APPENDIX

TAB A

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Frank WUTERICH Staff Sergeant (E-6) U.S. Marine Corps Petitioner v. UNITED STATES Respondent	NMCCA NO. 200800183 PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A STAY OF COURT-MARTIAL PROCEEDINGS 10/27/10 O R D E R

On 25 October 2010, the Petitioner filed a petition for extraordinary relief in the nature of a stay of court-martial proceedings. The Petitioner seeks to stay proceedings of his court-martial pending issuance of the military judge's findings of fact and conclusions of law concerning the military judge's denial of Petitioner's motion for appropriate relief arising from a claimed severance of his attorney-client relationship with detailed military counsel. The Petitioner also seeks a stay to permit filing of a petition for extraordinary relief challenging that denial. On 27 October 2010, Petitioner filed a motion for leave to file a motion to attach the military judge's findings of fact and conclusions of law.

After consideration of the entire pleadings filed to date, it is, by the Court, this 27 day of October 2010,

ORDERED:

The motion for leave to file a motion to attach the military judge's findings of fact and conclusions of law is GRANTED.

The petition for extraordinary relief in the nature of a stay is DENIED without prejudice to the Petitioner's ability to petition for relief from the military judge's denial of the motion for appropriate relief.

In light of our action, the Government's 26 October 2010 request for expedited review or for an immediate stay pending resolution of the Petitioner's petition for extraordinary relief is DENIED as moot.

For the Court

For R.H. TROIDL
Clerk of Court

27 Oct 2010

Copy to:
NMCCA (51.3)
Petitioner (via U.S. mail)
45
46 (B.K. Keller)
02

TAB B

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Frank W. Wuterich **Staff Sergeant (E-6)** **U. S. Marine Corps** **Petitioner**	**NMCCA NO. 200800183** **PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS**
v.	
LtCol D.M. Jones, USMC **Military Judge**	
and	**O R D E R**
UNITED STATES **Respondents**	

On 28 October 2010 the petitioner filed for extraordinary relief in the nature of a writ of mandamus. Specifically, the petitioner seeks a declaration from this court that the attorney-client relationship between the petitioner and a former detailed defense counsel was improperly severed. Additionally, the petitioner seeks an abatement of the trial, scheduled to commence on 2 November 2010, until such time as the former detailed defense counsel, now retired, is restored as defense counsel, or the Court remands this case to the military judge for appropriate relief.

Having considered the petition and supporting brief, it appears that the military judge severed the attorney client relationship having found good cause shown on the record, i.e., "an irreconcilable conflict of interest." *See* RULE FOR COURTS-MARTIAL 505(d)(2)(B)(iii), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). This matter seems to fit squarely in the normal course of review under Article 66, UCMJ, if necessary.

Accordingly, it is, by the Court, this 29th day of October 2010,

ORDERED:

That the petition is denied without prejudice to the right to raise the matter during the ordinary course of appellate review.

For the Court

R.H. TROIDL
Clerk of Court
29 Oct 2010

Copy to:
NMCCA (51.2)
LtCol Jones (via e-mail)
45 (Maj Sripinyo)
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02
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TAB C

Maj Bruning

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

OCT 2010
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NMCCA

Frank D. Wuterich, Staff Sergeant (E-6) United States Marine Corps, Petitioner	)	MOTION TO COMPEL PRODUCTION
v.	)	Case No. 200800183
David M. Jones Lieutenant Colonel, United States Marine Corps, (in his official capacity as Military Judge), Respondent.	)	

Rejected OS NOT A matter in Controversy Before this COURT 10/28/10 FOR

10/28/10 FOR

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

COMES NOW Petitioner Staff Sergeant (SSgt) Frank D. Wuterich, United States Marine Corps, by and through his undersigned counsel, and pursuant to Rule 23.9 of this Court's Rules of Practice and Procedure files this motion to compel production of verbatim transcripts of the Article 39(a) sessions that covered Petitioner's motion to dismiss for improper severance of counsel (hereinafter "Hutchins Motion") held in the court-martial below.

