation request in August 2006, he did not inform the appellant that he would be leaving active duty until early May 2007." *Id. at 6.*

"After this early May 2007 meeting between Captain Bass and the appellant, the appellant never saw Captain Bass again." *Id.*

"The appellant was never advised that he could request that Captain Bass be extended on active duty to complete the appellant's trial." *Id.*

"The appellant never signed a document releasing Captain Bass from active duty." *Id.*

"Captain Bass never 'requested' that the appellant release him as his counsel; instead, Captain Bass presented the situation to the appellant as one in which there was no other option to remain on active duty." *Id.*

"During an 11 June 2007 Article 39a, UCMJ session, the military judge informed the appellant that because Captain Bass would be leaving active duty, there was no way the Marine Corps could keep him on the defense team." *Id.* at 7.

"The appellant told the military judge that, after having consulted with [his remaining counsel] about this issue, he had no objection to proceeding without Captain Bass." *Id.*

We do not adopt that portion of the *DuBay* judge's finding that indicates "Captain Bass never... informed the court that he was leaving the Marine Corps." *Id.* at 7. This finding is inconsistent with AE XLIV, which documents that the court was made aware of Capt Bass' pending separation from active duty no later than 18 May 2007.

We accept and adopt the *DuBay* judge's additional findings that:

"[T]he appellant was never informed of the possibility of objection to Captain Bass leaving the case." AE CL at 8.

APPELLATE EXHIBIT XCIV
PAGE 23 OF 130

"Captain Bass commenced terminal leave in May 2007 and left Southern California."[8] *Id.*

"Captain Bass met with Lieutenant Colonel Vokey, the Regional Defense Counsel, in May 2007 regarding Captain Bass' imminent departure from active duty. Lieutenant Colonel Vokey... had first hand knowledge of some judge advocates having had requested extensions to their EASs to complete representation of their clients as well as other judge advocates who had been denied terminal leave so they could finish representation of their clients." *Id.* at 11.

The *DuBay* hearing military judge concluded that the remaining trial defense counsel, LtCol Smith, and the civilian counsel "were operating under the mistaken belief that no other option existed to extend Captain Bass' EAS. The Regional Defense Counsel, Lieutenant Colonel Vokey, was not laboring under this false impression; nevertheless, he never provided contrary advice to Captain Bass or the rest of the defense team." *Id.* at 15.

We note the following additional pertinent facts from the record.

1) Capt Bass was assigned to the Hutchins case by the RDC; but reported to the Commanding Officer, Headquarters & Headquarters Squadron, MCAS Miramar for operational and administrative purposes. AE CXXXIX at 2-3, *DuBay* Hearing Record.
2) Capt Bass's terminal leave date was approved by Marine Corps personnel outside of the RDC chain-of-command. *Id.* at 3.
3) On 12 March 2007 the trial defense requested a continuance of the trial date. They requested a motions hearing date of 11-12 June 2007 and a trial date of 16-27 July 2007. AE XXV.
4) On 26 March 2007, with no objection from Government counsel, the military judge approved the request. Record at 416.
5) On 18 May 2007 the defense requested another continuance and served the request upon the court and Government counsel on the same day. AE XLIV.
6) The defense indicated that one of the reasons for the request was that Capt Bass would be separating from active duty on 1 July 2007 and it would require additional time adequately prepare his replacement counsel. *Id.* at 3.
7) On 24 May 2007 Government Counsel filed its response with the court. AE XLV.
8) The Government counsel did not oppose a continuance for up to 10 days. The Government opposed a continuance greater than 10 days. *Id.* at 4.
9) As part of its rationale, the Government noted that during the session of court involving the first continuance

[8] Capt Bass testified that he believed his terminal leave began on 25 May 2007. *DuBay* Hearing Record at 2088, 2151.

APPELLATE EXHIBIT XCIV
PAGE 24 OF 136

request the defense did not inform the court that they were requesting the military judge to "set this case for trial beyond Capt Bass' EAS." *Id.* at 2.

10) On 11 June 2007, the court addressed the continuance motion on the record. Record at 460.
11) On 11 June 2007, Capt Bass was absent from court. *Id.* at 449.
12) On 11 June 2007 the military judge misinformed the appellant regarding Capt Bass' then-current active duty status. *Id.* at 454-55.
13) On 11 June 2007, the military judge misinformed the appellant regarding the appellant's option to effectively object to Capt Bass' pending departure. Specifically, the military judge further misled the appellant by misinforming him that there was nothing the United States Marine Corps could do to effectuate continued representation by Capt Bass. *Id.*
14) On 13 June 2007, the military judge noted that the defense and the Government had reached an agreement regarding the continuance request. *Id.* 716-17.
15) The Government agreed to begin trial on 24 July 2007. *Id.*

We agree with the *DuBay* Hearing judge's legal conclusion that the military judge effectively severed the attorney-client relationship between Capt Bass and the appellant. AE CL at 7-8. We do not, however, agree that the severance was for good cause. *Id.* at 8.

"The right to effective assistance of counsel and *to the continuation of an established attorney-client relationship is fundamental* in the military justice system." *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988) (emphasis added) (citing *United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977)). Whether an established attorney-client relationship is properly severed is a question of law which we review *de novo*. *United States v. Allred*, 50 M.J. 795, 799 (N.M.Ct.Crim.App. 1999).

All trial participants, including the military judge, were apparently mutually confused regarding Capt Bass' active duty status, the appellant's option to effectively object to Capt Bass' departure from active duty, and what factors constitute good cause for a military judge to sever an existing attorney-client relationship in an ongoing trial without the consent of the client.

We reject the Government's contention that the appellant voluntarily consented to the severance of his attorney-client relationship with Capt Bass. To hold that the appellant's apparent acquiescence to a muddled situation described to him by his own legal counsel and the military judge as a *fait accompli*, beyond anyone's control, would require us to impart a higher degree of knowledge of the law and facts to the appellant than that which was collectively shared by multiple seasoned lawyers.

APPELLATE EXHIBIT XCIV
PAGE 85 OF 136

This we will not do. In the present case, the appellant's statement that he had no objection to proceeding forward was not made with knowledge of the true facts or law. The military judge's reference to the appellant's "right" to be represented by all his detailed counsel was, in the factual context presented at trial, at best an illusory right and amounted to the appellant having no option but to agree.

The Uniform Code of Military Justice provides an accused with rights to counsel that exceed Constitutional standards. The President has gone further to require – in very direct and extraordinary terms not found elsewhere in the Manual for Courts-Martial – that release of a defense counsel in situations such as this occur only with the approval of the military judge for good cause, or with the "express consent" of the accused. Given the elevated treatment this right to counsel has been given by both Congress and the President, appellant's uninformed acquiescence to Capt Bass' departure is best interpreted under these facts as a constructive objection to the loss of this right.

The question remains whether termination of Capt Bass' attorney-client relationship with the appellant was severed by the military judge, without the appellant's consent, for good cause. We begin by noting that the military judge's action to effectively sever the appellant's relationship with Capt Bass was flawed both factually and legally. As noted above, the military judge was apparently operating under the misapprehension or at least confusion regarding whether Capt Bass was on terminal leave or had already been released from active duty. He failed to properly determine the actual facts. Further, the military judge apparently believed that departure from active duty constituted good cause for severing an attorney-client relationship during an ongoing trial. We disagree.

In the absence of the accused's consent or an approved application for withdrawal by the defense counsel, severance of the relationship can only be proper when good cause is shown on the record. *Allred,* 50 M.J. at 799-800. Convenience of the Government is not a sufficient basis to establish good cause, *Id.* at 800 (citing *United States v. Murray*, 42 C.M.R. 253, 254 (C.M.A. 1970)). Good cause must be based on a "truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship." *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978) (footnote omitted).

No good cause existed to sever the attorney-client relationship in the instant case. We find the Government's reliance on *Allred* and Manual of the Judge Advocate General, JAGINST 5800.7E § 0131 (20 Jun 2007) (JAGMAN) to be misplaced. In the latter instance, the Government acknowledges that the JAGMAN provision deals with denying an Individual Military Counsel (IMC) request for a counsel who has not yet been detailed to function as a trial defense attorney for a particular court-martial and does not directly address the scenario of an existing attorney-

APPELLATE EXHIBIT XCIV
PAGE 26 OF 136

client relationship during the pendency of an ongoing general court-martial. Government's Answer of 16 Apr 09 at 16.

In ***Allred***, a Marine facing various court-martial charges was detailed a trial defense counsel. For reasons not germane to this analysis, the charges were withdrawn and identical charges were re-referred to a new court-martial some two months later. Allred was detailed a different trial defense counsel in connection with the re-referred charges. He submitted an IMC request for his original defense counsel. The request was denied by the detailing authority. The court held that withdrawal of charges does not sever an existing attorney-client relationship regarding the charged offenses. An IMC request for a particular attorney with whom an accused enjoys an existing attorney-client relationship may only be denied for good cause. The court went on to opine that, in the context of an IMC request, good cause was satisfied by a situation such as "requested counsel's release from active duty or terminal leave." ***Allred***, 50 M.J. at 801.

"Good cause" is defined to include, "physical disability, military exigency, and other extraordinary circumstances which render the . . . counsel . . . unable to proceed with the court-martial within a reasonable time. 'Good cause' does not include temporary inconveniences which are incident to normal conditions of military life." RULE FOR COURTS-MARTIAL 505(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).[9] ***See also United States v. Morgan***, 62 M.J. 631 (N.M.Ct.Crim.App. 2006) (finding error in the severance of the trial defense counsel from taking part in the post-trial processing due to counsel's change of commands). We distinguish ***Allred*** based on the underlying context of the severance.

Unlike an IMC request made at an early stage of the case, in the instant case the trial was underway and Capt Bass had participated in nearly a year of defense consultation and planning efforts. He had actively participated in the ongoing development of trial strategy, contributed to the decision-making process which defined the anticipated contribution of each counsel, and earned the appellant's trust. This is fundamentally different from the IMC context in which the requested attorney has, as yet, played no role in an ongoing defense strategy and planning process. ***See United States v. Spriggs***, 52 M.J. 235, 246 (C.A.A.F. 2000) (criteria used by the court to determine if a reservist may be involuntarily recalled to serve as counsel included consideration, ***inter alia***, of whether the attorney accomplished substantial trial preparation.)

Thus, "good cause" must be assessed on a sliding scale which considers the contextual impact of the severance on the client.

---

[9] While this standard is actually applicable to excusal for good cause by the authority who detailed the counsel to the case, and the proper standard for good cause excusal is the R.C.M. 506 standard as explained in *Iverson*, *infra*, our conclusion is the same under either standard of good cause.

Severance of an attorney/client relationship early in a case will have significantly less impact on an accused's representation rights than severance after work has been done on the defense case. A severance on the eve of trial after nearly a year of defense strategizing and preparation has even greater impact. Good cause in the context of an IMC request early in a trial cannot, therefore, be broadly applied to all severance cases as the Government urges. Excusal for good cause by the military judge should, as the Court of Appeals for the Armed Forces (C.A.A.F.) stated, be authorized only in cases where there exists "truly extraordinary circumstance[s] rendering virtually impossible the continuation of the established relationship." *Iverson*, 5 M.J. at 442-43.

In the instant case there existed no truly extraordinary circumstance which rendered impossible the continuation of the long-established relationship between the appellant and Capt Bass. Certainly this was true during the period prior to 1 July 2007, when Capt Bass was on terminal leave. Terminal leave and an attorney's end of active service is a normal occurrence of military life that can be planned for. EAS, standing alone, cannot be used as a basis to sever an existing attorney-client relationship in this case after nearly a year of preparatory work and mere weeks before commencement of a general court-martial for murder.

Assuming, *arguendo*, that this court does not find good cause for severance, the Government urges us to find that the defense counsel, not the Government severed the attorney-client relationship. At the *Dubay* hearing, the Government argued that trial defense counsel had not requested an extension of his service, nor informed the Government counsel or military judge of his pending departure. We take issue with the latter assertion. The record clearly demonstrates that the Government counsel and the military judge were both made aware of Capt Bass' EAS no later than 24 May 2007. They were also aware that the pending trial date was after Capt Bass' EAS.

The multiple errors and inattention leading to deprivation of counsel in this case reflect something of a perfect storm. The initial errors arose in the defense team and with Capt Bass in particular.[10] The record and the *DuBay* hearing reflect that the defense team as a whole, and Capt Bass in particular, consistently failed to provide the appellant with proper legal advice regarding the appellant's very real option to actively contest Capt Bass' pending departure from active duty and from the defense team.

