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

Before Panel No. 2

Frank D. WUTERICH, Staff Sergeant (E-6) U.S. Marine Corps, Petitioner v. UNITED STATES, Respondent	)))))))))	RESPONDENT'S MOTION FOR LEAVE TO FILE AND MOTION TO FILE ERRATA-CORRECTED RESPONSE Case No. 200800183

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

The Government respectfully moves under Rule 23(d) of this Court's Rules of Practice and Procedure for leave to file and moves to file an errata-corrected Answer in place of the Government's Show Cause Order Answer that was filed on July 22, 2011.

The Government filed a response to the Court's Show Cause Order on July 22, 2011, but the attached answer is the corrected version that should have been submitted to the Court instead. The Government requests that Court accept the attached Answer and discard the erroneously filed Answer.

WHEREFORE, the Government respectfully requests that the Court grant these Motions and permit the Government to file the attached errata-corrected Answer.

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Certificate of Filing and Service

I certify that the foregoing was delivered to the Court and a copy served upon opposing counsel on July 22, 2011.

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NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

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

Preamble

COMES NOW THE UNITED STATES pursuant to this Court's Order of July 11, 2011, and respectfully requests that this Court deny Petitioner's Writ of Mandamus Petition and, further, that this Court vacate its stay of proceedings, issued on May 27, 2011.

I

History of the Case

The Government preferred charges on December 21, 2006, and the Convening Authority referred charges to a general court-martial on December 27, 2007, alleging that Petitioner committed various offenses under the Uniform Code of Military Justice (UCMJ) in Iraq. Early pretrial rulings resulted in two Government Article 62, UCMJ, appeals, which are unrelated to this petition. *See United States v. Wuterich*, 66 M.J. 685 (C.A.A.F. 2008), *vacated*, *United States v. Wuterich*, 67 M.J. 63

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Petitioner filed a writ petition on October 25, 2010, seeking a stay so that Petitioner could file an extraordinary writ to "protect his fundamental right not to have his ongoing attorney-client relationship with LtCol Vokey severed." (Petitioner's Writ-Appeal at 24, Oct. 25, 2010.) This Court denied the petition.

The next day, Petitioner filed a petition for a writ of mandamus with this Court, seeking a declaration that "Petitioner's right to the continuance of an established attorney-client relationship was improperly severed." (Petitioner's writ-appeal at 36, Oct. 28, 2010.) This Court denied the petition.

Accordingly, on November 5, 2010, Petitioner petitioned the Court of Appeals for the Armed Forces (CAAF). On December 20, 2010, CAAF vacated this Court's decision and remanded the case, ordering this Court to: (1) obtain transcripts of Article 39(a) sessions from September 13 and 14, 2010; (2) determine whether portions of those sessions should remain sealed; and, (3) determine whether the Military Judge abused his discretion in finding good cause to sever the attorney-client relationship.

Wuterich v. United States, No. 11-8009/MC, 2010 CAAF LEXIS 1066 (C.A.A.F. Dec. 20, 2010) (order).

In *Wuterich v. Jones,* No. 200800183, 2011 CCA LEXIS 2 (N-M. Ct. Crim. App., Jan. 7, 2011), this Court once again found that the Military Judge did not abuse his discretion by granting Mr. Vokey's request to withdraw for a conflict of interest. And in *Wuterich v. Jones,* No. 11-8009/MC, 2011 CAAF LEXIS 258 (C.A.A.F. Apr. 4, 2011), CAAF denied Petitioner's writ appeal because it "request[ed] appellate intervention in an ongoing trial in the form of an extraordinary writ that would provide relief not requested from the military judge on a theory not presented to the military judge."

So Petitioner returned to the trial court and motioned to "abate the court-martial proceedings ... until LtCol Colby Vokey, USMC (ret)[,] is restored as [Petitioner's] detailed defense counsel." (Military Judge's Findings of Fact and Conclusions of Law (MJ's Findings) at 1, May 31, 2011.) Based on an extensive review of the documentary evidence, testimony, and argument of counsel, the Military Judge concluded that although there was a procedural error by not putting Mr. Vokey's change in status—from detailed military counsel to civilian defense counsel—on the Record in March of 2009, the error was harmless because the underlying attorney-client relationship remained intact through the transition. (MJ's Findings at 25.) Additionally, the

Military Judge found that the attorney-client relationship continued until Mr. Vokey sought a withdrawal from Petitioner's case in 2010:

> The attorney-client relationship existed until 15 September 2010, when the Court granted Mr. Vokey's application for withdrawal based on good cause due to his claims of being conflicted from further participation in the case.

(MJ's Findings at 25.) Thus, based on the severance of Mr. Vokey as counsel due to actual and imputed conflict, the absence of a conflict waiver, and the absence of prejudice, the Military Judge denied Petitioner's motion. (MJ's Findings at 25, 32, 39, 45, 47-48.)

