IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. Wuterich, Staff Sergeant (E-6), United States Marine Corps, Appellant,	APPENDIX
v.	
David M. Jones, Lieutenant Colonel, United States Marine Corps, In his official capacity as Military Judge, and	Crim.App. Misc. Dkt. No. 200800183 USCA Misc. Dkt. No. _____
The United States, Appellees.	

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

Before
J.A. MAKSYM, L.T. BOOKER, B.L. PAYTON-O'BRIEN
Appellate Military Judges

FRANK D. WUTERICH
STAFF SERGEANT (E-6), U.S. MARINE CORPS

v.

UNITED STATES OF AMERICA

NMCCA 200800183
Review of Petition for Extraordinary Relief in the Nature of a Writ of Mandamus

Military Judge: LtCol D.M. Jones, USMC.
For Petitioner: Neal Puckett, Esq.; Haytham Faraj, Esq.; Col D.H. Sullivan, USMCR; Maj B. Kaza, USMCR; Maj K. Sripinyo, USMC; Capt B. Bottomly, USMC.
For Appellee: Maj W.C. Kirby, USMC; CAPT Samuel Moore, USMC.

25 August 2011

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

MAKSYM, Senior Judge:

This matter is currently before the court on a Petition for Extraordinary Relief in the Nature of a Writ of Mandamus. The Petitioner is seeking to restore detailed representation by Lieutenant Colonel (LtCol) Colby Vokey, United States Marine Corps (Retired), one of his former defense counsel in the pending court-martial. He prays that this court will abate his court-martial proceedings until the United States restores his attorney-client relationship with LtCol Vokey. We conclude that the Petitioner is not entitled to relief in the form of a writ of mandamus abating his court-martial. The Petitioner has failed to establish a showing of prejudice and, even if he had,

an extraordinary writ is not the appropriate means by which to remedy the error that he alleges.

Relevant Facts

LtCol Vokey submitted his request for retirement within weeks of being detailed to represent the Petitioner in early 2007. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Finding 2. Due to several appeals by the Government, the Petitioner's court-martial was delayed indefinitely for a period in 2008 during which LtCol Vokey submitted multiple requests to extend his retirement date from April 2008 until November 2008. *Id.*; Transcript of Article 39(a), UCMJ, Session of 25 Apr 2011 at 106-13. LtCol Vokey never attempted to rescind his request to retire or have a general officer endorse any sort of administrative action that would authorize additional time on active duty beyond the extension requests that he had been submitting to Marine Corps Headquarters throughout the spring and summer of 2008. Transcript of Article 39(a), UCMJ, Session of 25 Apr 2011 at 106-13. LtCol Vokey retired from the Marine Corps in November 2008 and began working at Fitzpatrick, Hagood, Smith, and Uhl, LLP, a law firm that had represented Sergeant (Sgt) Hector Salinas, another Marine involved in the events in Haditha in November 2005 that form the underlying basis of the Petitioner's court-martial. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Finding 4. In March 2010, LtCol Vokey appeared in the capacity as civilian counsel representing the Petitioner at an Article 39(a) session. *Id.* In September 2010, the defense team moved to release LtCol Vokey from representing the Petitioner, citing matters which would render his further representation ethically untenable. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Finding 6. As a result of this motion and after taking *ex parte* evidence, the trial judge then released LtCol Vokey from any further representation of the Petitioner pursuant to RULE FOR COURTS-MARTIAL 505(d)(2)(B)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Id.*