The military judge's approach compounded the defense team's errors by cementing and validating the appellant's misperception of his rights and options. The military judge had a statutory

[10] We leave the ethical implications of Capt Bass' conduct to his state bar authority and the Navy Rules Counsel.

APPELLATE EXHIBIT XCIV
PAGE 28 OF 130

responsibility to ensure compliance with the representational severance rules in R.C.M. 506(c), or, if necessary, to abate proceedings until the appellant's right to continue an ongoing attorney/client relationship had been formally adjudicated under this rule.

On three separate occasions, the military judge, faced with a proceeding in which one of the defense counsel was not present, informed the appellant that he had the absolute right to the presence of his counsel. Record at 269-70, 415-16, 722. With that context, the military judge's statement suggesting that the appellant was faced with a ***fait accompli*** provided a judicial imprimatur to the appellant's misunderstanding that there was no way for appellant to effectively object to Capt Bass' departure. The military judge's failure arose directly from his failure to formally carry out his responsibilities under R.C.M. 506(c).

The ambiguous facts surrounding Capt Bass' departure and his actual duty status, plus the military judge's unclear explanation of the appellant's legal rights to have all of his counsel present, should have prompted a vigilant Government counsel to ameliorate this situation by requesting the military judge to affirmatively determine the status of Capt Bass and appellant's desire for representation irrespective of Capt Bass' pending release from active duty. In this regard, we observe that this issue may have been avoided altogether had Capt Bass' supervisory defense attorney, or his Officer in Charge at Miramar, or the Officer in Charge of LSSS at Camp Pendleton, formally confirmed that the appellant had properly released Capt Bass, or that the military judge had made a good cause ruling before they allowed Capt Bass to commence terminal leave or be separated from the Marine Corps. At any point prior to 1 July 2007, any one of these officers could have initiated steps to recall Capt Bass from terminal leave and/or delay execution of his release from active duty.

With regard to a showing of prejudice, this is a case of first impression. The case law suggests two possible paths depending on who was at fault for the deprivation. In cases involving severance of an existing attorney/client relationship by someone other than the appellant or the defense team, C.A.A.F. has consistently opined that, due to the unique nature of defense counsel, appellate courts will not engage in "nice calculations as to the existence of prejudice"... but will instead presume prejudice. ***Baca***, 27 M.J. at 119; ***see also United States v. Schreck***, 10 M.J. 226, 229 (C.M.A. 1981); ***Allred***, 50 M.J. at 801. Our court has more recently held that it will not undertake a prejudice analysis when an existing attorney-client relationship was improperly severed, and will instead find that improper severance requires reversal. ***United States v. Dickinson***, 65 M.J. 562, 566 (N.M.Ct.Crim.App. 2006); ***see also Iverson***, 5 M.J. at 444 (setting aside that portion of the court-martial that the trial defense counsel who was improperly severed was not able to

APPELLATE EXHIBIT XCCV
PAGE 39 OF 136

participate in without inquiring into the existence of prejudice).

The second path is reflected in cases involving improper abandonment of a client by a defense attorney or which involve a client validation of a severance at some point before or after the severance. Such cases have conducted a prejudice analysis and examined the facts and circumstances surrounding the severance/abandonment. *See Strickland v. Washington*, 466 U.S. 668 (1984); *United States v. Acton*, 38 M.J. 330 (C.M.A. 1993); *United States v. Kelly*, 16 M.J. 244 (C.M.A. 1983). Thus, we are faced with a hybrid situation involving error both within and without the defense team

Based on the record, it appears that Capt Bass departed with no turnover with either his "relief" or the remaining counsel - a mere five to six weeks before commencement of this murder trial. There is no evidence that Capt Bass made any attempt to integrate his prior work into the activities of the remaining attorneys. Unfortunately, we do not know, and we cannot know, the actual real-world impact of Capt Bass' departure from the defense team.

We believe the dissent's prejudice analysis consideration of the adequacy of the remaining defense counsel is mistaken. A right to the continuation of an existing attorney-client relationship is illusory if it can be disregarded without an accused's consent for any but the most compelling reasons. It is of little moment whether the remaining defense counsel provided good, poor, or indifferent representation. At issue is what, if anything, Capt Bass would have added to the mix.

Without speculating, we know from the *DuBay* hearing that Capt Bass was developing a theory of post-traumatic stress disorder (PTSD) with an expert consultant. We also know that this consultant was ultimately dismissed by the civilian counsel in favor of an expert with arguably less impressive credentials. Had the PTSD theory been further refined, we have no way of knowing whether the appellant might have elected to testify during the trial on the merits before the members. We cannot know if the appellant would, in that circumstance, have struck an empathetic chord in them. Further, we have no way to assess whether the appellant's evidence and his appearance might have been considered, as well, during sentencing. Had Capt Bass stayed with the case, it is impossible to determine whether the appellant might have testified during the sentencing proceedings rather than present an unsworn statement. Although an unsworn statement was certainly an authorized means of presenting the appellant's version of extenuating and mitigating evidence, the difference in impact is another unknowable factor. Because we do not and cannot know these things, we can never rationally assess the actual impact of Capt Bass' departure.

Under the facts and circumstances of this case, we are persuaded that any attempt to assess prejudice would be

APPELLATE EXHIBIT XCIV
PAGE 10 OF 136

speculative. In view of the significant involvement of parties outside the defense team to the appellant's loss of Capt Bass' services, we place the burden of proof on the Government and will, therefore, presume prejudice. We note, however, that our determination to presume prejudice is very fact specific. Another case with other facts might well be more amenable to a reasoned prejudice analysis.

We are convinced that the military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and law. The fact that no one person or entity was entirely responsible for the inappropriate severance of the attorney-client relationship in this case does not alter the fact that a wrongful severance occurred.[11]

Conclusion

The findings and approved sentence are set aside. The record is returned to the Judge Advocate General of the Navy for remand to an appropriate convening authority who may order a rehearing. In view of our action, the remaining assignments of error are now moot.

Chief Judge REISMEIER, Senior Judges MITCHELL and CARBERRY, and Judge PERLAK concur.

MAKSYM, Senior Judge (concurring):

I associate myself entirely with the opinion authored by Senior Judge Geiser. I write separately in view of the abdication of professional responsibility in this case by the detailed defense counsel, Captain Bass, who seemingly abandoned his client just weeks before the commencement of a murder trial. That this act of abandonment was given the imprimatur of de facto judicial assent by the trial judge is particularly disconcerting and constitutes the type of conduct we will not countenance.

Rule 1.16 of the Rules of Professional Conduct governing attorneys practicing under the cognizance of the Judge Advocate General of the Navy (Judge Advoctae General Instruction 5803.1C (9 Nov 2004)) sets forth the conditions under which a judge advocate can terminate the privileged state he/she enjoys with a client. The rule states in part:

> b. Except as stated in paragraph c, a covered attorney may seek to withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:
> (1) the client persists in a course of action involving the covered attorney's services that the

[11] We note that appending to the record a release of counsel signed by an accused or special findings of the military judge regarding good cause to document compliance with R.C.M. 506(c) is a prudent practice.

APPELLATE EXHIBIT XCIV
PAGE 31 OF 136

covered attorney reasonably believes is criminal or fraudulent;

(2) the client has used the covered attorney's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the covered attorney considers repugnant or imprudent;

(4) in the case of covered non-USG attorneys, the representation will result in an unreasonable financial burden on the attorney or has been rendered unreasonably difficult by the client; or

(5) other good cause for withdrawal exists.

The comment section of this rule also reflects that "[a] covered attorney should not represent a client in a matter unless the covered attorney can perform competently, promptly, without improper conflict of interests, and to completion."

In the case at bar, Captain Bass never made application to the court for leave to withdraw, or sought release from his client, who was facing confinement for the remainder of his natural life if convicted. *See* RULE FOR COURTS-MARTIAL 505(d)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.) and R.C.M. 506(c)). The time line of Captain Bass' participation in this matter has been soundly outlined within the majority opinion. However, it bears emphasizing that the detailed defense counsel were assigned to this very serious case on 13 July 2006. Trial was ultimately held from 1-3 August 2007. Just two weeks after his assignment to the case, Captain Bass tendered his resignation, which was, after winding its way through the administrative chain of command, granted in due course, with an effective date of 1 July 2007. It is only by virtue of a reference within the 18 May 2007 defense continuance motion that the military judge was constructively informed that one of Sergeant Hutchins' attorneys was intending to leave active duty prior to the trial. Upon receipt of this pleading, the prayer for which was subsequently granted, the military judge failed to initiate action regarding the still unauthorized prospective withdrawal of counsel.

A review of Captain Bass' performance, namely his failure to file pleadings with the court below in which he either sought leave to withdraw for good cause or, in the alternative, indicated that he had obtained express permission from his client to withdraw, seemingly stands in violation of the rules governing covered attorneys practicing under the cognizance of the Judge Advocate General of the Navy. That an attorney would place his personal ambitions or desires ahead of his/her client's interests in any case would constitute a grave breach of his fundamental obligation to his client. The fact that this clear breach of professional responsibility took place within the ambit of a high-profile murder case only compounds the injury done to the statutorily-protected institution that is the attorney-client relationship. I therefore believe it is appropriate for this

APPELLATE EXHIBIT XCIV
PAGE 98 OF 136

court to call upon the Judge Advocate General to initiate such ethical review as he thinks necessary through the Rules Counsel to determine what, if any, administrative action should be taken relative to this attorney. Of course, Captain Bass does not stand alone in failing to approach the trial court. The record is clear that no member of the defense team acted until the eleventh hour of this litigation. Unfortunately, the record is also clear that no one in a supervisory position ever acted to ensure Captain Bass' actions were in keeping with the standards required of judge advocates seeking to withdraw from active representation in a criminal case.

Inaction by the trial judge exacerbated the impact of Captain Bass' failure in respect to the representation of his client. As set forth in full within the majority opinion, rather than immediately addressing the issue of pending withdrawal after coming into possession of the continuance request that obliquely referenced it, the judge waited until a subsequent Article 39a hearing nearly three weeks later and treated the disappearance of Captain Bass as nothing more than a fait accompli. Clearly, Judge Meeks could have compelled Captain Bass' appearance for purposes of addressing this critical matter – even to the point of ordering an abatement of proceedings to ensure that the consular rights of the appellant were safeguarded. As the majority opinion reveals, he failed to do so.

Courts-martial possess all the powers inherent in any court to regulate the practical methods of conducting their business and hearing cases. *See Rencher v. Anderson*, 93 N.C. 105, 107 (1885); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)(citing *United States v. Hudson*, 11 U.S. 32 (1812)). This long-standing doctrine of inherent authority, as supplemented by R.C.M. 801, has equipped military judges with the means by which to enforce their judicial will in an effort to properly execute their all-important function. *See United States v. Gore*, 60 M.J. 178, 186 (C.A.A.F. 2004) (citations omitted). The trial judge, armed with his actual and inherent powers, is the gatekeeper of justice. He must never abdicate his oversight responsibilities by adopting, de facto, the illegitimate acts of counsel, as in the case at bar.

Navy and Marine Corps judge advocates are required to comport their behavior to ethical requirements without regard to grade or experience. An association of attorneys that fails to hold even its most junior members professionally accountable loses public confidence. Similarly, supervisory judge advocates are charged with overseeing subordinate compliance with professional responsibility rules and taking reasonable remedial action when aware of conduct that does not meet those standards. JAGINST 5803.1C at Rule 5.1. Likewise, Navy and Marine Corps judges have been endowed with the responsibility for the application of justice and, uniquely, the professional growth of the uniformed attorney's appearing before them. They are the

APPELLATE EXHIBIT XCIV
PAGE 33 OF 136

last line of defense against the kind of ill-considered conduct that occurred during this case.

This case serves as a grave exemplar of what can happen when an attorney fails to recall the obligation he owes to his client and to the military justice system, and where a supervisory judge advocate fails to recognize and remediate deviation from that obligation. It underscores the requirement for judges to remain active in safeguarding the interests of all parties, especially the constitutionally-mandated rights of those who are placed before them for judgment. What happened here is unacceptable.

Judge BEAL joining this opinion.

BOOKER, Senior Judge (concurring in the result):

I concur in the judgment of the court, but for slightly different reasons from those stated in the lead opinion. Accordingly, I respectfully file this separate opinion.

I would characterize the error in this case as structural. If an error is characterized as "structural," it is an error that so infects the regularity of the proceedings that it cannot be tested for prejudice. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991). In a limited number of cases, the structural error is one where harmlessness is irrelevant. *See McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). In either case, the error will dictate a reversal of the decision at the trial level. *See Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993).