Statement of the Case

On 25 October 2010, Petitioner SSgt Wuterich filed a petition for extraordinary relief asking this Court to stay proceedings in his court-martial until the military judge issued findings of fact and conclusions of law and Petitioner had a

chance to file a petition challenging that ruling. On 26 October 2010, the government moved this Court to stay proceedings in the court-martial case or expedite its review of Petitioner's request for extraordinary relief. That same day, the military judge issued his findings of fact and conclusions of law in the case.

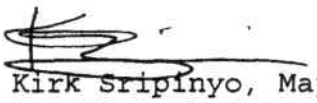
Argument

This Court should grant this motion and issue an order compelling the production of verbatim transcripts of all the Article 39(a) sessions relevant to the military judge's decision regarding the Hutchins Motion. These transcripts, along with the military judge's findings of fact and conclusions of law, which Petitioner has provided this Court in a separate motion, are necessary for Petitioner to prepare and file a Petition for Extraordinary Relief addressing the merits of the improper severance of attorney-client relationship issue. Accordingly, they should be produced.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant his motion and compel production of a verbatim transcript of the Article 39(a) sessions held below.

Respectfully submitted,



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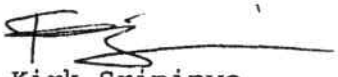

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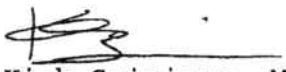

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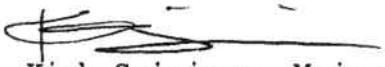

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Counsel for Petitioner

Certificate of Service

I certify that this document was delivered to the Court, the Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on 27 October 2010.

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TAB D

United States	)	
	)	
vs.	)	ARTICLE 39(a)
	)	EXCERPT
WUTERICH, Frank D. Staff Sergeant U.S. Marine Corps	)	

Excerpt of an Article 39(a) session, held at Marine Corps Base, Camp Pendleton, California on 11-12 March 2009.

PARTIES PRESENT

MILITARY JUDGE:	LtCol J. G. Meeks, USMC
TRIAL COUNSEL:	LtCol D. J. Erickson, USMC
TRIAL COUNSEL:	Maj D. J. Plowman, USMC
TRIAL COUNSEL:	Capt N. L. Gannon, USMC
CIVILIAN COUNSEL:	Mr. C. Benedetti, CBS
CIVILIAN COUNSEL:	Mr. Puckett, Defense
DEFENSE COUNSEL:	LtCol P. A. Tafoya, USMC
COURT REPORTERS:	Sgt M. H. Doyle, USMC Sgt K. C. Myers, USMC

The Article 39(a) session opened at 0916, 11 March 2009.

MJ: This court is called to order. All parties present before the court last recessed are again present with the following exceptions: In the prior session of court, Staff Sergeant Cherry [sic] sat as court reporter. She has been relieved and has been replaced by Sergeant Doyle, who has previously been sworn.

Present today representing the government is Lieutenant Colonel Erickson, Major Plowman, and Captain Gannon, who has previously made appearances on this case before the court.

Present today representing the defense is a new counsel, Lieutenant Colonel Tafoya.

Lieutenant Colonel Tafoya, would you please state your legal qualifications, status as to oath, and by whom you have been detailed.

DC (LtCol Tafoya): Yes, sir. I have detailed myself to this case in my capacity as the Regional Defense Counsel for the Western Region. I'm qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. I have not acted in any disqualifying manner in this case.

MJ: Very well. Now, previously present in the court appearing to represent Staff Sergeant Wuterich was Captain Bonner as the individual military counsel.

What is the status of Captain Bonner?

DC (LtCol Tafoya): Sir, Captain Bonner to my knowledge is still the individual military counsel for Staff Sergeant Wuterich.

MJ: Okay. He is not present here today.

DC (LtCol Tafoya): He is not present in the courtroom today.

MJ: All right. Also representing previously as a, I believe, detailed defense counsel was Lieutenant Colonel Vokey. My understanding is that Lieutenant Colonel Vokey has since retired from the Marine Corps; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: There has been some discussion that he may be retained in this case in the capacity as civilian counsel, but that has not occurred; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

MJ: Also, not present here today is Mr. Zaid and Mr. Faraj. What are their status today?

DC (LtCol Tafoya): They are not present in the courtroom today, sir.

MJ: Okay. And telephonically present is Mr. Neal Puckett, the senior of the civilian counsel; is that correct?

Mr. Puckett, you can chime in if you are here.