Initially, when Petitioner began filing motions and writs to request relief under *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011), trial was set to commence November 2010. Due to Petitioner's revised requests for relief, and requests for interrogatories in conjunction with his request for extraordinary relief, trial was moved to April 12, 2011, then later to June 27, 2011, and now, as due to the stay the Defense does not recognize the Military Judge's ability to order a trial date, the defense has refused to commit to a new trial date. Consequently, this court martial has effectively been stayed indefinitely.

Jurisdictional Statement

This Court has jurisdiction to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a); *Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999); *Loving v. United States*, 62 M.J. 235, 239 (C.A.A.F. 2005). The All Writs Act provides that "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). The Act requires two separate determinations: first, whether the requested writ is "in aid of" a court's jurisdiction; and second, whether the requested writ is "necessary or appropriate." *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008).

II

Specific Relief Sought

Respondent seeks an Order denying Petitioner's Writ of Mandamus Petition and that this Court vacate its stay of proceedings, issued on May 27, 2011.

III

Issue Presented

> SHOULD THIS COURT ORDER COURT-MARTIAL PROCEEDINGS ABATED PENDING THE RESTORATION OF PETITIONER'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL WHERE: (1) THE MILITARY JUDGE DENIED A MOTION TO RESTORE THE ACCUSED'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL; (2) THAT FORMER DETAILED DEFENSE COUNSEL WAS PETITIONER'S ONLY COUNSEL WHO HAS VISITED THE SCENE OF THE ALLEGED OFFENSES; (3) A SITE VISIT BY PETITIONER'S CURRENT COUNSEL IS IMPOSSIBLE; (4) THE MILITARY JUDGE CONCLUDED THAT ERROR OCCURRED IN THE TERMINATION OF THE FORMER DETAILED DEFENSE COUNSEL'S STATUS; (5) THE MILITARY JUDGE CONCLUDED THAT THAT ERROR WAS HARMLESS BECAUSE THE FORMER DETAILED DEFENSE COUNSEL CONTINUED TO REPRESENT PETITIONER WITHOUT INTERRUPTION; AND (6) THE MILITARY JUDGE'S FINDING OF UNINTERRUPTED REPRESENTATION IS CLEARLY ERRONEOUS?

IV

Statement of Facts

Within twenty-one days of being detailed to this case, Mr. Vokey, then an active duty Lieutenant Colonel in the United States Marine Corps, submitted his voluntary retirement request. (MJ's Findings at 6, May 31, 2011.) Mr. Vokey testified that he submitted his request to retire fourteen months from his desired retirement date. (R. 32, Sep. 13, 2010.) Requests to modify or cancel retirement requests must be sent "with justification and endorsements, via separate correspondence or message to the CMC(MMSR-2) not later than 45 days prior to the effective date

of retirement." MARCORSEPMAN Par. 2004.8a; (Appellate Ex. CXVII at 17).

Because of the interlocutory appeal in the case and the automatic stay, sometime after February 2008 Mr. Vokey submitted a first request to extend his retirement date until June 1, 2008. (R. 33-34, Sep. 13, 2010.) Mr. Vokey then submitted a second written request, in the middle of April, to extend his retirement date until July 1, 2008. (R. 34-35, Sep. 13, 2010.) A third request by phone extended the retirement date until August 1, 2008. (R. 35, Sep. 13, 2010.)

In mid-July 2008, Mr. Vokey called Colonel Patrick Redmon, Deputy Director of the Marine Corps Manpower office that handles retirement processing, to seek an additional extension. (R. 36, 57-58, 65-66, Sep. 13, 2010; R. 90-98, Apr. 25, 2011.) During that conversation, Mr. Vokey believed that Col Redmon informed him no further extensions would be granted after August 2010. (R. 36-37, 57-58, Sep. 13, 2010; R. 96, Apr. 25, 2011; Appellate Ex. CI at 3.)

Mr. Vokey did not make a written request, however, nor did he seek assistance from the LSSS OIC or other parties in the leadership chain of the Staff Judge Advocate to the Commandant, after receiving this verbal denial. (R. 65, Sep. 13, 2010; R. 96, Apr. 25, 2011.) Nonetheless, Mr. Vokey submitted another request to modify his retirement date. (R. 45, 57, Sep. 13,

2010; R. 104, Apr. 25, 2011.) In late July of 2008, Manpower approved this request, thereby moving his retirement date from August 1, 2008, to November 1, 2008. (R. 45, 57-58, Sep. 13, 2010; R. 104, Apr. 25, 2011.) Mr. Vokey submitted no further written extension requests, and he sought no further relief from the Convening Authority, the Military Judge, or any other party. (R. 59-60, Sep. 13, 2010.)

With a November 1 retirement date approaching, Mr. Vokey soon left for terminal leave. Mr. Vokey testified that he had felt only a personal obligation to Petitioner, and that his desire to assist Petitioner on his case after retirement was unrelated to his having been formerly detailed to the case. (R. 69-70, Sep. 13, 2010.) Mr. Vokey did not seek an excusal on the Record before leaving active duty. (R. 70, Sep. 13, 2010.) Nor did he seek an excusal from Petitioner. (R. 70, Sep. 13, 2010.)