The error that I see, moreover, is the denial of the opportunity to have Captain (Capt) Bass properly released from representation under RULE FOR COURTS-MARTIAL 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). R.C.M. 505 sets out specific procedures to follow when an attorney-client relationship in an active case must be terminated. I cannot tell from this record whether those procedures were followed, and, like the majority, I cannot tell what impact Capt Bass's departure had on the trial of this case.

Comings and goings are facts of military life. It is not unreasonable to suspect that a noncommissioned officer of Marines would have served under a number of commanding and executive officers during his career, would have had multiple primary care managers assigned to him, and would have had more than one chaplain for pastoral care. It would not be unreasonable to suspect, then, that when the appellant was told that his detailed defense counsel was leaving active duty, the appellant would have assumed that attorneys are no different from any other professional, especially if his remaining attorneys had not correctly explained why that is not in fact the case. The military judge could have explained to the appellant the difference between waiving counsel for a particular session of the court and severing all ties with the counsel. The counsel's

APPELLATE EXHIBIT XCIV
PAGE 49 OF 136

understanding of the length of his service could have been ascertained. The military judge could have ensured continued representation during the post-trial process until the proper relief occurred under Article 70, UCMJ. My great frustration in this case is the lack of a factual record of the events culminating in the appellant's apparent resignation to the absence of Capt Bass from the trial.

Had this matter been properly litigated and preserved, it would have been possible for the appellant to seek immediate relief from our court in the nature of a writ of mandamus to require Capt Bass to continue on the case until its completion. We might or might not have granted the requested relief, but we would not be faced now, after findings and sentence had been announced and the sentence at least partially executed, with the task of picking apart the workings of the defense team in presentation of the case using the cleaver, not the scalpel, of the *DuBay*[1] hearing.

I point out that the relevant concern is as follows: "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan*, 508 U.S. at 279. This phrasing of the test clearly places the burden of demonstrating the effect of the error on the Government, and as the majority notes, the Government has failed to dispel the concern.

I would therefore conclude that structural error occurred in this case and would set aside the findings and sentence. Recognizing that structural errors are rare and that there is a strong presumption that an error is not structural, *e.g.*, *United States v. Brooks*, 66 M.J. 221, 224 (C.A.A.F. 2008) (citing *Rose v. Clark*, 478 U.S. 570, 579 (1986)), nonetheless the denial of military due process that the appellant suffered in this case casts doubt, in my mind, on the fairness and regularity of the proceedings.

PRICE, Judge (concurring in part, dissenting in part):

I concur in the court's decision to set aside the sentence, but respectfully dissent from that portion of the opinion setting aside the findings.

Assuming that the appellant was improperly deprived of the full exercise of his statutory right to continuation of an established attorney-client relationship,[1] the source of that

[1] *United States v. DuBay*, 37 C.M.R. 411 (C.M.A. 1967).

[1] The record includes substantial evidence upon which this court can conclude that "good cause" exists to find Captain Bass' withdrawal proper, including: Captain Bass' voluntary resignation and release from active duty prior to trial; defense knowledge of his approved release date before requesting trial

APPELLATE EXHIBIT XCIV
PAGE 35 OF 136

deprivation was action or inaction from within the defense team resulting in Captain Bass' improper withdrawal. Articles 27 and 38, Uniform Code of Military Justice, 10 U.S.C. §§ 827 and 838. Although I agree that the military judge's colloquy with the appellant was insufficient to establish the appellant's express consent to Captain Bass' excusal, I disagree with the majority's conclusion that any assessment of prejudice would be speculative and with the decision to presume prejudice resulting in complete reversal.

Under these facts, we *can* and *should* test for prejudice, fully cognizant of the unique and fundamental nature of the right at issue, and the challenges inherent to that assessment. *See United States v. Acton*, 38 M.J. 330, 336 n.2 (C.M.A. 1993); *see also United States v. Wiechmann*, 67 M.J. 456, 463 (C.A.A.F. 2009).

Assuming without deciding that deprivation of the appellant's right to continuation of an established attorney-client relationship constitutes an error "of constitutional dimension," *Wiechmann*, 67 M.J. at 463–64, I am convinced beyond any reasonable doubt that Captain Bass' improper withdrawal did not contribute to the findings of guilt and that "the guilty verdict actually rendered in *this* trial was surely unattributable to [his absence]," *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

However, given Captain Bass' extensive knowledge of the case, probable role in presentencing, and the potential mitigating effect of Dr. Sparr's testimony, I am not convinced beyond a reasonable doubt that his absence did not contribute to the sentence awarded. Therefore, I would affirm the findings approved by the convening authority, but set aside the sentence and authorize a rehearing on sentence.

Analysis

The majority identifies errors from within and outside the defense team, noting in cases of improper severance by the Government or military judge – we presume prejudice, and where an attorney-client relationship is severed from within, military courts have tested for prejudice. Slip op. at 12-13. The majority then presumes prejudice, citing "the significant involvement of parties outside the defense team. . . ." and the

---

delay past his end of active service (EAS) date without mention of that fact; the appellant's failure to object to Captain Bass' absence though informed of that right by the military judge and Lieutenant Colonel (LtCol) Smith (Record at 449, 454-55, 1949, 2002-03); defense team planning that accounted for Captain Bass' departure; detail of LtCol Cosgrove within three weeks of Captain Bass' departure; defense request and grant of additional delay to provide LtCol Cosgrove preparation time; and the appellant being represented by three counsel virtually throughout the process. *See* RULES FOR COURTS-MARTIAL 505(d)(2)(B)(iii) and 506(c), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

APPELLATE EXHIBIT XCIV
PAGE 34 OF 136

challenges inherent to assessing "the actual impact of Captain Bass' departure." *Id.* at 14.

Under these facts, we *can* and *should* test for prejudice. We *should* test for prejudice because the appellant was deprived of his statutory right to continuation of an established attorney-client relationship due to Captain Bass' improper withdrawal, other defense team action or inaction, and because the appellant was represented by three qualified counsel virtually throughout the proceedings.

The deprivation originated with Captain Bass' August 2006 voluntary resignation request and defense motion, seven months later, to delay the trial until after his approved release date without disclosure of that fact. It was perfected when he commenced terminal leave on 25 May 2007 and ceased representing the appellant more than two weeks before the hearing on further defense requested delay, partially due to his "release[]." Appellate Exhibit XLIV.

In addition, the defense team either misinformed, or failed to fully inform the appellant of his right to contest Captain Bass' departure. Record at 1949, 2002-03; AE CL at 6-7). They also misinformed the military judge that Captain Bass had been "released" or "relieved" as detailed defense counsel at least three times before and during the 11 June 2007 Article 39a, UCMJ, hearing. AE XLIV; Record at 449, 454-55.

At that hearing the military judge informed the appellant of his right to Captain Bass' presence, but then noted "once [he] leaves active duty, there's no way the Marine Corps can keep him on as your detailed defense counsel." Record at 449, 454-55. The appellant acknowledged understanding his rights, claimed to have discussed this issue with lead and associate counsel "[i]n detail" and then responded that he had no objection to proceeding without Captain Bass. *Id.*

I agree with the majority that this colloquy failed to clarify whether Captain Bass was then on terminal leave, subject to immediate recall, or had been released from active duty, and that the military judge's comments likely further muddled the appellant's understanding of the efficacy of objecting to Captain Bass' absence. I also agree that this colloquy was insufficient to establish the appellant's express consent to Captain Bass' excusal and the military judge's confusing comments render application of the doctrine of waiver inappropriate. *See United States v. Cutting*, 34 C.M.R. 127, 131 (C.M.A. 1964)("Courts indulge every reasonable presumption against the waiver of fundamental rights").

However, I respectfully disagree that the military judge's incomplete inquiry into the appellant's purported excusal of Captain Bass constitutes "significant involvement" in the loss of his services, somehow converting his improper withdrawal into

APPELLATE EXHIBIT XCIV
PAGE 37 OF 136

improper severance by the military judge, and warranting a presumption of prejudice.

In addition, the appellant was represented by three qualified counsel virtually throughout the proceedings including his civilian lead counsel, Mr. J. R. Brannon. Both LtCol Smith and Captain Bass were detailed in the summer of 2006, and LtCol Smith served as associate counsel through trial. After Captain Bass withdrew, LtCol Cosgrove was detailed as his replacement approximately three weeks later, on 15 June 2007, and worked on the case through trial.

Although the military judge and the appellant's supervisory chain of command failed to take appropriate action to prevent the deprivation, as they reasonably could and should have done, the deprivation was not caused by their actions or omissions. Instead, the deprivation was a direct result of Captain Bass' noncompliance with the rules of professional responsibility and Rules for Courts-Martial, Mr. Brannon's and LtCol Smith's misunderstanding of those rules and poor advice to the appellant, and Captain Bass' improper withdrawal. Presuming prejudice, the test applicable to improper severance by the military judge or Government, is, in my view, counter to the interests of justice.

Contrary to the majority's assertion that "we can never rationally assess the actual impact of Capt[ain] Bass' departure," Slip Op. at 14, I believe we *can* rationally test for prejudice given the record development of specific and general prejudice, weight and credibility of the evidence, and role Captain Bass performed and was expected to perform at trial.

Specific Prejudice

The appellant alleges specific prejudice on findings including potential loss of a complete defense. The majority notes that Captain Bass was developing a theory of post-traumatic stress disorder with an expert consultant, Dr. Sparr, that Dr. Sparr was ultimately dismissed in favor of an expert with less impressive credentials, and then speculates as to what might have happened had the "PTSD theory been further refined." *Id.* at 14.

The record reflects that the novel defense theory was not a recognized defense in military jurisprudence and was irrelevant to findings. Dr. Sparr concluded that the appellant's symptoms were consistent with chronic PTSD and obsessive-compulsive personality traits, and noted parallels between "battered woman syndrome" and this case. AE LXII at 4-5. He opined the appellant and his squad "believed they had to act proactively to diminish the violence against them which was quite literally a matter of life or death . . . that [the appellant] was experiencing significant stress by virtue of [] subsequent development of PTSD . . . . [and] [b]ecause [they were] under pervasive and persistent stress (sic) there was no 'cooling off' period. The heat of passion element is encompassed by anger at

APPELLATE EXHIBIT XCIV
PAGE 34 OF 136

the Iraqi's release of [a suspected insurgent] and the subsequent conclusion that one had to kill or be killed." *Id.* at 6.

Doctor Sparr's proposition is not recognized as a special defense in military law, nor does his opinion resemble, even remotely, existing defenses of justification, self-defense, coercion or duress. *See* RULE FOR COURTS-MARTIAL, 916, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); ***see also United States v. Lewis***, 65 M.J. 85, 87 (C.A.A.F. 2007) (holding that a military judge required to instruct on special (affirmative) defenses "in issue."). Even assuming this novel theory could possibly qualify as a defense in the killing of a known or suspected insurgent, it is irrelevant here. In this case, in an effort to demonstrate their seriousness, the appellant and Marines under his charge abducted and killed an unidentified man with no suspected insurgent ties because he was a military-aged male who lived near a suspected insurgent, after their plan to kill a suspected insurgent was compromised.

In addition, lead counsel decided against calling Dr. Sparr after concluding his report, which suggested a novel form of justification, was inconsistent with his theory of the case, and after losing confidence in Dr. Sparr due to perceived inappropriate communications with trial counsel while a defense consultant. Record at 2210-13. I am convinced beyond any reasonable doubt that the absence of further refinement of this novel theory and the decision not to call Dr. Sparr did not contribute to the findings of guilt and that "the guilty verdict actually rendered in ***this*** trial was surely unattributable to [his absence]." ***Wiechmann***, 67 M.J. at 463-64; ***see Sullivan***, 508 U.S. at 279.

General Prejudice

The appellant also asserts general prejudice in the loss of Captain Bass' expertise on findings and the majority alludes to the speculative nature of assessing the impact of that absence. We need not speculate as Mr. Brannon, with the appellant's consent, made all trial strategy decisions, assigned defense team responsibilities, and testified as to those decisions. Mr. Brannon intended to handle the majority of the merits case with LtCol Smith's assistance. Record at 2201-02, 2208; AE-CXLI. Captain Bass was assigned to work pretrial motions and with Dr. Sparr, and on the presentencing case. *Id.* With the possible exception of examining a few witnesses, and any comments he may have offered, this was the extent of Captain Bass' planned participation on the merits.