Extraordinary Relief and Severance of the Attorney-Client Relationship

This court is empowered to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a) (2006)(authorizing "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law"). *See Clinton v. Goldsmith*, 526 U.S. 529, 534 (1999). The Supreme Court has held that three conditions must be met before a court may provide extraordinary relief in the form of a writ of mandamus: (1) the party seeking the writ must have "no other adequate means to attain the relief"; (2) the party seeking the relief must show that the "right to issuance of the relief is clear and indisputable"; and (3) "even if the first two

prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004)(internal quotation marks 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)(quoting *United States v. LaBella*, 15 M.J. 228, 229 (C.M.A. 1983)(internal citation and quotation marks omitted); *United States v. Thomas*, 33 M.J. 768 (N.M.C.M.R. 1991). To prevail on such a writ, a petitioner must demonstrate that the decision by the lower court amounted "to more than even gross error; it must amount to a . . . usurpation of power." *Labella*, 15 M.J. at 229 (quoting *United States v. DiStephano*, 464 F.2d 845, 850 (2d Cir. 1972))(internal quotation marks omitted). Issuing such a writ is generally disfavored because it "disrupts the orderly process of appellate review" that occurs only after the completion of a court-martial proceeding at which an accused was convicted. *See Diaz v. United States*, 54 M.J. 880, 881 (N.M.Ct.Crim.App. 2000)(citing *McKinney v. Jarvis*, 46 M.J. 870, 873-74 (Army Ct.Crim.App. 1997)).

To gain relief under such a writ, the Petitioner must prove that there has been some improper severance of his attorney-client relationship with LtCol Vokey that can only be remedied through the requested writ of mandamus. An accused has a right to continued representation by detailed military counsel until the attorney-client relationship is properly severed. *See United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). R.C.M. 505 and 506 discuss circumstances under which an established attorney-client relationship between an accused and defense counsel may be severed. *See id.* R.C.M. 505(d)(2)(B) authorizes a change to detailed defense counsel after an attorney-client relationship has formed by an authority competent to detail such counsel in certain circumstances including an application for withdrawal by counsel under R.C.M. 506(c). R.C.M. 506(c) authorizes "Excusal or withdrawal" of defense counsel "by the military judge upon application for withdrawal by the defense counsel for good cause shown." "Good cause" is defined in R.C.M. 505(f) as including "extraordinary circumstances which render . . . counsel . . . unable to proceed with the court-martial within a reasonable time".

Counsel may be disqualified if a party-litigant brings an issue of conflict of interest or breach of ethical duties to the attention of the court. *See United States v. Humphreys*, 57 M.J. 83, 88 (C.A.A.F. 2002). "An attorney has an ethical duty to identify conflicts of interest concerning the attorney's representation of a client and to take appropriate steps to decline or terminate representation when required by applicable rules . . . ." *Id.* at 88 n.4 (citing Navy JAG Instruction 5803.1B, Rule 1.16, the predecessor to the current Dept. of the

Navy, Judge Advocate General Instr. 5803.1C of 9 Nov 2004, encl. 1, Rule 1.16, which states that "a covered attorney . . . when representation has commenced, shall seek to withdraw from the representation of a client if . . . the representation will result in violation of these Rules or other law or regulation . . . .."). A military judge's decision to disqualify counsel will be reviewed for an abuse of discretion. *United States v. Strother*, 60 M.J. 476, 478 (C.A.A.F. 2005).

Discussion

The Petitioner is not entitled to relief. His attorney-client relationship with LtCol Vokey was not completely severed until September 2010. Even if there had been a severance in 2008 or 2009, it was temporary and any error on the part of the Government was rendered harmless by LtCol Vokey's decision to represent the Petitioner at subsequent court-martial proceedings in his capacity as civilian counsel. Furthermore, the trial judge relieved LtCol Vokey from representing the Petitioner upon motion of the defense citing actions taken by LtCol Vokey in his capacity as private counsel, not by the Government. In short, the Petitioner seeks to burden the Government with a mandate to recall LtCol Vokey to active duty in order to remedy a malady of which they are not the cause. Accordingly, the Petitioner fails to demonstrate why he should be entitled to mandamus relief abating his court-martial proceedings.