Mr. Puckett?

CC (Mr. Puckett): Still here, sir.

MJ: Okay. Now, Staff Sergeant Wuterich, normally -- you can sit down, and you can remain seated at all times unless I specifically tell you to rise.

ACC: Aye, aye, sir.

The accused did as directed.

MJ: Normally, you have the right to have all of your attorneys to be present prior to proceeding in this trial here today. Now, I will note that we had some discussions previously before going on the record where I was informed that the counsel who are not present are going to be excused because you are giving them the permission to be excused. However, I haven't talked to you about that. So I'm going to go over your rights with you right now on that.

You have the right to have all of your counsel be present with you during the presentation of your case. If your counsel aren't here, normally I would stop the proceeding until they could be here. Of course, we would also have the alternative problem the court directing a date for the counsel to be here and the counsel not being here, we would have to deal with that

TAB E

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY
GENERAL COURT-MARTIAL

UNITED STATES	)	**FINDINGS OF FACT AND CONCLUSIONS OF LAW**
v.	)	**MOTION TO DISMISS FOR VIOLATION OF RIGHT OF DETAILED COUNSEL**
FRANK D. WUTERICH STAFF SERGEANT, USMC	)	**26 OCTOBER 2010**

The defense moves that all charges and specifications against the accused be dismissed, with prejudice, for violation of the accused's right to detailed counsel under the Sixth Amendment to the Constitution and Article 27 of the UCMJ. In the alternative, the defense argues for an abatement of the proceedings to "allow the Government to fashion a remedy." The Court has considered the documentary evidence presented, the testimonial evidence, the argument of counsel and has made all judgments of credibility of witnesses.

STATEMENT OF THE CASE

Charges were preferred against the accused on 21 December 2006 and referred on 27 December 2007 for actions relating to his conduct on 19 November 2005 in Haditha, Iraq. The charges allege violations of the UCMJ: Article 92 (dereliction of duty), 119 (voluntary manslaughter), 128 (aggravated assault) and Article 134 (reckless endangerment and obstruction of justice). 10 U.S.C. Sections 892, 919, 928, and 934.

As a result of rulings by a previous military judge regarding the release of CBS outtakes, the case has been appealed twice by the government pursuant to Article 62, U.C.M.J. *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.), *certificate for review dismissed*, 68 M.J. 404 (C.A.A.F. 2009). The particular appellate court rulings do not bear on the issues before the Court in the present motion. However, the delay in the proceedings due to the appellate litigation is relevant. Due to the time involved in litigating and appealing issues relating to this case, both original detailed defense counsel, LtCol Colby Vokey, USMC, and Major Haytham Faraj, USMC, retired from active duty.

ISSUE PRESENTED

Whether a change in defense counsels' status from a detailed defense counsel to a civilian defense counsel is a violation of the accused's Sixth Amendment right to counsel, or a violation of the accused's Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels' transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

FINDINGS OF FACT

1. Both Lieutenant Colonel Vokey and Major Faraj were "double-detailed" as counsel in this case; neither counsel represented the accused as individual military counsel (IMC). LtCol Vokey was detailed on 11 January 2007 and Major Faraj was co-detailed on 17 January 2007, both within 27 days of preferral of charges.

2. Within 21 days of being detailed to the case, LtCol Vokey submitted a request for voluntary retirement pursuant to 10 U.S.C. Section 6323. His initial request was approved and his retirement date was scheduled for 1 April 2008. Subsequently, LtCol Vokey requested that his retirement date be modified four times. All four of the requests were granted and he never requested further modification after the approvals. The changed retirement dates went from 1 April to 1 May 2008, 1 May to 1 June

2008, 1 June to 1 August 2008 and, finally, 1 August to 1 November 2008. LtCol Vokey retired on 1 November 2008 after 20 years, 7 months of active duty service.

3. LtCol Vokey never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. LtCol Vokey did meet resistance from manpower regarding the continual change of his retirement date a month at a time, but he never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case.