Conversely, evidence of the appellant's intent to kill, including his own admissions, is overwhelming. The appellant planned, led, and executed a conspiracy that resulted in the abduction and death of an Iraqi citizen without provocation by that citizen. The plan included the theft and subsequent planting of an AK-47 and shovel to suggest insurgent activity,

APPELLATE EXHIBIT XCIV
PAGE 39 OF 136

contingency planning to abduct and kill any nearby military-aged male in the event their efforts to abduct suspected insurgent(s) was compromised, false radio reports, a full-squad assault with automatic weapons on a bound victim, and ended when the appellant shot and killed a severely wounded person, and then submitted false reports intended to justify his killing.

Conclusion

Under these facts, I am convinced beyond a reasonable doubt that trial on the merits was fundamentally fair. The appellant was availed of his constitutional rights to effective assistance of counsel and counsel of choice, and his statutory right to continuity of counsel with respect to LtCol's Smith and Cosgrove. He was represented by three counsel at virtually all times, their representation was vigorous, consistent with their theory, and the results on findings "might well be characterized as spectacular" given the overwhelming evidence of premeditation. *United States v. Kelly*, 16 M.J. 244, 248 (C.M.A. 1983).

Assuming the appellant was improperly deprived of full exercise of his statutory right to continuation of an established attorney-client relationship with Captain Bass and that this deprivation constituted constitutional error, I am convinced beyond a reasonable doubt that Captain Bass' absence did not contribute to the findings of guilt and that "the guilty verdict actually rendered in *this* trial was surely unattributable to [his absence]." *See Wiechmann*, 67 M.J. at 463-64; *Sullivan*, 508 U.S. at 279.

For the Court

R.H. TROIDL
Clerk of Court

APPELLATE EXHIBIT XCIV
PAGE 40 OF 136

NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES v. CALEB HOHMAN XXX XX 6203 SERGEANT U.S. MARINE CORPS	GENERAL COURT-MARTIAL GOVERNMENT BRIEF REGARDING CAPTAIN ROBERT F. MUTH'S REPRESENTATION OF THE ACCUSED 3 August 2010

1. **Nature of Brief**. Pursuant to the Military Judge's Order, the Government submits this brief on why good cause exists such that excusal of Captain Robert F. Muth as defense counsel in this case is the appropriate remedy.

2. **Facts**.

(a) The accused, Sergeant Caleb Hohman, was charged with failure to obey a lawful order, dereliction of duty, and involuntary manslaughter, violations of Articles 92 and 119 of the Uniform Code of Military Justice (UCMJ), which allegedly occurred on or about 30 October 2006 (Enclosure 1).

(b) The accused was arraigned by the military judge, Lieutenant Colonel Sanzi on 5 May 2008.

(c) Captain Muth appeared on the record for the first time in this case as Sergeant Hohman's detailed defense counsel at an Article 39a, U.C.M.J. hearing dated 14 October 2009. The accused went on the record at that hearing and stated he waived his right to be represented any further by Major Munoz. Major Munoz was the detailed defense counsel prior to Captain Muth but was released by the accused as the detailed defense counsel so that he could deploy.

APPELLATE EXHIBIT XCIV
PAGE 91 OF 136

(d) The next hearing on the record was another Article 39a session on 15 November 2009. The main purpose of the hearing was to conduct an in camera review of the Safety Center investigation. Captain Muth represented Sergeant Hohman at this session. At the conclusion of the session, the military judge stated on the record, that Captain Muth asked for an extension of his End of Active Service (EAS) which was approved through 1 December 2009. Captain Muth confirmed this and also stated that he was denied terminal leave due to his pending cases. The military judge wanted to put the accused on the record whether he was willing to waive further representation by Captain Muth or not before Captain Muth left active duty. Both the government and defense agreed that another session should be held prior to 30 November 2009 to put Sergeant Hohman's decision on the record.

(e) On 23 November 2009, Captain Muth submitted an Administrative Action (AA) form through his chain of command requesting an extension of his EAS from 1 December 2009 to 1 March 2010 so he could complete his pending cases as a defense counsel. His chain of command approved his request and forwarded it to the approving authority, Commandant of the Marine Corps, Officer Assignments, Programs and Plans, hereinafter called MMOA-3. MMOA-3 denied his second request for an extension on 27 November 2009 (Enclosure 2).

(f) Captain Muth's EAS date was previously extended to 1 December 2009 on 16 September 2009 (Enclosure 2).

(g) Captain Muth completed his active service on 1 December 2009 and transferred to the Individual Ready Reserve (IRR) on the same date.

(h) In March 2010, Captain Muth, submitted a request to MMOA-3 to resign his commission and cease his service within the IRR. This request was granted and his last day in the IRR is 1 September 2010.

APPELLATE EXHIBIT XCIV
PAGE 42 OF 136

(i) On 6 April 2010, a 39a hearing was conducted to schedule trial dates. Capt Kunce appeared as the detailed defense counsel for the accused. Sergeant Hohman did not waive his right to further representation by Captain Muth and requested Captain Muth be retained as his defense counsel. The Government asked for further dialogue on this matter to determine the attorney client rights of the accused. The defense counsel insisted that the accused wanted Captain Muth on the case as a defense counsel.

(j) The military judge issued a Judicial Order dated 5 June 2010, which ordered the government to return Captain Muth to active duty to represent the accused in light of the recent Hutchins decision.

(k) At an Article 39 session on 9 July 2010, the Government proffered that it secured temporary active duty (TAD) funds through Marine Expeditionary Force One (I MEF) if Captain Muth would accept active duty orders to complete his representation of the accused and/or severe the attorney-client relationship. The Government was unable to successfully get in contact with Captain Muth, despite leaving at least two phone messages with Captain Muth to determine whether or not he was willing to come on active duty. The Defense did not know either, as of 9 July 2010, whether or not Captain Muth was willing to come on active duty, voluntarily, to complete his representation of the accused.

(l) The week following the 9 July 2010 Article 39a session, Captain Muth communicated with the military judge via email that he was unwilling to return to active duty to represent Sergeant Hohman, but would represent him as a civilian counsel at his current hourly rate of $300.00 an hour.

(m) The military judge issued a Judicial Order to submit briefs in anticipation of another Article 39a session regarding Captain Muth and his representation of the accused.

APPELLATE EXHIBIT XCIV
PAGE 43 OF 136

3. **Discussion**.

Where the attorney-client relationship was formed, the relevant portion of R.C.M 505(d)(2)(B) provides:

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

To excuse Captain Muth under 506(c), express consent of the accused is required or "by the military judge upon application for withdrawal by the defense counsel for good cause shown." Sergeant Hohman made it clear on the record that he seeks to retain Captain Muth as a defense counsel in this case. However, the summary of Captain Muth's position with respect to his desires to represent Sergeant Hohman in Judicial Order of 21 July 2010 states that his civilian clientele are his primary concern:

> Captain Muth provided that he is now engaged in the practice of law as a civilian attorney, and a return to active duty would be intolerably disruptive to his livelihood and civilian practice, and would interfere with his representation of civilian clientele. Captain Muth stated essentially that he does not desire to return to active duty to represent Sergeant Hohman, though he would represent him in his civilian capacity as long as the government pays him his current hourly rate of $300.00 per hour.

Captain Muth has not appeared as a defense counsel in this case since his EAS. Before *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct.Crim.App.2010), good cause to excuse Captain Muth would likely have been established on these facts alone. However, good cause under *Hutchins* requires, "truly extraordinary circumstances rendering virtually impossible the

APPELLATE EXHIBIT XCIV
PAGE 44 OF 136

continuation of the established relationship." This precedent requires the Government to show that every reasonable avenue was visited for good cause to be established.

Captain Muth exhausted the only option that would not require him to incur two additional years of obligated active duty service. If he were willing to stay in the active duty force for at least two more years, he would have the option to submit another request for an EAD in order to be reconsidered for career designation, pursuant to MCO 1001.45J. However, had he been successful in his request, he may have been selected on the next career designation board and incurred an additional two years of active duty service. Despite the fact that MMOA-3 did not provide a specific reason in the letter dated 27 November 2009, denying Captain Muth's EAD request the order that outlines the EAD request process provides:

> Approval of an administrative EAD request, where career potential is not the primary issue, may be granted under the following circumstances:
>
> (a) The extension of an officer is critical to meet a specific operational commitment. MCO 1001.45J(4)(b)(2)(a)(3).

The language of the Order seems to say that for someone in Captain Muth's position, who was not career designated, reasons that justify an EAD must be such that a particular officer is essential to a precise mission. Captain Muth expressed in the statement that accompanied his AA form, that he needed to complete his pending cases. MMOA-3 knew Captain Muth had at least three cases still pending because he explained that in his AA form. However, they chose to deny his request, indicating that representing his clients to the completion of their proceedings was not an operational commitment that rises to the critical level of granting an EAD for a non-career designated Marine Officer. This alone distinguishes this case from Captain Bass in *Hutchins*.

In *Hutchins*, Captain Bass did not seek to an EAD. In fact, unlike Captain Muth who was denied terminal leave, Captain Bass took terminal leave and left the Southern California area

APPELLATE EXHIBIT XCIV
PAGE 45 OF 136

prior to severing his attorney-client relationship with the accused. The military judge in *Hutchins* also did not inform the accused that he could seek to retain Captain Bass. Instead, the military judge told the accused that he could no longer have Captain Bass as in defense counsel because his EAS expired and there was no way to bring him back on active duty to complete the case.

In this case, the military judge established on the record that the accused wished to retain Captain Muth as his defense counsel. Although the Government denied Captain Muth's EAD request, it was able to secure TAD funds to bring Captain Muth back on active duty for the amount of time necessary to complete the Hohman case. The Government in *Hutchins* did not provide Captain Bass this option. Still, Captain Muth would have to accept active duty orders voluntarily and he told the military judge he is unwilling to accept orders.

There are only a few rare instances where the Government may involuntarily recall a Marine from the IRR. According to MCO 1000.8 the Fleet Assistance Program, "Upon mobilization, the CMC...may issue to Reserve and retired Marines mailgram orders involuntarily returning them to active duty." The language is permissive, and this is the only indicator that at any time, may an IRR Marine be recalled to active duty involuntarily. Otherwise, IRR Marines may only be "authorized voluntary active duty."

Another way an IRR Marine may be involuntarily recalled may occur when the recall has been authorized by the President or Secretary of Defense to augment the active forces for any operational mission or Support for Responses to Certain Emergencies U.S.C. Title 10 Section § 12304. Such a recall may not be made to "provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe." Additionally, such a recall requires a determination by the President that the response capabilities of all other agencies have been exhausted. A reservist may also be called to active duty during a time of

APPELLATE EXHIBIT XCIV
PAGE 46 OF 56

declared war or in response to a declared state of national emergency § 12301. Lastly, any reservist so recalled is allowed to file for Delay, Deferment and Exemption in order to escape involuntary recall.

Finally, Captain Muth expressed to the military judge in an email that the only way he would be willing to continue the attorney-client relationship with the accused is if the Government paid for his civilian hourly rate of $300.00 an hour. The Government may not ethically provide payment to Captain Muth under these circumstances. JAG Instruction 5803.1B, Rule 1.5(c) provides:

> A Reserve or Retired judge advocate, whether or not serving on extended active-duty, who has initially represented or interviewed a client or prospective client concerning a matter as part of the attorney's official Navy or Marine Corps duties, shall not accept any salary or other payments as compensation for services rendered to that client in a private capacity concerning the same general matter for which the client was seen in an official capacity, unless so authorized by the Judge Advocate General.

Captain Muth is a reserve judge advocate who says he is willing to continue representing Sergeant Hohman on the same matter as he did when he was the detailed defense counsel, but at his civilian rate of $300.00 an hour. The Government refuses to entertain this course of action because it would violate the Rules of Conduct for Judge Advocates. It would also violate Federal law. Title 18, U.S.C. § 203 states:

> **(a)** Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly— **(1)** demands, seeks, receives, accepts, or agrees to receive or accept any compensation for any representational services, as agent or attorney or otherwise, rendered or to be rendered either personally or by another...when such person is an officer or employee or Federal judge of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court, court-martial, officer, or any civil, military, or naval commission; or **(2)** knowingly gives, promises, or offers any compensation for any such representational

APPELLATE EXHIBIT XCIV
PAGE 47 OF 136

> services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered, is or was such a Member, Member Elect, Delegate, Delegate Elect, Commissioner, Commissioner Elect, Federal judge, officer, or employee; shall be subject to the penalties set forth in section 216 of this title.

If the Government were to comply with Captain Muth's request to pay him his hourly rate, not only would the Government violate the Judge Advocate General Rules of Conduct, it would violate Federal law. That leaves the following options in this case:

(1) Captain Muth withdraws his resignation request and submits another AA form requesting reconsideration of his EAD with the understanding that he could be career designated and incur two (2) years of active duty service.