While still on active duty, Mr. Vokey was hired by the law firm Fitzpatrick, Haygood, Smith, and Uhl, around October 1, 2008. (R. 10, Sep. 13, 2010; Appellate Ex. CI.) The firm was already representing another individual, Sergeant Salinas, USMC, who was co-actor and immunized percipient witness to the events related to Petitioner's case. (R. 10, Sep. 13, 2010.) There was no discussion about the possible conflict between the firm's representation of Sgt Salinas and Mr. Vokey's attorney-client relationship with Petitioner. (R. 10, Sep. 13, 2010.)

Nonetheless, Mr. Vokey continued to represent Petitioner as a civilian. (R. 40, Sep. 13, 2010.) LtCol Tafoya, Mr. Vokey's replacement as detailed military defense counsel, informed the Military Judge that as of March 2009, no definitive decision had been reached about whether Mr. Vokey would represent Petitioner in a civilian capacity. (R. 3, Mar. 10, 2009.) Yet on March 22, 2010, the Defense informed the Military Judge that Mr. Vokey was indeed on the defense team, but Petitioner waived Mr. Vokey's presence for the session. (R. 5-6, Mar. 22, 2010.) And after a court recess for lunch, Mr. Vokey sat at counsel table with Petitioner. (R. 64, Mar. 22, 2010.) Mr. Vokey informed the Military Judge that he had continued to represent Petitioner since departing active duty. (R. 65, Mar. 22, 2010.)

Mr. Vokey was also present on March 23 and 24, 2010. (R. 1, Mar. 23-24, 2010.) On March 26, 2010, Mr. Vokey was absent, and Petitioner waived his presence. (R. 1, Mar. 26, 2010.) Mr. Vokey realized in June or July of 2010 that the conflict with his firm's concurrent representation of Sgt Salinas was problematic: "It was only later as pretrial preparations got even closer that that became apparent." (R. 10-11, Sep. 13, 2010.)

On September 13, 2010, Mr. Puckett informed the Military Judge that Mr. Vokey wanted to present the Court with what Mr. Puckett believed was an ethical "conflict [that] was more than

one of appearances," that was "not a sham," which prevented Mr. Vokey's continued service, and which Mr. Puckett desired to relay to the Military Judge *ex parte* and outside the presence of the Government. (R. 9-14, Sep. 13, 2010.)

Mr. Vokey appeared that day to request withdrawal from the case based on a conflict of interest. (R. 1, Sep. 13, 2010.) Mr. Vokey did not reveal in open court what he knew about Sgt. Salinas's case, if anything, but Mr. Vokey testified that the conflict was real: "The same conflict exists whether [my firm has] ceased representation or they're going to continue representation. That——it really has no bearing on the conflict." (R. 13-14, Sep. 13, 2010.)

After hearing from Mr. Vokey *ex parte*, the Military Judge found good cause to release Mr. Vokey from further participation in the case under R.C.M. 506(c). (R. 20-21, Sep. 13, 2010.) The Military Judge found good cause: "[b]ased on our *ex parte* hearing and [Mr. Vokey's] representation to the court and previous representations by counsel regarding this issue, the court releases Mr. Vokey from all further participation in this case." (R. 20, Sep. 13, 2010.) The Military Judge stated, "I specifically find good cause shown and a proper request or application for withdrawal by Mr. Vokey." (R. 21, Sep. 13, 2010.)

The Defense team informed the Military Judge in September 2010, that they had "recovered" the fruits of Mr. Vokey's previous work on Petitioner's case to their benefit:

> MJ: Do you feel at liberty . . . Mr. Puckett or Mr. Faraj, in stating whether you have been able to get——whether you have been able to get all of the information from Mr. Vokey of his——his portion in the case early on and use it to your benefit or do you not feel at liberty to discuss that? . . . . In other words, his——his doing the site visit and early work on the case——which it appears more substantial than it has been recently——have you been able to communicate and get that information from him to assist your client?
>
> CC: (Mr. Puckett): By way of reports and things like that? Absolutely, sir.
>
> MJ: Okay.
>
> CC: (Mr. Puckett): Yes.
>
> MJ: And you still have the information from your videographer?
>
> CC: (Mr. Puckett): Yes, Your Honor, we do.

(R. 15, Sep. 13, 2010.)

V

Reasons Why The Writ Should Not Issue

THE MILITARY JUDGE'S RULING DOES NOT AMOUNT TO A JUDICIAL USURPATION OF POWER: THE MILITARY JUDGE CORRECTLY FOUND (1) NO SEVERANCE IN PETITIONER'S ATTORNEY-CLIENT RELATIONSHIP, (2) AN ACTUAL AND IMPUTED CONFLICT THAT PREVENTED MR. VOKEY'S CONTINUED REPRESENTATION OF PETITIONER, AND (3) PETITIONER SUFFERED NO PREJUDICE FROM PROCEDURAL ERROR. MOREOVER, PETITIONER FAILS TO DEMONSTRATE THE PREREQUISITE FACTS INCLUDING WAIVERS FROM THE RELEVANT PARTIES, COMBINED WITH A CLEARLY ERRONEOUS DENIAL OF A REQUEST TO REPRESENT PETITIONER OR TO RETURN TO ACTIVE DUTY, THAT MIGHT SUPPORT AN INDISPUTABLE RIGHT TO RELIEF OR THAT ALTERNATIVE REMEDIES ARE NOT AVAILABLE.