4. In October 2008, while still on active duty (albeit it terminal leave), LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP (hereinafter Fitzpatrick). Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings, to include in March 2010 and September 2010 in front of the present judge. Mr. Vokey continued to represent the accused while a member of the Fitzpatrick law firm, despite the firm already having established representation of former Sgt Hector Salinas, an alleged co-conspirator in the accused's case. Mr. Vokey was told, orally, upon his hiring, that Sgt Salinas did not have a conflict with the firm hiring Mr. Vokey, despite the fact that the accused's interests may be contradictory to the firm's interests of Salinas.

5. There is no evidence that the firm has a written waiver of Sgt Salinas, regarding this potential conflict of interest. Nor did Mr. Vokey, while on active duty or since retirement, ever secure a waiver from the accused concerning this conflict.

6. The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case. However, at the Article 39(a) sessions of 13 and 14 September, the defense team asked for an ex parte hearing with the judge regarding the continued representation of Mr. Vokey on the case, given the potential conflict involved. When the Military Judge had tried to sever this relationship with the accused's approval on the record, the judge was stymied by the

defense. So, after hearing the defense's request, including the desires of Mr. Vokey, the Court was constrained to release Mr. Vokey from further participation in this case, pursuant to R.C.M. 505(d)(2)(B)(3), based on an irreconcilable conflict of interest. (A record of this ex parte hearing will be sealed and attached to the record of trial.) Until being released at the September Article 39(a) session, Mr. Vokey had continued to represent the accused.

7. Within 31 days of being detailed to the accused's case, on 18 February 2008, Maj Faraj submitted his request to voluntary retire on 1 May 2008. He subsequently requested two modifications to the retirement dates, from 1 May to 1 June 2008 and from 1 June to 1 August 2008. Both requests were granted and Maj Faraj subsequently retired on 1 August 2008, after being on active duty some 22 years. Maj Faraj never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. Maj Faraj never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case (except for the extensions already discussed).

8. Immediately upon retiring in August 2008, Mr. Faraj entered private practice. He formed a partnership with Mr. Neal Puckett, one of the civilian attorneys who had already been representing the accused and with whom Mr. Faraj had worked with on the case. Mr. Faraj has never been released by either the Court, or his client, from his attorney-client relationship (hereinafter, ACR), and that ACR continues to exist.

9. Mr. Faraj indicated that he is not getting paid for his representation of the accused, but still represents him as his legal ethics and personal morals dictate that he must. But his law firm is getting paid, as the law firm continues to represent the accused. *See*, http://www.puckettfaraj.com. Mr. Puckett and Mr. Faraj continue to zealously represent the accused, along with another civilian counsel (Mr. Mark Zaid) and a detailed defense counsel (Major Meredith Marshall, USMC). The defense had not asked for a detailed defense counsel to be assigned to the case, but the Court insisted in March that a detailed defense counsel be assigned. At the beginning of July 2010,

Major Marshall was appointed detailed defense counsel. She has been assisting the defense for almost four months.

10. Also representing the accused in the past, and having been properly relieved, have been LtCol Patricio Tafoya and Captain Nute Bonner. Therefore, until Mr. Vokey was released by the Court in September 2010, both detailed defense counsel became, in effect, civilian counsel of record and continued to represent the accused. Neither party, however, ever filed notices of appearance as civilian attorneys in the case. The accused never released either one of them from participation and neither had the Court until Mr. Vokey was released on 13 September 2010.

11. The prosecution team has consisted of, primarily, LtCol Sean Sullivan, Major Don Plowman and Major Nick Gannon. Major Plowman retired in May 2010 and has been released from all further participation in the case. LtCol Sullivan, a reservist, applied for sanctuary, meaning that he submitted a request for 3-year orders so that he could retire with a full pension. He did this on 4 March 2009, some five to seven months after Mr. Faraj and Mr. Vokey had retired.

12. Undoubtedly, the primary reason for LtCol Sullivan's sanctuary request was personal, as the granting of sanctuary would allow him to immediately secure the vesting of his pension. But the reason for the approval was, to some extent, tied to the letters written to Manpower by General Officers (and others), requesting that LtCol Sullivan be granted sanctuary so that he could assist in the Haditha cases, including the accused's case. There was nothing improper about LtCol Sullivan's request for sanctuary or the government's approval of it. Retaining LtCol Sullivan on active duty did not occur at the expense of the active duty slots available for LtCol Vokey or Maj Faraj to continue on active duty because they applied at different times and under different statutes and administrative procedures.