(2) Captain Muth represents the accused in his civilian capacity as a civilian defense counsel at no cost to the Government.

(3) Based on the exigent circumstances that meet or exceed the *Hutchins* standard for good cause, that is the Hutchins standard, "in cases where there exist truly extraordinary circumstances of the established relationship," the military judge should excuse Captain Muth from this case.

(4) Captain Muth submits a withdrawal request pursuant to R.C.M. 506(c) to the military judge to be excused from this case.

4. **Remedy**. Excuse Captain Muth as defense counsel for the Accused for good cause on the record.

N. L. Gannon
Major, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT XCIV
PAGE 44 OF 136

****

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by electronic mail on ~~1 August 2010~~. 3 Aug 2010

N. L. Gannon
Major, U.S. Marine Corps
Trial Counsel

APPELLATE EXHIBIT XCIV
PAGE 49 OF 136

CHARGE SHEET

I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, MI)	2. SSN	3. RANK/RATE	4. PAY GRADE
Hohman, Caleb P.	475 02 6203	Sgt	E-5

5. UNIT OR ORGANIZATION	6. CURRENT SERVICE	
	a. INITIAL DATE	b. TERM
HqBn, 1stMarDiv, Camp Pendleton, CA	2 Oct 05	NA

7. PAY PER MONTH			8. NATURE OF RESTRAINT OF ACCUSED	9. DATE(S) IMPOSED
a. BASIC	b. SEA/FOREIGN DUTY	c. TOTAL		
$2171.40	None	$2171.40	None	Not Applicable

II. CHARGES AND SPECIFICATIONS

10. Charge I: Violation of the UCMJ, Article 92

Specification 1: In that Sergeant Caleb P. Hohman, U. S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Pendleton, California, on or about 20 October 2006, violate a ~~lawful~~ general order, to wit: Paragraph 7001.4(e), Camp Pendleton Base ~~Order P3500.1M~~, dated 4 September 2003, by removing 5.56mm ~~jacketed frangible~~ ammunition from the confines of live-fire Range 116D without authorization.

Specification ~~2~~ 1: In that Sergeant Caleb P. Hohman, U. S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Pendleton, California, on or about 30 October 2006, violate a lawful general order, to wit: Paragraph 7(b)(4)(b), I Marine Expeditionary Force Order 3574, dated 4 December 2003, by failing to ensure that his magazines were loaded with 5.56mm blank single round ammunition prior to participating in a blank-fire training exercise.

Specification 3: In that Sergeant Caleb P. Hohman, U. S. Marine Corps, on active duty, who knew of his duties on board Marine Corps Base Camp Pendleton, California, on or about 20 October ~~2006~~, ~~was derelict~~ in the performance of those duties ~~in that he negligently failed~~ to unload the 5.56mm jacketed frangible ammunition ~~from his M-4~~ service rifle magazines prior to leaving a live-fire range.

III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, MI)	b. GRADE	c. ORGANIZATION OF ACCUSER
JONES, THOMAS J.	SGT	CLR-17, 1st MLG, MarForPac, CamPen, CA

d. SIGNATURE OF ACCUSER	e. DATE
	18 Apr 07

AFFIDAVIT: ~~Before~~ me, the undersigned, authorized by law to administer oaths in cases of this character, personally appeared the above named accuser this 18th day of April 20~~07~~, and signed the foregoing charges and specifications under oath that he is a person subject to the Uniform Code of Military Justice and that he either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his knowledge and belief.

A. C. GOODE
Typed Name of Officer

CLR-17, 1st MLG, MarForPac, CamPen, CA
Organization of Officer

Captain, USMC
Grade and Service

Judge Advocate
Official Capacity to Administer Oaths
(See R.C.M. 307(b)--must be commissioned officer)

A. C. Goode
Signature

DD FORM 458

S/N 0102-LF-000-4580

APPELLATE EXHIBIT KCIN
PAGE 50 OF 50 PAGES
ORIGINAL
ENCLOSURE (17)

12. On 19 APRIL 20 07, the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me. *(See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)*

B. M. O'SHEA — *Typed Name of Immediate Commander*

HqBn, 1stMarDiv, CamPen, CA — *Organization of Immediate Commander*

First Lieutenant — *Grade*

Signature

IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY

13. The sworn charges were received at 1600 hours, 19 APRIL 20 07 at HqBn, 1stMarDiv — *Designation of Command or*

Camp Pendleton, CA — *Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)*

FOR THE[1] Commanding Officer

B. M. O'SHEA — *Typed Name of Officer*

Legal Officer — *Official Capacity of Officer Signing*

First Lieutenant — *Grade*

Signature

V. REFERRAL; SERVICE OF CHARGES

14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY	b. PLACE	c. DATE
1st Marine Division (Rein)	Camp Pendleton, CA	MAR 19 2008

Referred for trial to the General court-martial convened by GCMCO serial # 01-06

dated 02 October 20 06, subject to the following instructions:[2] None.

By //////////////////////////////// of — *Command or Order*

T. D. WALDHAUSER — *Typed Name of Officer*

Commanding General — *Official Capacity of Officer Signing*

Major General — *Grade*

Signature

15. On 14 April 20 08, I (caused to be) served a copy hereof on (~~each of~~) the above named accused.

W. J. RYAN — Typed Name of Trial Counsel

Captain — Grade or Rank of Trial Counsel

Signature

FOOTNOTES

1 -- When an appropriate commander signs personally, inapplicable words are stricken.

2 -- See R.C.M. 601(e) concerning instructions. If none, so state.

DD Form 458 Reverse

APPELLATE EXHIBIT XCIV

PAGE 51 OF 136

Specification ~~4~~ 2: In that Sergeant Caleb P. Hohman, U. S. Marine Corps, on active duty, who knew of his duties on board Marine Corps Base Camp Pendleton, California, on or about 30 October 2006, was derelict in the performance of those duties in that he negligently failed to ensure that only 5.56mm blank single round ammunition was loaded into his magazines and failed to ensure that only 5.56mm blank single round ammunition was inserted into the chamber of his M-4 carbine service rifle prior to discharging the weapon at Sergeant Seth M. Algrim during a blank-fire training exercise.

Charge II: Violation of the UCMJ, Article 119

Specification: In that Sergeant Caleb P. Hohman, U. S. Marine Corps, on active duty, did, on board Marine Corps Base Camp Pendleton, California, on or about 30 October 2006, by culpable negligence, unlawfully kill Sergeant Seth M. Algrim, U. S. Marine Corps, by shooting him in the head with a 5.56mm jacketed frangible ammunition round from an M-4 Carbine service rifle.

ORIGINAL

APPELLATE EXHIBIT XCIV
PAGE 52 OF 136

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
3280 RUSSELL ROAD
QUANTICO, VIRGINIA 22134-5103

IN REPLY REFER TO:
1400
MMOA-3
NOV 27 2009

From: Commandant of the Marine Corps (MMOA-3)
To: Captain Robert F. Muth XXX-XX-3590/4402
Via: (1) Commanding General, 1st Marine Logistics Group
(2) Commanding Officer, Combat Logistics Regiment-17
(3) Company Commander, Service Company, Combat Logistics Regiment-17
(4) Officer-in-Charge, Legal Services Support Section, 1st Marine Logistics Group

Subj: REQUEST FOR EAD ICO CAPTAIN ROBERT F. MUTH XXX XX 3590/4402

Ref: (a) Captain's AA form of 26 Aug 09

1. Per response to reference (a) Captain Muth's request for extension on active duty has been carefully considered but disapproved.

2. Captain Muth's End of Active Service (EAS) date was previously extended to 1 December 2009 on 16 September 2009.

3. The point of contact for further questions is Second Lieutenant S. L. Snyder at (703) 784-9284.

D. J. Davis
By direction

Copy to:
Captain Muth
MMOA-2

APPELLATE EXHIBIT XCIV
PAGE 53 OF 136

ENCLOSURE (2)

UNITED STATES MARINE CORPS
1ST MARINE LOGISTICS GROUP
BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

1160
G-1
23 Nov 09

FOURTH ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Commanding General
To: Commandant of the Marine Corps (MMOA-3)

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

S. B. ARMSTRONG
By direction

APPELLATE EXHIBIT XCIV
PAGE 54 OF 136

UNITED STATES MARINE CORPS
COMBAT LOGISTICS REGIMENT-17
1ST MARINE LOGISTICS GROUP
BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

1160
S-1
23 Nov 09

THIRD ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Commanding Officer
To: Commandant of the Marine Corps (MMOA-3)
Via: (1) Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

T. J. GALVIN
By direction

APPELLATE EXHIBIT XCIV
PAGE 55 OF 136

UNITED STATES MARINE CORPS
SERVICE COMPANY
COMBAT LOGISTICS REGIMENT-17
1ST MARINE LOGISTICS GROUP
BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

1160
SVC
23 Nov 09

SECOND ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Commanding Officer
To: Commandant of the Marine Corps (MMOA-3)
Via: (1) Commanding Officer, Combat Logistics Regiment-17, 1st Marine Logistics Group
(2) Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

1. Forwarded, recommending approval.

T. R. POST

APPELLATE EXHIBIT XCIV
PAGE 56 OF 136

UNITED STATES MARINE CORPS

LEGAL SERVICES SUPPORT SECTION
1ST MARINE LOGISTICS GROUP, MARFORPAC
BOX 555171
CAMP PENDLETON, CA 92055-5171

IN REPLY REFER TO
1000
OIC
23 Nov 09

FIRST ENDORSEMENT on Capt Muth's AA Form 1000 of 23 Nov 09

From: Officer-in-Charge, Legal Services Support Section, 1st Marine Logistics Group
To: Commandant of the Marine Corps (MMOA-3)
Via: (1) Commanding Officer, Service Company, Combat Logistics Regiment-17, 1st Marine Logistics Group
(2) Commanding Officer, Combat Logistics Regiment-17, 1st Marine Logistics Group
(3) Commanding General, 1st Marine Logistics Group

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

Ref: (a) JAGINST 5803.1C

1. Forwarded recommending approval. Approval of Captain Muth's request for a three-month extension to his End of Active Service (EAS) will promote the accomplishment of the Legal Services Support Section (LSSS), 1st Marine Logistics Group (1st MLG) mission and minimize the additional expenditure of government time and resources in potential further delay of the cases and on potential post-trial issues.

2. Defense counsel detailed to represent servicemembers form an attorney-client relationship with their client under reference (a). During the course of their representation, defense counsel devote a considerable amount of time and resources investigating and preparing for trial. Captain Muth was detailed to each of these two complex cases, which are described in the basic correspondence, because of his unique skills and extensive experience as a defense counsel. He has spent a period of months preparing for trial in each of these cases.

3. One of the two court-martial cases in which Captain Muth has been detailed, U.S. v. Watson, is scheduled to be completed by 1 February 2010. Any denial of Captain Muth's request for extension of his EAS may have a direct adverse operational impact on the mission of the LSSS, 1st MLG, which is to provide effective and expeditious trial services support. Specifically,

APPELLATE EXHIBIT XCIV
PAGE 57 OF 136

Subj: REQUEST FOR SECOND EXTENSION OF END OF ACTIVE SERVICE IN THE CASE OF CAPTAIN ROBERT F. MUTH 3590/4402 USMC

Captain Muth would be excused as detailed defense counsel as a result of his EAS on 1 December 2009 and the second detailed defense counsel, Captain Sameit, could potentially need additional time to adequately prepare for trial. Furthermore, this excusal could create the potential for future post-trial issues arising over whether the accused received adequate legal representation.

4. If you wish to contact me with questions concerning this recommendation, I can be reached telephonically at (760) 725-9700 or by e-mail at Keith.Forkin@usmc.mil.

KEITH A. FORKIN

APPELLATE EXHIBIT XCIV
PAGE 59 OF 136

ADMINISTRATIVE ACTION (5216)

NAVMC 102.74 (REV. 3.86)
Previous editions will be used
SN: 00000-00-003-0904 U/I: PADS OF 100

1. ACTION NO.	2. SSIC/FILE NO.
	1000

3. DATE: 23 NOV 09

4. FROM (Grade, Name, SSN, MOS or (O) Pers. O etc.)
CAPT MUTH, ROBERT F. XXX XX-3590/4402, USMC

5. ORGANIZATION AND STATION (Complete Address)
Legal Services Support Team-Echo
Legal Services Support Section
Box 555607
Camp Pendleton, California 92055

6. VIA (As required)
(1) OIC, LSSS
(2) CO, Svc Co
(3) CO, CLR-17
(4) CO, 1st MLG

7. TO:
Commandant of the Marine Corps
(MMOA-2)
3280 Russell Road
Quantico, VA 22134-5103

8. NATURE OF ACTION/SUBJECT
Request for extension of EAS date.

9. COPY TO
(1) FILE

10. REFERENCE OR AUTHORITY (If Applicable)

11. ENCLOSURES (If Any)
(1) Description of pending cases

12. SUPPLEMENTAL INFORMATION (Reduce to minimum wording. Type name of originator and sign 3 line below text)

1. I respectfully request an extension of my active duty service in order to have sufficient time to complete my work as a defense counsel on pending General Courts Martial cases and one complicated DuBay Hearing.