A. A writ of mandamus is not a substitute for the normal appellate process, and is appropriate only when a Military Judge makes an order amounting to a judicial usurpation of power.

Extraordinary writs may not be employed as a substitute for relief obtainable during the ordinary course of appellate review, even though hardship may ensue from delay. "[W]hatever may be done without the writ may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953); *see also United States v. Snyder*, 18 C.M.A. 480, 483 (C.M.A. 1969); *United States v. Frischholz*, 16 C.M.A. 150 (C.M.A. 1966) (petitions for extraordinary relief not substitutes for normal appellate process). The All Writs Act "is a residual source of authority to issue writs that are not otherwise covered by

statute." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 42-43 (1985).

"Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 43. If alternative remedies are available, resort to the All Writs Act is "out of bounds, being unjustifiable either as 'necessary' or as 'appropriate.'" *Clinton*, 526 U.S. at 537. "The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Id.* (citations omitted). "Mandamus is intended to provide a remedy for a petitioner only if he has exhausted all of the avenues of relief and only if the respondent owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (internal punctuation omitted).

A writ of mandamus is a "drastic remedy . . . [which] should be invoked only in truly extraordinary situations." *Murray v. Haldeman*, 16 M.J. 74, 76 (C.M.A. 1983) (citing *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). The burden is on Petitioner to show "[his] right to issuance of the writ is

clear and indisputable." *Bankers Life*, 346 U.S. at 384 (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

"Where a matter is committed to discretion, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35 (1980) (quoting *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978)); *see Ponder v. Stone,* 54 M.J. 613, 616 (N-M. Ct. Crim. App. 2000). "[I]t is clear that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."[1] *Will v. United States*, 389 U.S. 90, 95 (1967) (citation omitted). In the context of writs of mandamus, military courts have read this rule to require Petitioner to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger,* 7 M.J. at 224; *McKinney v. Jarvis*, 46 M.J. 870 (A. Ct. Crim. App. 1997).

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[1] "Thus the writ has been invoked where unwarranted judicial action threatened 'to embarrass the executive arm of the Government in conducting foreign relations,' *Ex parte Peru*, 318 U.S. 578, 588 (1943), where it was the only means of forestalling intrusion by the federal judiciary on a delicate area of federal-state relations, *Maryland v. Soper*, 270 U.S. 9 (1926), where it was necessary to confine a lower court to the terms of an appellate tribunal's mandate, *United States v. United States District Court*, 334 U.S. 258 (1948), and where a district judge displayed a persistent disregard of the Rules of Civil Procedure promulgated by [the Supreme] Court, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957); *see McCullough v. Cosgrave*, 309 U.S. 634 (1940); *Los Angeles Brush Mfg. Corp. v. James*, 272 U.S. 701, 706, 707 (1927) (dictum)." *Will*, 389 U.S. at 95-96.

B. Petitioner fails to demonstrate he has exhausted his administrative remedies by providing the requisite waivers to the Military Judge and requesting that Mr. Vokey seek a return to active duty and termination of his employment with the conflicting firm, or that a writ is necessary, given that the Military Judge has refused Mr. Vokey's representation of Petitioner, after being presented with the prerequisite factual basis to issue such a ruling.

Petitioner fails to demonstrate that relief may not be had without resort to extraordinary relief. First, Petitioner has failed to demonstrate Mr. Vokey has submitted a request to re-enter active duty, and that the request has been denied. Second, Petitioner offers no evidence that Mr. Vokey has terminated work for his firm, and has attempted to continue representing him. Third, Petitioner has not only not offered a waiver of conflict, but he has not produced a waiver by Sgt Salinas, or contrary proof from Mr. Vokey's firm of an absence of the actual and imputed conflict found by the Military Judge. (MJ's Findings 34.) Finally, no Military Judge has issued a ruling——which itself would have to be a gross usurpation of power or clearly erroneous——refusing to permit Mr. Vokey to represent Petitioner under those circumstances.

Because Petitioner has not exhausted his administrative remedies and has not demonstrated the necessity or appropriateness of extraordinary relief, application for extraordinary relief must be denied.

C. Petitioner fails to demonstrate that the ordinary course of appeal will not resolve this issue. On direct review, the distinctions between this case and *Hutchins* permit testing for prejudice. The application of Article 27 and R.C.M. 505(d)(2)(B) support the change of detailed defense counsel by the designated detailing authority, and the later sua sponte disqualification of Mr. Vokey for conflict of interest.