13. LtCol Paul Atterbury, mentioned in the defense motion as a prosecutor, never made an appearance in court, so evidence of his role in the case is of very minimal

relevance, if it is relevant at all. Major Gannon was allowed to continue on as a prosecutor in the Haditha cases despite his staying at the legal team in excess of what would normally be expected. There was no disparate treatment of the prosecution team and the defense team. The circumstances between the individuals was completely different; LtCol Sullivan was trying to achieve sanctuary, Maj Faraj and LtCol Vokey were retiring and Maj Gannon was simply left in place at this duty station to work on Hamdaniyah and Haditha cases. There was no intent by the government to undermine the integrity of the defense team while simultaneously making a herculean effort to keep the trial team intact. All of these actions occurred in the normal course of governmental business. Retaining LtCol Sullivan on active duty did not occur at the expense of active duty slots available for LtCol Vokey or Maj Faraj; the officers were not in competition for slots because they applied for retention at different times, under different statutes and administrative procedures. The situations between LtCol Sullivan and the accused were divergent in status, conduct and time.

14. The government was not seeking to improperly influence the accused's right to counsel by the voluntary retirements of his two detailed defense counsel. Although it is true that Manpower did not perhaps fully understand the impact of the two attorneys retiring (as evidenced by Col Redmon, Deputy Director of Manpower), no one at Manpower, or for that matter the government as a whole, improperly influenced the right of the accused to his counsel. Col Redmon was frustrated of dealing with LtCol Vokey's constant change in retirement plans, to be sure, but his actions cannot be imputed as bad faith on behalf of the government. In fact, despite the letters submitted on behalf of LtCol Sullivan's package in March 2010, Col Redmon recommended against granting LtCol Sullivan sanctuary.

15. It is clear that both LtCol Vokey and Maj Faraj wanted to continue to represent the accused. LtCol Vokey even moved his family to Texas and lived in a trailer to continue working on the case pending his retirement. But they also understood that there was no way to know when the case was going to be litigated for sure based on

the extensive appellate litigation and appeals that were ongoing throughout 2008 and 2009. Eventually, both officers elected to retire and continue representing the accused as civilian attorneys. No one from the government stepped in to assist the two officers in securing extra time on active duty as the two officers did not petition the Court, the trial counsel, their Commanding Officer (with the exception of the extensions as noted) or the Convening Authority for relief to stay on active duty. The Court sincerely doubts that either officer would have been happy to remain on active duty for the two years it has taken this case to get to trial.

16. LtCol Vokey took an active role in the accused's case (even appearing on 22 March 2010 at an Article 39(a)) until he was released in September 2010 by the Court, upon a motion from the defense, from further participation based on a finding of an irreconcilable conflict of interest. Prior to that time, he had done a site visit to Iraq with the accused and a videographer from the Puckett law firm (among other support staff); had interviewed numerous witnesses; participated in the Article 32 hearing and bonded with the client. Mr. Faraj took the same active role, except that he did not physically go to Iraq for the site visit. Mr. Faraj is fluent in Arabic, which has and will assist the defense to no small measure. Both detailed defense counsel were sent to continuing legal education courses. The original trial date this case was scheduled for trial was early March 2008. However, the trial was continued once the appellate litigation started, which was during February 2008.

17. The previous judge in the case, LtCol Meeks, made no inquiry on the record regarding the excusal of the accused's two detailed counsel from active duty. SSgt Wuterich has never excused either counsel from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey ever made an application to the Court for excusal or withdrawal, nor did they ask that the proceedings be abated if they were not retained on active duty.

18. Mr. Faraj has taken, and continues to take the most active role of the defense counsel in representing the accused at pretrial hearings. Mr. Faraj acts as the lead attorney.

19. During the years this case has taken to get to trial, there has been equal access to witnesses, evidence and discovery. As illustrated by General Mattis' testimony during the unlawful command influence motion in March 2010, the Convening Authorities have sought to ensure a fair process for both the trial and defense teams in this case.

20. The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the fact that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience; 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) the defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; and 7) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

21. The Court is convinced that the previous "military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law." *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010).