2. My End of Active Service (EAS) date is currently 1 December 2009. I respectfully request that the date be changed to 1 March 2010. This change would provide sufficient time for me to complete the pending cases I am serving on as defense counsel. This will prevent the significant prejudice to my clients that will result from being forced to involuntarily withdraw my representation of those Marines I currently represent.

3. An explanation of current pending cases that serve as the basis of this request is provided in Encl (1).

Robert F. Muth
R. F. MUTH

APPELLATE EXHIBIT XCIV
PAGE 54 OF 136

13. PROCESSING ACTION (Complete processing action in Item 12 or on reverse. Endorse by rubber stamp where applicable)

STATEMENT OF CASES

The following information is provided on each pending case as justification for this request to extend the EAS of Capt R. P. Muth, XXX-XX-3590/4402, USMC:

(a) *United States v. Watson* - Private First Class (PFC) Watson is charged with two specifications of attempted rape and premeditated murder, one specification of attempted kidnapping, two specifications of possession of child pornography and various other charges related to state weapons charges, communicating threats, indecent language with minors, and unauthorized absence. PFC Watson has been in pretrial confinement since 11 March 2009 and I was detailed to represent him later that month. I have represented PFC Watson for his initial Article 32 hearing and again for his two subsequent Article 32 hearings. PFC Watson has made numerous requests for speedy trial. His charges were finally referred on 28 October 2009. He was arraigned on 3 November 2009 having waived the five day waiting period. At the arraignment PFC Watson requested to have his case heard prior to my 1 December 2009 scheduled EAS. The military judge indicated he would not schedule the trial dates that quickly due to the complexity of the case. PFC Watson's trial is currently scheduled for 19-28 January 2010. This case deals with a number of complex issues and voluminous discovery. My withdrawal from representing PFC Watson would cause great prejudice to his case and further the already extensive pre-trial confinement time he has already been subjected to at this point in order to allow for another defense counsel to prepare for his trial.

(b) *United States v. Hohman* - This case involves a Sergeant charged with manslaughter in the death of another Marine in a training accident. This case has been pending for over three years at this point and the delay is due to the Navy Safety Center's Safety Investigation in the case. A Safety Investigation has been completed and the Safety Center had refused, per their standard policy, to release the results of their findings. The case was on hold indefinitely while awaiting the Secretary of the Navy's determination of whether the Safety Center will release their report. On 16 November 2009, the government approved allowing the safety center investigator to testify and an *in camera* review was conducted regarding his investigation. The military judge is currently reviewing motions and

APPELLATE EXHIBIT XCIV
PAGE 60 OF 136

documents from this hearing and as a result, no new trial dates have been set in this case.

(c) *United States v. Marcillas* - This case is a DuBay hearing into issues raised to the Court of Appeals for the Armed Forces (CAAF). This extraordinarily complicated DuBay hearing relates to a General Courts-Martial that took place over six years ago. The case involved a number of issues related to the mental capacity of the accused and the purported ineffective assistance of counsel at the trial level. The case involves extensive discovery including thousands of pages of trial transcript, medical records and appellate briefs and extensive case law research. The client has been variously committed to the mental health department at the Beaumont Army Medical Center at Fort Bliss, Texas. The DuBay hearing was conducted on 14-15 October. While the hearing is complete, the military judge did not close the hearing and left open the possibility that she might require another session of court depending upon her review of the record. Due to the difficulty of this case and the client's unstable mental condition, it would be extremely prejudicial to his case to have a substitute defense counsel appointed at this point if the military judge decided to take further testimony prior to closing the hearing.

APPELLATE EXHIBIT XCIV
PAGE 6 OF 136

UNITED STATES, Appellee

v.

Frank D. WUTERICH, Staff Sergeant
U.S. Marine Corps, Appellant

No. 08-6006

Crim. App. No. 200800183

AND

CBS BROADCASTING INC., Petitioner

v.

NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS,
THE UNITED STATES OF AMERICA, and
Frank D. WUTERICH, Staff Sergeant, U.S. Marine Corps,
Respondents

No. 08-8020/MC

AND

In re Frank D. WUTERICH

No. 08-8021/MC

APPELLATE EXHIBIT XCIV
PAGE 62 OF 136

United States Court of Appeals for the Armed Forces

Argued September 17, 2008

Decided November 17, 2008

EFFRON, C.J., delivered the opinion of the Court, in which BAKER and STUCKY, JJ., joined. RYAN, J., filed a separate dissenting opinion, in which ERDMANN, J., joined.

Counsel

For Appellant/Petitioner Wuterich: Lieutenant Kathleen L. Kadlec, JAGC, USN (argued); Colonel Dwight H. Sullivan, USMCR, and Major Christian J. Broadston, USMC (on brief).

For Petitioner CBS Broadcasting Inc.: Lee Levine, Esq. (argued); Seth D. Berlin, Esq. (on brief).

For Appellee/Respondent United States: Lieutenant Timothy H. Delgado, JAGC, USN (argued).

For Amicus Curiae in Support of Petitioner CBS Broadcasting Inc.: Clifford M. Sloan, Esq., Amy R. Sabin, Esq., and David W. Foster, Esq. (on brief), Skadden, Arps, Slate, Meagher & Flom LLP.

Military Judge: Jeffrey G. Meeks

THIS OPINION IS SUBJECT TO EDITORIAL CORRECTION BEFORE FINAL PUBLICATION.

APPELLATE EXHIBIT XCIV
PAGE 63 OF 136

Chief Judge EFFRON delivered the opinion of the Court.

The present case concerns three filings arising out of United States v. Wuterich, a pending court-martial convened at Camp Pendleton, California. United States v. Wuterich, No. 08-6006, is a petition for grant of review under Article 67(a)(3), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867(a)(3) (2000), filed by Staff Sergeant (SSgt) Frank D. Wuterich (Appellant), the accused in the pending court-martial. In re Wuterich, No. 08-8021, is a petition for extraordinary relief filed by SSgt Wuterich under the All Writs Act, 28 U.S.C. § 1651(a) (2000). CBS Broadcasting Inc. v. United States, No. 08-0820, is a petition for extraordinary relief filed by CBS Broadcasting Inc., the recipient of a subpoena in the pending court-martial. On September 17, 2008, we held a consolidated hearing on these three filings.

The consolidated cases involve a ruling by the military judge in the pending court-martial. See infra Part I. Appellant faces charges of voluntary manslaughter and other offenses related to the deaths of civilians in Haditha, Iraq. During the period in which the civilian deaths were under investigation, Appellant provided an interview to CBS Broadcasting Inc. regarding the events on the date of and in the place of the charged offenses. CBS subsequently broadcast a portion of the interview as part of the 60 Minutes television

APPELLATE EXHIBIT XCIV
PAGE 64 OF 136

program. The Government issued a subpoena to CBS that included a request for the outtakes -- the portions of the interview given by Appellant that were not included in the broadcast. CBS declined to provide the outtakes and filed a motion to quash the subpoena. The military judge, without reviewing the content of the outtakes, granted the motion to quash the subpoena. The Government appealed under Article 62, UCMJ, 10 U.S.C. § 862 (2000), which provides authority for interlocutory government appeals similar to the authority available in federal civilian criminal prosecutions under 18 U.S.C. § 3731 (2000).

The present appeal primarily involves two issues. First, whether the military judge's ruling is subject to appeal under Article 62. Second, whether the military judge erred by granting the motion to quash the subpoena without first conducting an in camera review of the contents of the requested material.

This Court consistently has looked to the decisions of the federal courts under section 3731 for guidance in interpreting the parallel provisions of Article 62. See infra Part III.B.1. Under those decisions, which provide important guidance limiting such review, a ruling that quashes a subpoena is subject to interlocutory appellate review. See infra Part III.B.2. Likewise, those decisions provide guidance as to the circumstances in which it is appropriate for the trial court to

APPELLATE EXHIBIT XCIV
PAGE 65 OF 136

conduct an in camera review. See infra Part III.D. For the reasons set forth below, we conclude that the ruling of the military judge was subject to appeal under Article 62. We further conclude that it was an abuse of discretion for the military judge to quash the subpoena without first conducting an in camera review of the requested materials. In our decretal paragraph, we order the military judge to review the requested material prior to ruling on the motion to quash the subpoena.

Part I summarizes the circumstances leading up to the current appeal. Part II describes the issues set forth in each of the filings. Part III discusses the procedural and substantive issues raised by the filings. Part IV sets forth our decision.

I. BACKGROUND

A. THE CHARGES AT THE PENDING COURT-MARTIAL

The trial of SSgt Wuterich concerns the alleged unlawful killing of civilians during military operations in Haditha, Iraq, on November 19, 2005. During an investigation into the events in Haditha, Appellant provided a statement on February 21, 2006, concerning this incident and his role.

Following further investigation, charges against Appellant were referred for trial by court-martial on December 27, 2007. The pending charges allege dereliction of duty, voluntary

APPELLATE EXHIBIT XCIV
PAGE 6 OF 136

manslaughter, aggravated assault, reckless endangerment, and obstruction of justice, offenses under Articles 92, 119, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 919, 928, 934 (2000).

B. STATEMENTS PROVIDED BY APPELLANT TO CBS REGARDING THE CHARGED OFFENSES

On March 18, 2007, the CBS television program 60 Minutes broadcast a segment entitled "The Killings in Haditha; Staff Sergeant Frank Wuterich discusses what the Marines did the day 24 Iraqi civilians were killed." At the outset of the broadcast, the CBS correspondent offered the following introduction:

> On November 19th, 2005, a squad of United States Marines killed 24 apparently innocent civilians in an Iraqi town called Haditha. The dead included men, women and children as young as two. Iraqi witnesses say the Marines were on a rampage, slaughtering people in the street and in their homes. And in December, four Marines were charged with murder. Was it murder? Was Haditha a massacre? A military jury will decide, but there's no question that Haditha is symbolic of a war that leaves American troops with terrible choices. The Marine making those choices in Haditha was a 25-year-old sergeant named Frank Wuterich. He's charged with 18 murders, the most by far, and he's accused of lying on the day that it happened. Wuterich faces life in prison. None of the Marines charged with murder has spoken publicly about this, but tonight Staff Sergeant Wuterich says he wants to tell the truth about the day he decided who would live and who would die in Haditha.

APPELLATE EXHIBIT XCIV
PAGE 107 OF 136

The segment included questions to Appellant by CBS correspondent Scott Pelley, statements by Appellant, observations by Mr. Pelley regarding Appellant's statements, other commentary by Mr. Pelley, and statements by other individuals. The segment consisted of about one-half hour of broadcast time.

The statements broadcast by CBS were made during an on-camera interview with Appellant conducted by Mr. Pelley in October 2006. According to Mr. Pelley, "During our interview, Staff Sergeant Wuterich recounted the events of the incident at Haditha." The precise length of Appellant's interview with CBS is not set forth in the record. Defense counsel indicated on the record that the interview lasted for "hours," and the military judge referred to representations that there were "several hours" of outtakes. These statements have not been challenged on appeal. Subsequent to Appellant's meeting with Mr. Pelley, CBS selected portions of the interview for presentation during the broadcast.

C. THE SUBPOENA FOR APPELLANT'S STATEMENTS TO CBS

The prosecution issued a subpoena to CBS, dated January 16, 2008. See Rule for Courts-Martial (R.C.M.) 703. In pertinent part, the subpoena required CBS "to deliver any and all video and/or audio tape(s), to include out-takes and raw footage, of any and all interviews and/or statements, oral comments, and/or oral communications or nonverbal acts, actions, and/or

APPELLATE EXHIBIT XCIV
PAGE 64 OF 136

acknowledgements made by Staff Sergeant Frank D. Wuterich, United States Marine Corps, recorded by or for, or in the possession of, CBS News." The subpoena also noted that "SSgt Frank D. Wuterich is a criminal defendant and any/all statements made by him or his defense counsel concerning his actions could be deemed to be admissions and admissible at the trial of the facts . . . ."