The Petitioner's attorney-client relationship with LtCol Vokey was not conclusively severed until September 2010. This severance was granted for good cause upon Petitioner's motion. The trial judge found that the attorney-client relationship remained intact until September 2010. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Findings 4 and 6. He then relied on *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009), in concluding as a matter of law that the denial of LtCol Vokey as detailed defense counsel amounted to harmless error. Findings of Fact and Conclusions of Law of 31 May 11, Conclusion 1. The finding of fact was not clearly erroneous and the conclusion of law was not incorrect, thus the trial judge did not abuse his discretion in denying the Petitioner's motion for abatement. As the Court of Appeals for the Armed Forces (CAAF) has previously stated, "[a]bsent government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship . . . ." *United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000). Quite rightly the CAAF has also noted that "highly contextual circumstances may warrant en exception from this general guidance." *Hutchins*, 69 M.J. at 290-91. The Petitioner relies on *Hutchins*, as well as the CAAF's recent decision in *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011), which also dealt with procedural error in the severance of an attorney-client relationship, to argue that error occurred when the Secretary of the Navy placed LtCol Vokey on the retired list and he was excused from subsequent court-martial hearings

without a waiver or excusal on the record. Petitioner's Brief of 6 Jul 2011 at 21-24. Additionally, he argues that the trial judge erred in finding there was no severance of the attorney-client relationship in late 2008. We disagree. LtCol Vokey did maintain a relationship with the Petitioner throughout 2009, demonstrating that while the attorney-client relationship may have been strained it was never completely severed. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Finding 4. We would note that even if the attorney-client relationship had been temporarily severed, LtCol Vokey voluntarily resumed representation of the Petitioner when he made appearances on the record as the Petitioner's civilian counsel. Therefore, the Petitioner enjoyed the benefit of LtCol Vokey's representation even after his retirement from active duty. Once that occurred, any severance of the attorney-client relationship due to LtCol Vokey's retirement was rendered irrelevant and any possible error on the part of the Government for effectuating his retirement was vitiated and rendered harmless. Therefore we accept the trial judge's findings of fact and conclusions of law on this issue and find that he did not abuse his discretion in denying the motion for abatement based on these findings and conclusions.

We agree with the trial judge's findings and conclusions regarding the September 2010 severance of the attorney-client relationship between the Petitioner and LtCol Vokey. Furthermore, we endorse his conclusive severance of the attorney-client relationship in his findings of fact and conclusions of law. The trial judge compared the actions of LtCol Vokey to that of the detailed counsel in *Hutchins*, and concluded that LtCol Vokey did not follow appropriate procedures with respect to terminating the attorney-client relationship with the Petitioner; but also found that there existed a conflict that precluded further representation by LtCol Vokey of the Petitioner at that time. Conclusions of Law 1 & 2, 31 May 11 Findings and Conclusions of Law at 26-27, 31-32. The trial judge further concluded, however, that the conflict could be waivable if both the Petitioner and Sgt Salinas consented to LtCol Vokey's representation of the Petitioner. Findings of Fact and Conclusions of Law of 31 May 11, Conclusion Conclusion 2. The trial judge based his decision upon his analysis of the Texas Disciplinary Rules of Professional Conduct and testimony taken at the 25 April 2011 *ex parte* hearing. We find that the trial judge has shown "good cause" on the record for why the attorney-client relationship was appropriately severed. *See Hutchins*, 69 M.J. at 289; *Hohman*, 70 M.J. at 98 (both discussing R.C.M. 505 and 506). We note that the record stands as anemic relative to any grant of waiver of conflict by the Petitioner - and that would have cured LtCol Vokey's ethical preclusion and realized Petitioner's ongoing desire for his representation. Therefore, we do not find that the trial judge abused his discretion in maintaining and finalizing the severance of the attorney-client relationship between LtCol Vokey and the Petitioner.