Petitioner fails to demonstrate that the ordinary course of appeal cannot resolve his concerns. The Military Judge's ruling to remove Mr. Vokey as counsel because of a conflict of interest may be reversed for abuse of discretion. *United States v. Strother*, 60 M.J. 476, 478 (C.A.A.F. 2005) ("We review a military judge's decision on a motion to disqualify counsel for an abuse of discretion."). Likewise, the Detailing Authority's detailing of Substitute Defense Counsel in 2008 after LtCol Vokey's retirement may, as argued below, be tested for prejudice upon direct review, given both the inapplicability of *Hutchins* to this case, as well as the application of the mandate of Article 59(a) to this case. Thus extraordinary relief now is unnecessary.

The court routinely requires litigants to wait until after final judgment to vindicate valuable rights. *See, e.g., Flanagan v. United States*, 465 U.S. 259, 268 (1984) (holding that an order disqualifying counsel in a criminal case did not qualify for immediate appeal under the collateral order doctrine). "The correctness of a trial court's rejection even

of a constitutional claim made by the accused in the process of prosecution must await his conviction before its reconsideration by an appellate tribunal." *Cobbledick v. United States*, 309 U.S. 323, 325 (1940) (quotation omitted).

Here, should trial on the merits begin and Petitioner find himself prejudiced by the absence of Mr. Vokey, Petitioner remains able to assign errors in briefing before the Navy-Marine Corps Court of Criminal Appeals, and may petition to raise those matters further before the Court of Appeals for the Armed Forces. At this stage of trial——pre-trial on the merits——nothing Petitioner cites supplies adequate cause to further delay the commencement of trial with the assistance of his current team of counsel including Civilian Defense Counsel Mr. Puckett, Mr. Zaid, and Mr. Faraj, in addition to Associate Defense Counsel Maj Marshall.

Consequently, the errors alleged by Petitioner should be addressed in the normal course of appellate review. The Military Judge analyzed the evidence and the conflict extensively, and based on Mr. Vokey's own request, the Military Judge found that there is both an actual and imputed conflict. The Military Judge disqualified Mr. Vokey and severance of the attorney-client relationship. Petitioner continues to be represented by detailed defense counsel and multiple experienced and able civilian counsel. Whether Mr. Vokey could be recalled

to active duty and the procedures that may or may not apply are irrelevant to the issue. In short, an extraordinary writ is not appropriate.

D. The Military Judge did not usurp his power in denying Petitioner's motion: Petitioner has not indisputably demonstrated that the Military Judge clearly erred in finding (1) no severance in the attorney-client relationship between June 2008 and September 2010, (2) that Mr. Vokey's conflict warranted severance, and (3) no prejudice.

1. Regardless of the failure to procedurally note the change of detailed military counsel on the Record when detailed counsel, Mr. Vokey, retired, the Military Judge properly found no reversible prejudice that cannot be addressed in the regular course of appeal; and given Petitioner's ample, skilled, and constitutionally effective Defense team, Petitioner fails to fulfill his burden to demonstrate an indisputable right to relief immediately to remedy that "procedural" error.

Whether an attorney-client relationship has been severed is a mixed question of fact and law. *United States v. Spriggs,* 52 M.J. 235, 244 (C.A.A.F. 2000). Legal conclusions are reviewed *de novo* and findings of fact are reviewed under a clearly erroneous standard. *Id.* R.C.M. 505(d)(2)(B) and 506(c) provide the primary authority for termination of the attorney-client relationship between an accused and detailed military defense counsel. The Military Judge's role is to ensure that any change or absence, as well as the "good cause" for such change under R.C.M. 505(f), is documented on the Record. *Hutchins*, 69 M.J.

at 289. A record of "good cause" is a procedural requirement. *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011).

The Military Judge did not err in concluding that there was no reversible error in the termination of Mr. Vokey's detailed status at the time of retirement. (MJ's Findings at 25, May 31, 2011); *see United States v. Weichmann,* 67 M.J. 456, 463-64 (C.A.A.F. 2009). Any harm was procedural: no harm resulted from any error in failing to document Mr. Vokey's retirement from active duty and the detailing of replacement military counsel under 505(d)(2)(B)(iii), or otherwise excuse Mr. Vokey, until September of 2010. *Hohman*, 70 M.J. at 98. In fact, the Military Judge further found that the attorney-client relationship continued until September 2010, a finding that is also not clearly erroneous. (MJ's Findings at 25); *see Weichmann,* 67 M.J. at 463-64. Thus, Petitioner fails to fulfill his burden to indisputably demonstrate error in this finding. *La Buy*, 352 U.S. at 314 (1957).

Mr. Vokey's attorney-client relationship was not severed upon retirement because he continued to represent Petitioner "albeit in a much reduced role" after leaving active duty, Petitioner "has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case," and there was not an official severance of the attorney-client relationship until September 2010. (MJ's

Findings at 7, 25, May 31, 2011; R. 65, Mar. 22, 2010.) After leaving active duty, Mr. Vokey represented Petitioner in multiple hearings and his absence was often noted on the Record. (MJ's Findings at 6-7, May 31, 2011.) Mr. Vokey's representation remained intact until his "application for withdrawal based on good cause due to his claims of being conflicted from further participation in the case" in September of 2010. (MJ's Findings at 25.)