CBS moved to quash the portion of the subpoena that sought production of the unaired footage. In support of the motion, CBS cited R.C.M. 703(f)(4)(C), which authorizes the military judge to require that a subpoena be withdrawn or modified if it is "unreasonable or oppressive." CBS also contended that the subpoena should be quashed because the Government could not meet its burden of showing that production of the unaired footage was required under "a qualified reporter's privilege that is rooted in both the First Amendment . . . and the common law." As an alternative to the motion to quash the subpoena, CBS moved that the military judge issue "a protective order, pursuant to R.C.M. 701(g)(2), precluding the Government from obtaining the materials sought by the subpoena." CBS agreed to provide and authenticate a copy of the segment broadcast on 60 Minutes.

Responding to the CBS motion, the prosecution asserted that the subpoena reflected a good faith determination that the outtakes contained admissions from Appellant that were relevant,

APPELLATE EXHIBIT XCIV
PAGE 69 OF 130

material, and necessary. The prosecution contended that the existence of a reporter's privilege represented a minority view among the federal courts and that, even under the rulings of those courts that had found a qualified privilege, the subpoena should not be quashed.

The prosecution and CBS submitted detailed briefs to the military judge, including appendices directed to the question of whether the information sought in the outtakes was cumulative of evidence otherwise in the Government's possession. The military judge reviewed the 60 Minutes broadcast, but he did not obtain and review the unaired outtakes that were the subject of the motion to quash.

The defense did not submit a brief on the CBS motion to quash. When the military judge asked whether the defense had a position on the motion to quash, defense counsel responded: "No, Your Honor."

During a subsequent colloquy with trial counsel, the military judge commented to trial counsel that after viewing the 60 Minutes broadcast, "I'm having a hard time seeing what it is you think that's there that's not already there." Trial counsel responded that the outtakes could provide the prosecution with the following information about Appellant's broadcast statements:

APPELLATE EXHIBIT XCIV
PAGE 70 OF 136

> The background to those comments. The backdrop for his rational[e]. The in-context expressions of the accused in the context of the interview. Not the snippets. Not the sound bites. Not the portion that has been edited for broadcast. But the context. The totality of his expressions of his conduct, and his rational[e] for his conduct and the conduct on the part of his Marines.

The military judge then asked defense counsel what position the defense would take at trial if the prosecution offered into evidence Appellant's statements from the 60 Minutes broadcast. Defense counsel responded that he would object if the prosecution sought to admit only the broadcast portions of the interview: "I would assert the doctrine of completeness [under] M.R.E. 106 and ask that it all be there for context." At that point, the military judge asked counsel for CBS what position CBS would take if the defense asked for the complete interview. Counsel for CBS responded that "we would, I suspect, file a similar motion to quash," depending on the state of the record at the time, among other factors. He further noted that the burden to overcome the privilege asserted by CBS would rest with the defense, although the balance might be different in the context of a defense request.

Defense counsel requested permission to address the issue, noting that the defense was not "requesting that these outtakes be admitted [at] trial." Defense counsel further emphasized

APPELLATE EXHIBIT XCIV
PAGE 71 OF 136

that "we are not a party to the dispute that's going on today. And we are also not required to assist the government in acquiring its evidence or the evidence it thinks it needs. That's never our duty . . . ."

The military judge did not indicate how he might rule if the defense were to offer a motion to compel introduction of the interview outtakes under Military Rule of Evidence (M.R.E.) 106. Instead, he indicated that he would provide both the prosecution and counsel for CBS with the opportunity to brief that issue should it arise in the future.

At the conclusion of arguments on the motion, the military judge granted the motion to quash the subpoena on the grounds that "the requirement of necessity has not been met." See R.C.M. 703(f)(1) ("Each party is entitled to the production of evidence which is relevant and necessary."). The military judge took note of "the representation that there are several hours of outtakes in the possession of CBS which contain information concerning the accused's view of the events that occurred on the 19th of November of 2005." He also observed that the outtakes "could be admissible into the evidence as statements of the accused under Military Rule of Evidence 801(d) [admissibility of statements by a party-opponent]." The military judge concluded, however, that "with respect to the outtakes, the contents of the accused's comments are speculative at this point and the court

APPELLATE EXHIBIT XCIV
PAGE 72 OF 136

is concerned that the subpoena in this case likely qualifies as a fishing expedition."

The military judge determined that production of the requested information was not necessary because "the information desired here by the government from CBS would be cumulative with what is already in the hands of the government." See R.C.M. 703(f)(1) Discussion (noting, in the nonbinding commentary accompanying the rule, that "[r]elevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue"). In the course of reaching his conclusion on cumulativeness, the military judge considered the availability to the prosecution of statements by Appellant broadcast in the 60 Minutes segment; other statements made by Appellant prior to trial; statements made by members of his unit; and the forensic evidence, photographs, and other physical evidence obtained from the scene of the charged offenses.

The military judge also addressed the question of whether CBS could rely on a newsgathering privilege, stating that he was persuaded that such a privilege existed "under federal common law." He added, however, that it was not necessary to base his decision on such a privilege because any motion to quash that met the "lower standard" of R.C.M. 703 would necessarily meet

APPELLATE EXHIBIT XCIV
PAGE 73 OF 136

"the greater standard required for disclosure" under a qualified reporter's privilege.

The prosecution asked the military judge to reconsider his ruling "and order an in camera inspection to determine whether or not the material in question is in fact cumulative . . . given the fact that the military judge had not had an opportunity to review" the material. See R.C.M. 703(f)(4)(C) (providing that when the recipient of a subpoena requests relief, "the military judge may direct that the evidence be submitted to the military judge for an in camera inspection to determine whether such relief should be granted"). The military judge denied the motion without explanation. The Government appealed the ruling to the Court of Criminal Appeals under Article 62, UCMJ, 10 U.S.C. § 862 (2000). The United States Navy-Marine Corps Court of Criminal Appeals vacated the ruling of the military judge and remanded the case for further proceedings. United States v. Wuterich, 66 M.J. 685, 691-92 (N-M. Ct. Crim. App. 2008).

II. THE PENDING PROCEEDINGS

The present consolidated case addresses three pending filings that seek review of the decision by the Court of Criminal Appeals. In United States v. Wuterich, No. 08-6006, Appellant has filed a petition for grant of review under Article

APPELLATE EXHIBIT XCIV
PAGE 74 OF 136

67(a)(3), UCMJ. On Appellant's petition, we have granted review of the following issues:

> I. Whether the lower court erred in holding that it has jurisdiction to entertain the Government's challenge of a discovery ruling pursuant to Article 62, UCMJ.
>
> II. Whether the lower court erred in holding that the Appellant did not have standing as petitioner/appellee and thereby violated Appellant's statutory and constitutional right to counsel.

In a related case, In re Wuterich, No. 08-8021, Appellant filed a petition for extraordinary relief under 28 U.S.C. § 1651(a), as an alternative, in the event that we determined Appellant lacks standing to appeal under Article 67(a)(3), UCMJ. In view of our determination, infra Part III.A., that Appellant has standing to appeal under Article 67(a)(3), UCMJ, we deny the writ petition as moot.

The third filing, CBS Broadcasting Inc. v. United States, No. 08-0820, is a petition for extraordinary relief to obtain review of the decision by the Court of Criminal Appeals. CBS filed this writ as an alternative to reliance on Appellant's petition for grant of review under Article 67(a)(3), UCMJ, as the vehicle for reviewing the decision of the court below. In the writ petition, CBS suggested that the merits of the decision by the lower court could be addressed properly during consideration of Appellant's petition for review under Article

APPELLATE EXHIBIT XCIV
PAGE 75 OF 130

67(a)(3), UCMJ. We agree, and deny the CBS writ petition as moot.

The Government appeal under Article 62 automatically stayed the proceedings before the court-martial pending disposition by the Court of Criminal Appeals. See R.C.M. 908(b)(4). The Court of Criminal Appeals subsequently returned the case for further proceedings before the court-martial. 66 M.J. at 691-92. Our Court has not ordered a stay of the pending court-martial proceedings. See R.C.M. 908(c)(3). Neither party has asked us to issue a stay or otherwise take action with respect to the status of the court-martial.

III. DISCUSSION

In the present case, Appellant -- knowing of the investigation into the events in Haditha -- granted an interview to CBS Broadcasting Inc. CBS, which was aware of the ongoing investigation, focused the interview on the events occurring on the date and in the place of the matters under investigation. CBS broadcast some, but not all, of the statements made by Appellant during the interview. In the nationally televised 60 Minutes program, CBS stated that Appellant wanted "to tell the truth about the day he decided who would live and who would die in Haditha."

APPELLATE EXHIBIT XCIV
PAGE 76 OF 136

At this stage in the appellate proceedings, Appellant neither contests the voluntariness of the statements made during his CBS interview about the events in Haditha nor claims any privilege that would preclude use of his statements to CBS in the pending court-martial. The majority of the statements made by Appellant during the CBS interview, however, are not now available for introduction into evidence at the court-martial. In response to a Government subpoena for tapes of Appellant's entire interview, CBS produced only the broadcast portion. It declined to provide the court-martial with the outtakes, which contained the majority of Appellant's interview statements.

On the record before us, only CBS has access to Appellant's full interview regarding the events in Haditha. Only CBS -- an entity that is not a party to the pending court-martial -- is in a position to assess whether the statements in the outtakes are exculpatory, inculpatory, or otherwise necessary to enhance the significance of other statements made by Appellant.

The military judge ruled that the Government could not have access to the majority of statements made by the accused in his interview because the military judge concluded that those statements -- which he had not reviewed -- were cumulative in relationship to other evidence available to the Government. The military judge did not explain on the record how he was able to

APPELLATE EXHIBIT XCIV
PAGE 77 OF 136

assess the content and quality of statements contained in the outtakes that he had not reviewed.

Appellant and Petitioner-CBS each contend that the military judge's ruling was not appealable under Article 62, UCMJ, the statute governing prosecution appeals. Further, each contends that the ruling by the military judge, even if subject to appeal, did not constitute an abuse of discretion. In addition, Appellant contends that the lower court erred in ruling that he did not have standing to participate in the appellate proceedings. Section A of this discussion addresses standing. Section B discusses government appeals in criminal cases. Section C considers the Government appeal in the present case. Section D discusses the military judge's decision that production of the outtakes was not necessary because the evidence therein was cumulative. Section E addresses further proceedings.

A. STANDING

After the military judge quashed the Government's subpoena, the Government filed an appeal under Article 62, UCMJ. Appellant filed a motion to dismiss on the grounds that the military judge's ruling was not appealable under Article 62, UMCJ.

The Court of Criminal Appeals declined to consider Appellant's filings on the grounds that Appellant had no

APPELLATE EXHIBIT XCIV
PAGE 19 OF 100

standing to participate in the Government's appeal under Article 62, UCMJ. Wuterich, 66 M.J. at 688-89. The Court of Criminal Appeals noted that defense counsel had asserted at trial that SSgt Wuterich was not a party to the dispute between CBS and the Government. Id. at 688. The court primarily relied on cases involving the concept of standing under the Fourth Amendment, as well as cases involving privileges and third-party subpoenas. See id. at 688-89.

The jurisdictional concept of standing normally concerns the limitation of the judicial power of the United States to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. See, e.g., Sprint Communc'ns Co. v. APCC Servs., Inc., 128 S. Ct. 2531, 2535 (2008) (summarizing the requirements for a plaintiff in civil litigation to establish standing -- an injury in fact, causation, and redressability). This Court, which was established under Article I of the Constitution, has applied the principles from the "cases" and "controversies" limitation as a prudential matter. See United States v. Chisholm, 59 M.J. 151, 152 (C.A.A.F. 2003).

The evidentiary concept of standing in criminal cases concerns the issue of whether a defendant has a sufficient interest in the object of a search, a claim of privilege, or other evidentiary matter to prevail on the merits of the objection. See, e.g., Rakas v. Illinois, 439 U.S. 128, 134-40

APPELLATE EXHIBIT XCIV
PAGE 79 OF 136

(1978); United States v. Johnson, 53 M.J. 459, 461-62 (C.A.A.F. 2000); United States v. Jones, 52 M.J. 60, 63-64 (C.A.A.F. 1999). These cases involve the criteria used to assess the merits of a criminal defendant's evidentiary claims, not the right of a defendant to participate as a litigant in the assessment of those claims.

Appellant did not initiate the present litigation. He is a defendant in a criminal case brought by the United States. Trial defense counsel's comment regarding the dispute between the Government and CBS was offered in the context of counsel's position that the defense had no obligation to assist the Government in obtaining the evidence from CBS. Defense counsel expressly addressed the interest of Appellant in the requested material under the rule of completeness of M.R.E. 106. See supra Part I.C. The position articulated by trial defense counsel before the military judge underscores the direct interest of Appellant in the scope of any ruling at trial or on appeal regarding the evidence that would be available for consideration at this trial.