This court is not entirely unsympathetic to the Petitioner's current plight. It strikes us as unfair that LtCol Vokey has been able to choose employment that is convenient for him, whilst the Petitioner has lost a defense attorney who possesses a unique understanding of the Petitioner's case and who visited the site of the alleged offense, much like the defense attorney who was the subject of the Court of Military Appeals' decision in *United States v. Eason*, 45 C.M.R. 109 (C.M.A. 1972). But, even after losing such counsel, the Petitioner still enjoys the benefit of numerous other defense counsel, some of whom have been serving him for years, like Mr. Faraj who speaks Arabic and was on active duty and detailed to the Petitioner's court-martial at roughly the same time as LtCol Vokey. Findings of Fact and Conclusions of Law of 31 May 11, Conclusion, Supplemented Findings 1, 19, and 21. Furthermore, while we agree with counsel's statement at oral argument[1] that watching Iraq on TV is not the same as being there,[2] there remains a video-recording of LtCol Vokey's site visit that the defense can deploy in its case; the defense can call LtCol Vokey as a witness to testify, within the bounds of his ethical obligations to both the Petitioner and Sgt Salinas, about his site visit and to explain the video. Therefore, looking at "the balance of the case", we do not see any prejudice against the Petitioner at this time that would entitle him to mandamus relief in the form of an extraordinary writ. *Hutchins*, 69 M.J. at 293.

If there is any prejudice against the Petitioner, it was laid upon him through the actions of his defense counsel. "The invited error doctrine recognizes that a party may not invite or provoke error at trial and then complain about the error on appeal." *United States v. Harvey*, 67 M.J. 758, 763 (A.F.Ct.Crim.App. 2009)(citing *United States v. Wells*, 519 U.S.

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[1] Oral argument was held on 8 August 2011. The court heard argument on the following issues:

I. WHETHER THE PETITIONER MEETS THE THRESHOLD REQUIREMENTS FOR MANDAMUS RELIEF BASED UPON HIS CLAIM THAT LTCOL VOKEY, HIS FORMER DETAILED DEFENSE COUNSEL AND CIVILIAN DEFENSE COUNSEL, SHOULD BE RESTORED TO HIS DEFENSE TEAM BEFORE PETITIONER'S COURT-MARTIAL PROCEEDS.

II. WHETHER LTCOL VOKEY VOLUNTARILY TERMINATED HIS REPRESENTATION OF THE PETITIONER WHEN HE ALERTED THE TRIAL JUDGE TO A CONFLICT OF INTEREST AND MOVED TO WITHDRAW HIMSELF AS CIVILIAN DEFENSE COUNSEL IN SEPTEMBER 2010.

III. IF LTCOL VOKEY VOLUNTARILY RETIRED FROM ACTIVE DUTY AND THEN ASSUMED THE MANTLE OF CIVILIAN DEFENSE COUNSEL IN REPRESENTING THE PETITIONER, IS RESTORATION TO ACTIVE DUTY A VIABLE OPTION FOR REMEDY?

An audio recording of the argument can be found at the following location: http://www.jag.navy.mil/courts/oral_arguments.htm.

[2] Oral argument audio at 48:30.

482, 488 (1997) and *United States v. Dinges*, 55 M.J. 308, 311 (C.A.A.F. 2001)); *see also United States v. Mazza*, No. 200400095, 2008 CCA LEXIS 623, at *6-8 (N.M.Ct.Crim.App. 17 Jul 2008), *aff'd*, 67 M.J. 470 (C.A.A.F. 2009). We note that LtCol Vokey has never asked to return to active duty. As articulated above, he never asked to withdraw his retirement request. LtCol Vokey then chose to work at a firm that was representing another Marine, Sgt Hector Salinas, involved in the events in Haditha, Iraq in 2005, which created his ethical conflict. Furthermore, he let the Petitioner know that he was taking up employment with that firm, yet the record contains no indication that LtCol Vokey ever sought a waiver from either the Petitioner or Sgt Salinas. Findings of Fact and Conclusions of Law of 31 May 11, Conclusion, Supplemented Finding 4. To his credit, LtCol Vokey did identify a conflict of interest and take appropriate steps to terminate representation. *Humphreys*, 57 M.J. at 88 n.4. However, we must agree with the trial judge when he says, "Essentially, Mr Vokey's actions were the proximate cause of the conflict, not the government's actions." Findings of Fact and Conclusions of Law of 31 May 11, Conclusion 3. Therefore, we cannot find that it was the Government who created the ethical conflict that caused the trial judge to relieve LtCol Vokey from representing the Petitioner. The Government has no responsibility to call LtCol Vokey back to active duty at this point.