The Military Judge's findings are not clearly erroneous for three reasons: (1) Mr. Vokey clearly informed the Military Judge that he had continued to represent Petitioner since departing active duty (R. 65, Mar. 22, 2010); (2) trial was automatically stayed from February 2008 to June 30, 2008, and from Petitioner's petition to this Court ten days later, in July 2008, through March 2009, no trial proceedings were held, and a continuance had been granted in September 2008 due to the appellate litigation (R. 6, Mar. 11-12, 2009); and, (3) Petitioner identifies no lapsed duties that might evidence a severance in the attorney-client relationship with Mr. Vokey between July 2008 and March 2009.

The error, here, was procedural. The Military Judge did not conduct a proper inquiry into Mr. Vokey's change from active duty to civilian status. *Hutchins*, 69 M.J. at 289. But even highly contextual circumstances failing the RCM 505(f) test for

a finding of “good cause” would be merely procedural error. Petitioner fails to establish that the assignment of replacement counsel in this case——which like *Hohman* is in a pretrial posture——was insufficient to remedy the non-constitutional and procedural error in Mr. Vokey’s replacement.

Petitioner’s argument that Mr. Vokey could have been retained on active duty *sua sponte* by the Government without a request by him to do so, or that the Military Judge misinterpreted the Government’s ability to do so, is of no moment; the only question for the purposes of an application to halt trial and issue a writ of mandamus is whether the Military Judge grossly abused his discretion in failing to compel Mr. Vokey to remain on active duty as Petitioner’s detailed defense counsel. That answer is clearly no. Thus, Petitioner fails to meet his burden to demonstrate that the Military Judge’s ruling was not clearly erroneous and, therefore, not writ worthy.

2. Petitioner cannot indisputably demonstrate that the Military Judge clearly erred in determining that there was an actual and imputed conflict.

The Supreme Court has endorsed trial courts’ primary role in assessing conflicts of interest and refusing to allow attorneys to represent defendants due to either actual or potential conflict of interest. *Wheat v. United States*, 486 U.S. 153, 164 (1988), *reh. den*. 487 U.S. 1243 (“that presumption [of attorney of choice] may be overcome not only by a demonstration

of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court"). Federal courts have forbidden representation of co-defendants by all members of law firms, even after waiver by the clients, because of potential conflicts of interest. *See, e.g, United States v. Stewart*, 185 F.3d 112, 122 (3d Cir. 1999); *United States v. Dempsey*, 724 F. Supp. 573 (N.D. Ill. 1989).

Several situations can give rise to the need to disqualify counsel, including multiple representation situations, or the prior representation of witnesses or co-defendants. *United States v. Locascio*, 6 F.3d 924, 931 (2d Cir. 1993). Conflicts of interest arise whenever an attorney's loyalties are divided, *United States v. Wheat*, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988). An attorney who cross-examines former clients inherently encounters divided loyalties, *Lightbourne v. Dugger*, 829 F.2d 1012, 1023 (11th Cir. 1987), *cert. denied*, 488 U.S. 934 (1988). See also *Wheat*, 813 F.2d at 1402 n.1 ("A substantial relationship between successive representations often triggers concerns about divided loyalties and conflicts of interest"; citing Model Rule of Professional Conduct 1.9); *United States v. Moscony*, 927 F.2d 742, 750 (3d Cir. 1991).

Rule 1.06(b) of the Texas Disciplinary Rules of Professional Conduct, which bind Mr. Vokey, states that lawyers shall not represent persons if representation of that person:

> (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
> (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Texas State Rules of Professional Conduct, Rule 1.06(b). Likewise, the Navy-Marine Corps Rules of Professional Responsibility bar further representation of a client, and require counsel to seek to withdraw, where further representation will be directly adverse to another client or will result in a violation of the Navy-Marine Corps Rules of Professional Responsibility, Rule 1.16(a), JUDGE ADVOCATE GENERAL OF THE NAVY INSTRUCTION 5803.1C, (Nov. 8, 2004).

And where representation is directly adverse to a client, agreement or consent to the conflict may not properly be sought; furthermore, the conflict must be individually resolved as to each client. Comment to Rule 1.7, JAGINST 5803.1C. Where covered attorneys are directly involved in a given matter, subsequent representation of other clients with materially adverse interests "clearly is prohibited." Comment to Rule 1.9, JAGINST 5803.1C. Nor may such an attorney use information relating to

the representation to the disadvantage of the former client, or to the attorney's own advantage. Rule 1.9(a), JAGINST 5803.1C.

Petitioner cannot indisputably demonstrate that the Military Judge committed a gross usurpation of power or clearly erred in disqualifying Mr. Vokey from the case for an actual and imputed conflict, in the absence of waivers from the appropriate parties and a request by Mr. Vokey to the Military Judge to represent Petitioner, denied in a gross abuse of discretion. Here, Mr. Vokey *himself* petitioned the court to be removed from the case due to the conflict. (MJ's Findings at 7, May 31, 2011.) And Petitioner offered no waiver by himself and Sgt Salinas. Petitioner now attacks the Military Judge's grant of Mr. Vokey's request.