SUMMARY OF THE LAW

Rule for Court-Martial 506(c) states:

(c) *Excusal or withdrawal*. Except as otherwise provided in R.C.M. 505(d)(2) and subsection of (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

Regarding changes of detailed defense counsel, Rule for Court-Martial 505(d)(2)(B) states:

(B) *After formation of attorney-client relationship*. After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

(i) Under R.C.M. 506(b)(3);

(ii) Upon request of the accused of application for withdrawal by such counsel under R.C.M. 506(c); or

(iii) For other good cause shown on the record.

R.C.M. 505(f) states:

(f) *Good cause*. For purposes of this rule, "good cause" includes physical disability, military exigency, and other extraordinary circumstances which render the…counsel…unable to proceed with the court-martial within a reasonable time. "Good cause" does not include temporary inconveniences which are incident to normal conditions of military life.

The case of *United States v. Hutchins*, the Navy-Marine Corps Court of Criminal Appeals stated the following: "The Uniform Code of Military Justice provides an accused with rights to counsel that exceed Constitutional standards…" and that "release of a defense counsel in situation such as this occur only with the approval of the military judge for good cause, or with the 'express consent" of the accused." 68 M.J. 623, 628 (N-M. Ct. Crim. App. 2010).

Further, "[g]ood cause must be based on a 'truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship.'" *Id.*, quoting *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978).

Without the accused's consent of release of counsel, or approval of an application of withdrawal by the defense counsel, severance of the relationship can only be proper when good cause is shown on the record. *United States v. Allred*, 50 M.J. 795, 799-800.

Convenience of the government is not a sufficient basis to establish good cause. *Id.*, at 800, (citing *United States v. Murray*, 42 C.M.R. 253, 254).

Although an accused is not absolutely entitled to the defense counsel of his choice, he is entitled to retain an established relationship with the counsel in the absence of demonstrated good cause. *United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988).

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009).

A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463.

The core of the Sixth Amendment right to counsel "has historically been, and remains today, the "opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial." *Id.*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, __ U.S. __, 129 S.Ct. 1841 1844-45 (2009).

"Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians…But these broader rights are the creations of statute and regulation, not of the Constitution." *Id.*, at 465.

Paragraph 2004.8 of MCO P1900.16F, Modification or Cancellation of Requests states in pertinent part:

a…Approval will be based on the following criteria:

(1) Bona fide humanitarian or hardship circumstances.

(2) A critical need exists for the officer's grade and MOS.

(3) Needs of the service.

(4) Selection for promotion.

c. Modification of any duration may be requested; however, as a general rule, the effective date of the requested modification should not exceed 14 months from the date of the submission of the original request…

ANALYSIS / CONCLUSIONS OF LAW

The issue is whether a change in defense counsels' status from a detailed defense counsel to a civilian defense counsel is a violation of the accused's Sixth Amendment right to counsel, or a violation of the accused's Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels' transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

The defense relies heavily on the case of *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010). This recent Navy-Marine Corps Court of Criminal Appeals case ruled that in the absence of the accused's consent or an approved application for withdrawal by defense counsel, severance of the attorney-client relationship can only be proper when good cause is shown on the record. *Id.*, at 628. Further, the Court found that the detailed defense counsel's departure from active duty did not constitute good cause for severing the attorney-client relationship when the counsel was replaced a mere five to six weeks before the murder trial and he had participated extensively in the trial preparation. *Id.* Lastly, the Court attached the presumption of prejudice to the wrongful severance.

The case at bar, however, is markedly different than the *Hutchins* case. First, the attorney-client relationship (hereinafter ACR) in Hutchins was severed by the defense attorney leaving active duty. In this case, that ACR survived the retiring of both LtCol Vokey and Major Faraj as they both continued to represent the accused at court sessions after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey continued to represent the accused from his retirement until he petitioned relief for good cause from the Court in September 2010. After their retirements, they continued to maintain the ACR for around two years since their retirement. Unlike the counsel in *Hutchins*, Mr. Vokey and Mr. Faraj have not abdicated their professional responsibility in this case despite failing to seek redress from the Court at an earlier time. They are to be commended for their professionalism.

