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	)	GOVERNMENT ANSWER TO PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS
v.	)	Case No. 200800183
UNITED STATES, Respondent	)	

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

(C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); and *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App. 2009), *certificate for review dismissed*, 68 M.J. 404 (C.A.A.F. 2009).

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.)

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, 2009, 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 WRIT SHOULD NOT ISSUE BECAUSE THE MILITARY JUDGE'S RULING DOES NOT AMOUNT TO A JUDICIAL USURPATION OF POWER: THE MILITARY JUDGE CORRECTLY DECIDED THAT (1) THERE WAS NO SEVERANCE IN PETITIONER'S ATTORNEY-CLIENT RELATIONSHIP, (2) AN ACTUAL AND IMPUTED CONFLICT PREVENTED MR. VOKEY'S CONTINUED REPRESENTATION OF PETITIONER, AND (3) PETITIONER SUFFERED NO PREJUDICE FROM ANY PROCEDURAL ERROR. MOREOVER, PETITIONER FAILS TO DEMONSTRATE AN INDISPUTABLE RIGHT TO RELIEF OR THAT ALTERNATIVE REMEDIES ARE NOT AVAILABLE.

A. A writ of mandamus is appropriate when a Military Judge makes an order amounting to a judicial usurpation of power.

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 & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (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 (Army Ct. Crim. App. 1997).

B. 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.

It is not enough that Petitioner disagrees with the Military Judge's ruling: "The peremptory writ of mandamus has

[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.

traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will*, 389 U.S. at 95 (citing *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943)). Mandamus is not to be used to control the decision of the trial court, but only to confine the trial court to the sphere of its discretionary power. *Bankers Life & Cas. Co.*, 346 U.S. at 382-83. Mandamus cannot be used "to correct a mere error in the exercise of conceded judicial power;" rather, it can only be used "when a court has no judicial power to do what it purports to do——when its action is not mere error but usurpation of power." *DeBeers Consolidated Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *see also Helstoski v. Meanor*, 442 U.S. 500, 505-08 (mandamus is not an appropriate vehicle to challenge indictment for alleged violation of Speech and Debate Clause where direct appellate review was available).

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 severance of an attorney-client relationship with 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.

The Military Judge did not err in concluding that there was no reversible error in the severance of Mr. Vokey's detailed status upon his 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. 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, May 31, 2011); *see Weichmann,* 67 M.J. at 463-64. Thus, Appellant fails to fulfill his burden to indisputably demonstrate error in this finding. *La Buy v. Howes Leather Co*., 352 U.S. 249, 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 *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011)——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.

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 to represent Petitioner by Mr. Vokey. Mr. Vokey himself petitioned the court to be removed from the case due to the conflict. (MJ's Findings at 7, May 31, 2011.) Petitioner now attacks the decision.

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.

In short, Petitioner's many arguments may be peripherally interesting, but they do not and cannot indisputably demonstrate that the Military Judge clearly erred in finding an actual and imputed conflict that warrants Mr. Vokey's removal from this case.

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 United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011) (in a writ appeal context, the appellant failed to establish that assignment of replacement detailed military defense counsel insufficiently remedied the "procedural" error); *Wheat v. United States*, 486 U.S. 153, 164 (1988), *reh. den.* 487 U.S. 1243; *Hutchins*, 69 M.J at 30 (request initiated by defense team itself does not implicate Sixth Amendment right to counsel).

C. A writ is neither necessary nor appropriate because Petitioner has other remedies available at law.

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 and perhaps [an] unnecessary trial." *Bankers Life & Cas. Co*., 346 U.S. at 383 (internal citations omitted). "Whatever may be done without the writ, may not be done with it." *Id*. (citing *Ex parte Rowland*, 104 U.S. 604, 617 (1882)); *Helstoski*, 442 U.S. at 505 (citing *Rowland*); *see Goldsmith*, 526 U.S. at 537 (1999) (extraordinary writ may not be used when alternative remedies available).

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, 260 (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).

Petitioner fails to demonstrate the necessity and appropriateness, under precedent, of a writ of mandamus in his case save for two brief citations to summary dispositions at our higher court. One is entirely 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.

The other is closer, *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003), which 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, multiple 39(a) sessions have been held in this case. Second, no party has waived the conflict. Third, the disqualification in *Shadwell* was on government motion; here, the Defense team itself requested disqualification.

Finally, *Shadwell's* interpretation of *Davis* is 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. But 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.

Moreover, *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 Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953).

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 the attorney-client relationship is severed. 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. 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, after receiving resistance from Manpower, 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, however, and he should not now be permitted to wield Mr. Vokey’s decisions as a sword.

Conclusion

WHEREFORE, the Government respectfully requests that this Court grant 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 21, 2011.

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