Due to the still extant ethical conflict that caused the trial judge to relieve LtCol Vokey of representing the Petitioner, recalling LtCol Vokey to active duty to rejoin the defense team may not have any positive effect for the Petitioner. At oral argument, the Petitioner's counsel conceded as much,[3] yet still urged this court to abate proceedings so that the Government could restore LtCol Vokey to active duty just so that the attorney-client relationship could be terminated *again* due to the same conflict that caused the trial judge to release LtCol Vokey in the first place.[4] Recalling LtCol Vokey to active duty when he would not even be able to represent the Petitioner would only serve to promote unnecessarily delay in the Petitioner's court-martial proceedings. Therefore, we refrain from taking action that would most likely land the Petitioner months or years from now back in the same situation that he currently is in while incurring massive administrative and monetary costs that would unduly impede his absolute right to a speedy resolution of this matter. Put simply, it is time to place this matter before a trial court for a verdict.

The Petitioner has failed to demonstrate that he has "no other adequate means to attain the relief" sought or that his

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[3] Oral argument audio at 52:00.

[4] Oral argument audio at 55:00-59:10.

"right to issuance of the relief is clear and indisputable". *Cheney*, 542 U.S. at 380-81 (internal quotation marks omitted). The trial judge's action did not amount to a "usurpation of power" when he relieved LtCol Vokey from representing the Petitioner (on Petitioner's motion) or when he denied the Petitioner's motion to abate. *Labella*, 15 M.J. at 229. If a decision is to be made that LtCol Vokey is still able to represent the Petitioner despite the ethical conflict that he brought to the court-martial's attention, perhaps it should be made with some input from the Texas Center for Legal Ethics.[5] But the more efficacious mode of resolving this ethical morass would come through the grant "of a knowing and intelligent waiver by the [Petitioner] and Sgt Salinas."[6] To be certain, we will not resolve this issue now based solely on the averment of appellate defense counsel that LtCol Vokey's conflict is only an imputed one that will be resolved through an **involuntary** recall to active duty.[7] The Petitioner has asked this court and the United Sates to remedy an error that the defense has inflicted upon itself and that it has not taken all possible actions to obviate. This we will not do. Abating proceedings would serve little purpose, and therefore the petition for the writ is denied. If the Government committed error in allowing LtCol Vokey to retire in November 2008 or if the trial judge erred in relieving him from representing the Petitioner and the Petitioner is prejudiced by either of these actions at court-martial, this court will address the matter, if necessary, in the normal course of Article 66 review, not at this time via a writ of mandamus. *See generally Diaz*, 54 M.J. at 881.

Accordingly, this court's order of 27 May 2011 staying the Petitioner's court-martial is hereby dissolved. The Petition for Extraordinary Relief in the Nature of a Writ of Mandamus is

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[5] While there are ethics resources available to Texas barred attorneys, *see* http://www.legalethicstexas.com/Home.aspx, the record is devoid of any evidence that LtCol Vokey or anyone else from the defense has used any of them. Findings of Fact and Conclusions of Law of 31 May 11, Supplemented Finding 6; *see also* 25 Apr 11 Article 39(a) session at 136.

[6] Findings of Fact and Conclusions of Law of 31 May 11, Conclusion 2.

[7] The Petitioner argues that the Judge Advocate General of the Navy's professional responsibility rules, JAGINST 5803.1C, require LtCol Vokey to continue to represent the Petitioner and that such rules preempt any state ethics rules. Petitioner's Brief at 24, 35. We disagree and are not persuaded by counsel's reliance on the CAAF's *Hohman* decision. The Petitioner's argument ignores the fact that if LtCol Vokey is in violation of his ethical obligations under the Texas state bar's rules for professional conduct, he could face censure and potentially be disbarred. If that were so, LtCol Vokey would not be able to represent any clients, much less the Petitioner. Recalling him to active duty to potentially place him back in the same ethical quandary that he brought to the court-martial's attention in September 2010 would not serve any purpose.

denied without prejudice to the Petitioner's right to raise the same issues during the course of appellate review.

Senior Judge BOOKER and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court