Second, the issue of the attorney's status as civilian vs. military counsel is entirely distinct from the counsel in *Hutchins*, who was altogether removed from the case by his terminating his active service. The attorney in the *Hutchins* case did not continue to do anything on the case after he left active duty, taking with him any knowledge he had of the case. Again, in the accused's case, both detailed counsel continued to represent the accused. The *Hutchins* case never addressed losing detailed counsel, but continuing to have those counsel represent you in a civilian capacity. Rather, the case was one of losing the experienced attorney close in time to the actual

trial. Therefore, the facts at bar are distinguishable from not only the *Hutchins* case, but also from *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); and *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978).

Third, in *Hutchins*, the military judge gave a misstatement of the law by indicating that after the attorney left active duty, there was no way the accused was entitled to keep him on as his attorney. The military judge in *Hutchins* effectively severed the accused's ACR by misinforming the accused and then getting an unintelligent waiver. No misstatement of the law occurred in the instant case by the military judge. There was no misinforming, misleading, or flawed legal or factual logic. Rather, there was simply a lack of due care by all concerning getting a waiver from the accused or releasing the attorneys for good cause shown.

Both Mr. Vokey and Mr. Faraj stopped submitting requests to modify their retirement dates in the summer of 2008, which was well before there was any appellate rulings regarding this case. In essence, the case at the trial level was in limbo, waiting out the appellate litigation. At this point, when it appeared that litigation was dragging on and there was no end in sight for when the case might be tried, all parties should have made known to the Court of the impending retirements of the two detailed defense counsel. Then, the pervious military judge should have held a hearing to determine whether good cause existed or not to release the two attorneys as detailed defense counsel for cause or by getting the accused's permission. Absent good cause, the officers, perhaps, would have remained on active duty.

But none of that was done in this case. And then to further compound the error, Mr. Vokey secured employment at a firm who was representing one of the other alleged shooters in the incident. He did so without securing a waiver from the accused regarding this potential conflict of interest. Evidently, no one thought there would be issues with this course of action and Mr. Vokey continued to represent the accused for almost two years from his hiring. Now, however, on petition from the defense, the Court released Mr. Vokey from all further participation in this case approximately

seven weeks before the trial. Errors by both the trial and defense teams by not petitioning the Court for redress have led us to where we are now regarding Mr. Vokey. However, he shares some blame by knowingly hiring on with the Fitzpatrick law firm where he was told about a potential conflict of interest and then failing to get a waiver of this issue from the accused. Regardless, the unfortunate outcome is that he is now conflicted from representation of the accused.

The core of the Sixth Amendment right to counsel "has historically been, and remains today, the "opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial." *Wiechmann*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, __ U.S. __, 129 S.Ct. 1841 1844-45 (2009). "Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians…But these broader rights are the creations of statute and regulation, not of the Constitution." *Id.*, at 465. When an ACR persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel.

It is true that because the government and the defense were asleep at the switch in seeking redress from the Court for this issue. As a result, Mr. Vokey is now unable to participate in the trial because of his choice of employment. It is unfortunate that it took the defense so long to ascertain that there really was a conflict in this case between Mr. Salinas and the accused. However, because the Court found good grounds to release Mr. Vokey, there can now be no further representation by him at the court-martial.

The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the facts that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience (again, see Mr. Puckett's website,

http://www.puckettfaraj.com); 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) The defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; 8) the Court will allow Mr. Faraj to read into the record all of his personal awards for the members and explain to them that he was on active duty when this case started; and 9) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009). A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463. There is a strong presumption that an error is not structural. *Id.*, at 634 (Senior Judge Booker concurring) (citations omitted).

There is no structural error in the accused's situation and, therefore, no proof of prejudice is required. There is no doubt in the Court's mind that the accused can receive a fair trial and that the criminal trial can reliably serve its function as a vehicle for determination of guilt or innocence. The Court, as the gatekeeper, may take whatever measures it deems necessary to ameliorate any affect of the accused now losing the services of Mr. Vokey on the defense team, to include: relaxing the rules of evidence, if necessary, for the admission of items garnered during Mr. Vokey's trip to

Iraq. The *Hutchins* Court specifically noted that "our determination to presume prejudice is very fact specific. Another case with other facts might well be more amenable to a reasoned prejudice analysis." *Id.*, at 631. Looking at both specific and general prejudice, (*Id.*, at 637) this Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and that he will not be unduly prejudiced by the removal of LtCol Vokey as counsel.