The Military Judge found an actual and imputed conflict based on the representations made by Mr. Vokey including the facts that he represented a client with adverse interests to a client his firm continues to represent, that neither conflicted party has waived the conflict, that this conflict is barred by Mr. Vokey's state ethics rules, and that Mr. Vokey "believes there are real and actual adverse interests that prevent him from continued representation of the accused while working at the Fitzpatrick law firm." (MJ's Findings at 14, 31-34.) These findings are neither clearly erroneous nor a judicial usurpation of power.

Whether Mr. Vokey's return to active duty is a legal possibility and which directive would govern such a procedure is irrelevant. His state ethics rules prevent his current representation of Petitioner, based both on an actual and imputed conflict of interest. Moreover, he has not requested to return to active duty, nor has he requested that the court permit him to continue representing Petitioner. He has indicated no desire to leave his firm. He has not obtained a waiver from the conflicted parties. And Texas state ethics rules would still govern Mr. Vokey's conduct, regardless of his employer, so long as he is a member of the state bar.

Petitioner cites two summary dispositions at our higher court in support of his argument that the Military Judge grossly usurped his power in disqualifying Mr. Vokey. One is inapposite, *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001), as it overturned the lower court for a holding that was contrary to longstanding law that permitted attorneys to, *in the absence of a conflict*, continue to represent a military accused——as Mr. Vokey did here——after exiting military service. Moreover, and even more significantly, *Nguyen* disposed with that issue in a post-trial context——not on a petition for extraordinary relief during a pending trial, as Petitioner asks this Court to do.

The other and more analogous case, *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003), summarily overturned the service court's refusal to interfere with a pending trial where the military judge disqualified defense counsel for a conflict of interest, and returned the record for a hearing under *United States v. Davis*, 3 M.J. 430 (C.M.A. 1977). But *Shadwell* does not alter the result here. First, even if *Shadwell*'s interpretation of *Davis* were correct or still good law, multiple 39(a) sessions have been held in this case during which Petitioner frustrated any attempt to secure a waiver of any conflict of interest. Thus although *Shadwell* misinterprets the rule in *Davis,* sessions have already been held in which the Defense refused to answer the question of whether Petitioner would waive a conflict of interest, notwithstanding the absence of a waiver by Sgt. Salinas. Second, as the Military Judge here notes, not only Petitioner's waiver is required——but so too, at minimum, is Sgt Salinas'. Third, the disqualification in *Shadwell* was on government motion; here, the Defense team *itself* requested disqualification, and prevented inquiry by the Military Judge into the question of waiver.

Finally, the *Shadwell* court's interpretation of *Davis* is simply incorrect, and if correct, no longer good law. The *Davis* case, in a post-trial context, set aside the findings and sentence because the appellant had proceeded through trial with

conflicted counsel, and the military judge failed entirely to secure a waiver that might have saved the conviction. This is a correct, and unsurprising, holding. No possible reading of *Davis* suggests that after or before a holding of disqualification, a military judge must solicit from an accused his waiver. The summary disposition of *Shadwell* relying on *Davis* is simply incorrect and seems to suggest that the Military Judge bears a burden to solicit a waiver so that an accused may proceed with otherwise conflicted counsel. In fact, *Wheat*, 486 U.S. at 164, and its progeny make clear that it is a judge's primary role to ensure a fair trial by disqualifying, at the judge's discretion, attorneys due to actual or potential conflicts of interest.

Shadwell tacitly misallocates the burden in counsel situations and in an application for extraordinary relief situation, and seems to give the burden to the military judge. Recent case law clarifies explicitly, in line with longstanding Federal and Supreme Court precedent, that to gain extraordinary relief, the petitioner always bears the burden of production. *See, e.g., Lis v. United States*, 66 M.J. 292 (C.A.A.F. 2008); *Bankers*, 346 U.S. at 379.

Moreover, recent caselaw on Article 27 and 38 changes of counsel settles that with regard to procedural error in changes of counsel, the error is nonconstitutional and can be assessed

for prejudice——a burden borne, again, by the appellant and on direct review. *See Hutchins*, 69 M.J. 282; *Hohman*, 70 M.J. 98. But Petitioner fails to demonstrate prejudice that cannot be assessed on appeal. And with regard to the conflict of interest, Petitioner fails shoulder his burden to demonstrate a gross usurpation of power: he has not met his burden to demonstrate a, still hypothetical, situation ripe for consideration where, after receiving waivers from all parties, Mr. Vokey having requested to return to active duty or even to represent Petitioner, and the Military Judge, clearly contrary to law, refused to allow Mr. Vokey to represent Petitioner. But Petitioner has demonstrated no such thing.

Petitioner has thus far succeeded in gaining this court's grant of extraordinary relief in the nature of a stay of his pending trial. But that test is the test for extraordinary relief, and the burden is heavy, *Graddick v. Newman*, 453 U.S. 928 (1981), and the Government continues to maintain that Petitioner has utterly failed to demonstrate an indisputable right to relief.