Appellant sought to persuade the Court of Criminal Appeals that the military judge's order was not subject to appeal under Article 62, and that the case should proceed with a trial on the merits. In so doing, Appellant invoked his direct interest in prompt disposition of the charges, a matter expressly addressed

APPELLATE EXHIBIT XCIV
PAGE 90 OF 136

in Article 62, UCMJ. Although it would have been appropriate for the Court of Criminal Appeals to consider the relationship of Appellant to the requested material for purposes of assessing how much weight, if any, to accord Appellant's views on the motion to quash the subpoena, it was not appropriate to deprive him altogether of the opportunity to participate in appellate litigation having direct consequences on the prompt disposition of criminal proceedings brought against him by the United States.

As a result of the lower court's erroneous view of standing, Appellant did not have the opportunity to participate in the appellate proceedings before that court. Under these circumstances, we vacate the decision of the court below in our decretal paragraph. In view of the pending court-martial proceedings, and because this case involves an issue of law that does not pertain to the unique factfinding powers of the Court of Criminal Appeals, we shall review directly the decision of the military judge without remanding the case to the lower court. See United States v. Shelton, 64 M.J. 32, 37 (C.A.A.F. 2006) ("When reviewing a decision of a Court of Criminal Appeals on a military judge's ruling, we typically have pierced through that intermediate level and examined the military judge's ruling, then decided whether the Court of Criminal Appeals was

APPELLATE EXHIBIT XCIV
PAGE 91 OF 136

right or wrong in its examination of the military judge's ruling.") (citations and quotation marks omitted).

B. GOVERNMENT APPEALS IN CRIMINAL CASES

Federal courts, including courts in the military justice system established under Article I of the Constitution, are courts of limited jurisdiction. See United States v. Lopez de Victoria, 66 M.J. 67, 69 (C.A.A.F. 2008) (noting that such jurisdiction "is conferred ultimately by the Constitution, and immediately by statute"). In criminal cases, prosecution appeals are not favored and are available only upon specific statutory authorization. See 7 Wayne R. LaFave et al., Criminal Procedure § 27.3(a)-(b) (3d. ed. 2007); United States v. Watson, 386 F.3d 304, 307 (1st Cir. 2004). The constitutional prohibition on double jeopardy and related statutory considerations severely limit post-trial appeals by the prosecution in contrast to the broad appellate rights of the defense following the conclusion of trial. See 7 LaFave, supra, § 27.3(a). In view of these limitations, the prosecution as a general matter has a somewhat broader opportunity than the defense to file appeals during the trial. See id. § 27.3(c). Congress has authorized interlocutory government appeals in federal civilian criminal cases under 18 U.S.C. § 3731 (2000).[1]

[1] The current version of 18 U.S.C. § 3731 provides:

APPELLATE EXHIBIT XCIV
PAGE 97 OF 136

Congress also has authorized interlocutory prosecution appeals in cases tried by courts-martial under Article 62, UCMJ, 10 U.S.C. § 862.[2]

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, or any part thereof, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, a decision or order granting release.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

[2] The current version of Article 62, UCMJ, provides:

> (a)(1) In a trial by court-martial in which a military judge presides and in which a punitive discharge may be adjudged, the United States may appeal the following (other than an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification):
>
> (A) An order or ruling of the military judge which terminates the proceedings with respect to a charge or specification.
>
> (B) An order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding.
>
> (C) An order or ruling which directs the disclosure of classified information.
>
> (D) An order or ruling which imposes sanctions for nondisclosure of classified information.
>
> (E) A refusal of the military judge to issue a protective order sought by the United States to prevent the disclosure of classified information.

APPELLATE EXHIBIT XCIV
PAGE 43 OF 130

1. The relationship between Article 62, UCMJ, and 18 U.S.C. § 3731

Congress provided authority for interlocutory government appeals under Article 62, UCMJ, in the Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393 (1983). Congress based the legislation on 18 U.S.C. § 3731, the statute applicable to the trial of criminal cases in the federal district courts. See S. Rep. No. 98-53, at 6 (1983) (stating that Article 62 "allows appeal by the government under procedures similar to an appeal by the United States in a federal civilian prosecution"); id. at 23 (stating that "[t]o the extent practicable, the proposal parallels 18 U.S.C. § 3731,

---

(F) A refusal by the military judge to enforce an order described in subparagraph (E) that has previously been issued by appropriate authority.

(2) An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours of the order or ruling. Such notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding.

(3) An appeal under this section shall be diligently prosecuted by appellate Government counsel.

(b) An appeal under this section shall be forwarded by a means prescribed under regulations of the President directly to the Court of Criminal Appeals and shall, whenever practicable, have priority over all other proceedings before that court. In ruling on an appeal under this section, the Court of Criminal Appeals may act only with respect to matters of law, notwithstanding section 866(c) of this title [10 U.S.C. § 866(c)] (article 66(c)).

(c) Any period of delay resulting from an appeal under this section shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit.

APPELLATE EXHIBIT XCIV
PAGE 84 OF 136

which permits appeals by the United States in federal prosecutions").

As Chief Judge Everett noted in United States v. Browers:

> Because the legislative history makes clear that Congress intended for Article 62 appeals to be conducted "under procedures similar to [those governing] an appeal by the United States in a federal civilian prosecution," we look to federal precedent for guidance on this question.

20 M.J. 356, 359 (C.M.A. 1985) (alteration in original) (quoting S. Rep. No. 98-53, at 6); accord Lopez de Victoria, 66 M.J. at 70-71; United States v. Brooks, 42 M.J. 484, 486 (C.A.A.F. 1995); United States v. Lincoln, 42 M.J. 315, 320 (C.A.A.F. 1995); United States v. True, 28 M.J. 1, 3 (C.M.A. 1989).

Federal court decisions interpreting 18 U.S.C. § 3731 constitute guidance, not binding precedent, in the interpretation of Article 62, UCMJ. When considering the import of cases arising under 18 U.S.C. § 3731, we bear in mind that "Congress, in enacting the revised Article 62, UCMJ, in 1983, clearly intended to afford the government a right to appeal which, 'to the extent practicable . . . parallels 18 U.S.C. § 3731 . . . .'" Lopez de Victoria, 66 M.J. at 70 (first ellipsis in original) (quoting S. Rep. No. 98-53, at 23). In that regard, we take into account the structural differences between courts-martial and trials in federal district court, as well as

APPELLATE EXHIBIT XCIV
PAGE 95 OF 126

the textual similarities and differences with respect to Article 62, UCMJ, and 18 U.S.C. § 3731.

Section 3731, for example, states: "The provisions of this section shall be liberally construed to effectuate its purposes." The First Circuit, in United States v. Watson, described the legislative background of this provision. The court noted that the initial statute authorizing government appeals in federal criminal cases referred only to "motion[s] to suppress." 386 F.3d at 308-10. Following a series of judicial decisions narrowly construing this provision, Congress expanded the statute to cover all orders suppressing or excluding evidence and added the language on liberal construction to "'reverse[] the practice of narrowly interpreting'" the statute. See id. at 309 (quoting S. Rep. No. 91-1296, at 37 (1970), and citing Omnibus Crime Control Act of 1970, Pub. L. No. 91-642, § 14, 84 Stat. 1880, 1890 (1971)). With respect to the guidance drawn from cases interpreting 18 U.S.C. § 3731, we note that those cases routinely cite the liberal construction admonition in the course of addressing the scope of section 3731. E.g., Watson, 386 F.3d at 310; In re Grand Jury Empanelled (Colucci), 597 F.2d 851, 855-56 (3d Cir. 1979).

Article 62, UCMJ, on the other hand, contains no language on statutory construction, and its legislative history does not demonstrate a rationale for the omission of this language.

APPELLATE EXHIBIT XCIV
PAGE 96 OF 136

Therefore, it would be inappropriate to apply the liberal construction mandate of section 3731 when interpreting Article 62, UCMJ. This is consistent with our past practice. We have not previously applied an explicit liberal construction when interpreting Article 62, UCMJ. We treat cases interpreting parallel provisions of 18 U.S.C. § 3731 as guidance, not as mandates; and we apply that guidance only to the extent consistent with an interpretation of Article 62 that is not dependent upon the liberal construction admonition.

2. Appeals under 18 U.S.C. § 3731

The issues in the present appeal concern the meaning of the term "excludes evidence" in Article 62. The statute permits the government to appeal an "order or ruling which excludes evidence that is substantial proof of a fact material in the proceeding." Article 62(a)(1)(B), UCMJ. Under this provision, trial counsel must file a certification with the military judge "that the appeal is not taken for the purpose of delay and (if the order or ruling appealed is one which excludes evidence) that the evidence excluded is substantial proof of a fact material in the proceeding." Article 62(a)(2), UCMJ.

The related provision governing federal civilian criminal trials, 18 U.S.C. § 3731, permits the government to appeal an order by the trial court "suppressing or excluding evidence." The United States Attorney must certify "that the appeal is not

APPELLATE EXHIBIT XCIV
PAGE 97 OF 136

taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding." Id.

The courts of appeals have addressed the meaning of the term "excluding evidence" under 18 U.S.C. § 3731 and have concluded that the term includes an order quashing a subpoena. See 25 James Wm. Moore et al., Moore's Federal Practice ¶ 617.08[4] (3d. ed. 2008); 7 LaFave, supra, § 27.3(c). The case law in this area, permitting appeal of an order quashing a subpoena, predates the enactment of Article 62, UCMJ. See, e.g., Colucci, 597 F.2d at 856.

In Watson, the First Circuit discussed the scope of the term "excluding evidence" under 18 U.S.C. § 3731. 386 F.3d at 307. The appeal involved a trial court ruling that denied a government motion for a continuance. Prior to trial, the prosecution asked immigration officials to keep the prosecution informed of the status of a potential witness. The immigration officials neglected to do so, and deported the witness. The government moved for a continuance to conduct an overseas deposition. The trial court denied the motion, noting that the case was more than three years old, there were speedy trial issues, the problem was a result of government negligence, and it could take six to twelve months to obtain the testimony by deposition. The government renewed its motion, and the trial

APPELLATE EXHIBIT XLV
PAGE 96 OF 130

court denied the renewed motion for the same reasons. Id. at 306-07.

The court of appeals concluded that the orders denying the motions were not appealable under 18 U.S.C. § 3731 because they were case-management orders, entered with the purpose of preventing delay:

> Although the orders appealed from will certainly hamper (and may effectively prevent) the obtaining and subsequent use of [the witness's] testimony, those orders did not, either in substance or in form, limit the pool of potential evidence that would be admissible at the forthcoming trial. Rather, they were premised on, and accomplished, a more prosaic goal: the lower court's determination to forestall further delay. That was why the court denied the requested continuance -- and the practical effect of that denial was to clear the way for the trial to proceed. That the orders had an incidental effect on the government's evidence-gathering is too remote a consequence to support appellate jurisdiction under the second paragraph of section 3731.

Id. at 313.

In the course of its opinion, the court of appeals reviewed the development of 18 U.S.C. § 3731 as well as cases applying the provision to permit appeals of decisions "excluding evidence." The court concluded that an interlocutory prosecution appeal under section 3731 is permitted when "the order itself is the practical equivalent of a suppression or exclusion order; that is, when the order has the direct effect

APPELLATE EXHIBIT XCIV
PAGE 99 OF 136

of denying the government the right to use evidence. If such an effect is only incidental, then there can be no appeal." Id. at 311. The cases discussed in Watson in support of this test reflect a highly case-specific approach to the determination of whether the effect on the exclusion of evidence is direct or incidental. See id. at 310-12. Watson did not call into question any of the cases permitting government appeal of an order quashing a subpoena.

Under Watson, the pertinent inquiry is not whether the court has issued a ruling on admissibility, but instead whether the ruling at issue "in substance or in form" has limited "the pool of potential evidence that would be admissible." Id. at 313. The distinction drawn by Watson between direct and incidental effects underscores that the inquiry concerns the impact of the ruling on the pool of potential evidence, not whether there has been a formal ruling on admissibility. See id. at 311-12.

3. Limitations on appeals under Article 62, UCMJ

Appellant and Petitioner-CBS contend that the prosecution may not appeal an order quashing a subpoena under Article 62, UCMJ, irrespective of the authority for the prosecution to appeal such orders under 18 U.S.C. § 3731. According to Appellant, Chief Judge Everett's opinion in Browers, 20 M.J. at 356, "stands for the proposition that Article 62 authorizes

APPELLATE EXHIBIT XCIV
PAGE 90 OF 136