Although all of the parties (to include the previous military judge) should have been alerted as to the fact that counsel who plan on leaving active duty need to be properly released by the Judge, it is worth noting that the Navy-Marine Corps Court of Criminal Appeals ruling in *Hutchins* came more than a year and a half after Mr. Vokey and Mr. Faraj retired.

The defense seems to believe that the *Hutchins* ruling means that a Court can never sever an ACR for an attorney who is retiring or leaving active duty. This is an unnecessary and overbroad reading of the case. The *Hutchins* Court had issues with the military judge's (and everyone else's) conclusion that just because the defense counsel was leaving active duty, that action constituted good cause in severing an ACR during an ongoing trial. The *Hutchins* Court meant what it said: "severance of the relationship can only be proper when good cause is shown on the record." *Hutchins*, at 628. But again, in this case, the ACR was never severed for the two detailed defense counsel until Mr. Vokey was removed at his own behest in September 2010.

Taking the defense position to the extreme, a senior defense counsel should never detail a young officer to a general court-martial if that officer wanted to leave active duty after one tour, because, potentially, the court-martial could be appealed for years and that officer could never be released while the litigation was ongoing. Or, using another example, the Officer in Charge of the Legal Services Support Section may never wish to put an attorney to work in defense unless that attorney signs a paper indicating that he or she will agree to stay on each court-martial case, regardless of

personal circumstances, for however long it takes, even if it is years. Of course, this is absurd and the *Hutchins* Court never endorsed this view.

The *Hutchins* Court did say that "good cause" must "be assessed on a sliding scale which considers the contextual impact of the severance of the client." *Id.*, at 629. After an ex parte hearing requested by the defense, this Court found that Mr. Vokey's excusal in this case was for "truly extraordinary circumstances which rendered "virtually impossible the continuation of the established relationship." *Id.*, quoting *United States v. Iverson*, 5 M.J. at 442-443.

Like in the *Hutchins* case, "[t]he multiple errors and inattention leading to deprivation of counsel in this case reflect something of a perfect storm." *Id.* Although the two detailed defense counsel wanted to continue to represent the accused, they did not seek redress from the Court, the Convening Authority (LtGen Mattis, who was very amenable to assist the defense, as shown in the UCI motion), their Commanding Officers or the Officer in Charge of the Legal Services Support Section. Neither defense attorney availed himself of the provisions of paragraph 2004.8(c), of MCO P1900.16F. Clearly, their ACR with the accused would fall under the regulation's criteria for granting modifications and cancellations of retirement. With no end in sight for the appellate litigation, the defense counsel assumed they had to retire and continue representing the accused.

Next, Mr. Vokey secured employment at a law firm whose interests ran counter to his client. Further, the government counsel stood by watching, with no meaningful intervention on behalf of the two detailed defense counsel. By the time the appellate litigation finished, the two detailed defense counsel were retired. But the bottom line is that both detailed defense counsel continued to represent the accused for almost two years after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey was removed for "good cause" by the Court.

Practically speaking, what is the appropriate remedy for the missteps at this point in the process? Abating the proceeding does nothing to assist the accused or the government because there is nothing to cure, and nothing to wait for. Due to Mr. Vokey's ill-advised hiring at the law firm of Fitzpatrick, et. al., sans a waiver from the accused, he is now conflicted out of the case. As previously mentioned, if the Court felt the defense needed more time to prepare, the Court would grant it. But the unspoken reality is that the parties have had plenty of time to get ready for trial and the trial has been delayed long enough. The Court knows that Mr. Faraj is a very able attorney. He has practiced in front of this judge many times in the past and, in fact, effectively litigated the first contested case of the Hamdaniyah cases, Cpl Thomas, in front of this judge (one of Sgt Hutchins' co-conspirators).

Dismissal of the charges in this case is a windfall for the accused and is not warranted based on the actions and inactions of both the trial and defense teams. The accused has not been "irreparably prejudiced" as the defense claims in their motion. This Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and receive very fine representation from Mr. Faraj, Mr. Puckett, Mr. Zaid, and Major Marshall, USMC. The Court will fashion whatever remedy it deems appropriate during trial to ensure both the accused and the government receive a fair trial.

RULING

The defense MOTION is DENIED.

D. M. JONES
LtCol, USMC
Military Judge