This case involves no intentional interference and no denial of an extension request. In light of the Military Judge's role in safeguarding the integrity of the process, considering the contents of the sealed exhibit, and because the release for good cause of Mr. Vokey by the Military Judge in

September 2010 is well-documented on the Record (R. 20-21, Sep. 13, 2010; MJ's Findings at 14-15, May 31, 2011), the Military Judge did not err in excusing Mr. Vokey for good cause. In short, Petitioner's many arguments may be peripherally interesting, but they fail to indisputably demonstrate that the Military Judge clearly erred in finding an actual and imputed conflict that warrants Mr. Vokey's removal from this case. Further delay should not be countenanced, and his case should be returned to proceed to trial, leaving these and related objections to be resolved on final appellate review.

3. Finally, Petitioner cannot indisputably demonstrate that the Military Judge clearly erred in finding no prejudice.

Moreover, Petitioner's counsel assured the Military Judge that they had received all of Mr. Vokey's reports and the video tapes from his site visit. (R. 15, Sep. 13, 2010.) The Military Judge further found that the extensive delay in this case due to appellate litigation has enabled Petitioner's defense team to review and prepare this information for use at trial. (MJ's Findings at 45-46, May 31, 2011.) Similarly, the presence of a native Arabic speaker, an experienced lead counsel, multiple civilian attorneys "with extensive military background experience" and the continual service of detailed military defense counsel throughout this case undercut Petitioner's claim of prejudice. (MJ's Findings at 45-46.) In short, Petitioner

cannot show that the Military Judge clearly erred in finding no prejudice. Petitioner only demonstrates disagreement with the finding. This is not enough.

Of note, Petitioner's prejudice argument also relies heavily on an unsupported——and erroneous——claim that Mr. Vokey was the only defense counsel to visit the site of the charged crimes. (Petitioner's Br. at 22, 31-32.) Although the Government agrees that Mr. Vokey visited the crime scene, Petitioner has not and cannot demonstrate that he was the only counsel for Petitioner to do so.

Just as in CAAF's *per curiam* disposition of the pre-trial Article 62 case in very similar circumstances in *Hohman,* this Court should reject Petitioner's request for a writ of mandamus, return this case to trial, and permit Petitioner to be brought to trial with a competent team of unconflicted attorneys. *See Hohman*, 70 M.J. 98 (in a writ appeal context, the appellant failed to establish that assignment of replacement detailed military defense counsel insufficiently remedied the "procedural" error); *Wheat*, 486 U.S. at 164; *Hutchins*, 69 M.J at 30 (request initiated by defense team itself does not implicate Sixth Amendment right to counsel).

E. Invited Error: Since there was no prejudice, Petitioner, having supplied no waiver, should not profit from his counsel's decision to leave active duty, to join a firm that would necessarily create a conflict, and to request a severance as Petitioner's counsel.

"[A] party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit." *United States v. Wells*, 519 U.S. 482, 488 (1997). Even tacit acceptance of a course of conduct can constitute invited error. *See, e.g., Ridge v. Cessna Aircraft Co.*, 117 F.3d 126, 129 (4th Cir. 1997) (defendant invited error by tacitly agreeing to jury's use of model aircraft). To be sure, many share blame for the current posture and in not acting attentively. Yet, Mr. Vokey did voluntarily seek retirement, and he did not seek further assistance in staying on active duty to continue as Petitioner's detailed defense counsel. (MJ's Findings at 6, May 31, 2011.)

And while maintaining an attorney-client relationship with Petitioner, Mr. Vokey freely sought and "secured employment at a law firm that was representing one of the other alleged defendants in the incident," related to Petitioner's charges. (MJ's Findings at 6, 28.) He did not receive a "written waiver, or a knowing, voluntary, or oral waiver from the accused" or from the other conflicted party. (MJ's Findings at 7, 28.)

Moreover, he then stopped participating in some case activities in early August——three months prior to his November 1, 2008, retirement date——while on terminal leave. (R. at 104-07, Apr. 25, 2011.) He failed to note his change in status on the Record. He then intermittently made appearances on the Record, while continually maintaining his attorney-client relationship.

Once he realized that there was a conflict of interest between his representation of Petitioner and his firm's representation of another client, so he petitioned the Court for removal from the case. (MJ's Findings at 25, May 31, 2011.) The defense team assured the Military Judge that this was a conflict; "more than one of appearances," and one that was "not a sham." (R. at 10-14, Sep. 13, 2010.) The Court agreed.

Petitioner now argues that Mr. Vokey must be returned on Government orders and at Government expense immediately. Petitioner was not prejudiced. And even assuming a waiver would sufficiently resolve the actual and imputed conflict found by the Military Judge, Petitioner cannot now be permitted to wield Mr. Vokey's decisions, and his own in failing to supply his waiver and Sgt Salinas's, as a sword.

Conclusion

WHEREFORE, the Government respectfully requests that this Court deny this petition for extraordinary relief and that this Court vacate its stay of proceedings, which was issued in this case on May 27, 2011.

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Certificate of Filing and Service

I certify that a copy of the foregoing was filed with the Court served on appellate defense counsel on July 22, 2011.

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