IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. WUTERICH	)	GOVERNMENT SUPPLEMENTAL ANSWER
Staff Sergeant (E-6)	)	
U.S. Marine Corps,	)	Crim.App. Misc. Dkt. No. 200800183
Appellant	)	
	)	USCA Dkt. No. 11-8009/MC
v.	)	
	)	
United States,	)	
Appellee	)	

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

PREAMBLE

COMES NOW THE UNITED STATES and respectfully requests this Court deny Appellant's Writ Appeal Petition.

I

HISTORY OF THE CASE

In addition to the History of the Case previously related, the Government provides the following additional History. On November 5, 2010, Appellant petitioned this Court for review of the lower Court's denial of extraordinary relief, with accompanying brief. On November 15, 2010, the Government filed its Writ-Appeal Answer with this Court. On November 23, 2010, Appellant filed its Reply.

On December 20, 2010, this Court vacated the lower court's decision, remanding the case to the lower 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 existed to sever the attorney-client relationship. *Wuterich v. United States*, 2010 CAAF LEXIS 1066 (C.A.A.F. Dec. 20, 2010) (order).

The same day, the lower court ordered the Government to produce authenticated transcripts of those sessions by December 27, 2010. *Wuterich v. United States,* No. 200800183 (N-M. Ct. Crim. App. Dec. 20, 2010) (order). The Government complied on December 27, 2010, and the lower court then ordered the production by January 3, 2011, of any appellate exhibits considered by the Military Judge in making his ruling. (Government Order Response, Dec. 27, 2010); *Wuterich v. United States,* No. 200800183 (N-M. Ct. Crim. App. Dec. 29, 2010) (order). The Government complied. (Government Order Responses, Jan. 3, 6, 2011.) The lower court considered the transcripts and exhibits, and concluded the Military Judge had not abused his discretion, ordered the sealed exhibits to remain sealed, and returned the Record to this Court. *Wuterich v. United States,* No. 200800183 (N-M. Ct. Crim. App. Jan. 7, 2011).

On January 11, 2011, this Court ordered a supplemental briefing schedule for the writ-appeal. On January 14, 2011, the Military Judge granted a joint continuance request by Appellant and the Government, moving the trial date to April 12, 2011. On January 18, 2011, Appellant moved this Court to grant the

Defense team access to the sealed memorandum that summarized the *ex parte* portions of the September 13, 2010, Article 39(a) session. On January 27, 2011, Appellant moved for a 10-day enlargement of time to file its Writ-Appeal Brief, citing the need to view the sealed exhibit. On January 28, 2011, the Government moved this Court to expedite ruling on Appellant's Writ-Appeal Petition as well as on Appellant's motion to view the sealed exhibit.

This Court granted Appellant's motion to view the sealed exhibit on February 4, 2011, and set a new briefing schedule. On February 24, 2011, Appellant filed a Supplemental Brief with this Court. Since then, Trial has again been continued by the Military Judge, citing to the appellate litigation, and now is scheduled to begin on June 27, 2011.

II

ISSUE PRESENTED

> WHERE THE ACCUSED'S DETAILED MILITARY DEFENSE COUNSEL: (1) SEEKS TO REMAIN ON ACTIVE DUTY TO CONTINUE REPRESENTING THE ACCUSED IN A HOMICIDE CASE; (2) IS INFORMED BY THE DEPUTY DIRECTOR OF HEADQUARTERS MARINE CORPS' MANPOWER SECTION THAT HE WILL NOT BE EXTENDED FURTHER; (3) TERMINATES HIS STATUS AS DETAILED DEFENE WITHOUT AUTHORIZATION FROM EITHER THE ACCUSED OR ANY COURT; AND (4) ACCEPTS CIVILIAN EMPLOYMENT THAT CREATES AN IMPUTED CONFLICT ULTIMATELY LEADING A MILITARY JUDGE TO SEVER HIS ATTORNEY-CLIENT RELATIONSHIP WITH THE ACCUSED, HAS THE ACCUSED'S RIGHT TO THE

CONTINUATION OF AN ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP BEEN VIOLATED?

III

STATEMENT OF FACTS

The Government provides the following additional facts, derived from the transcript and Appellate Exhibits, to supplement the Government's Answer of November 15, 2010.

LtCol Vokey was detailed to represent Appellant on January 11, 2007, by the Pacific Regional Defense Counsel, LtCol Simmons. (R. 41, Sep. 13, 2010.) Maj Faraj was detailed several days later. (R. 42, Sep. 13, 2010.) This detailing of two military defense counsel, called "double detailing," was uncommon, and to secure permission, LtCol Vokey specifically asked the Convening Authority for permission, which was granted. (R. 42-43, Sep. 13, 2010.) The next month, in February 2007, both LtCol Vokey and Maj Faraj submitted voluntary retirement requests. (R. 44, Sep. 13, 2010.)

Mr. Vokey testified that he submitted his request to retire 14 months from his desired retirement date. (R. 32, Sep. 13, 2010.) LtCol Vokey believed that at the time LtCol Vokey and Maj Faraj submitted retirement requests, the trial date had been in March 2008. (R. 33, Sep. 13, 2010.) By Marine Corps Order, any modification past the fourteen month date requires cancellation of the retirement request. MARCORSEPMAN Par.

2004.8.d (Appellate Ex. CXVII at 18). 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).

In August of 2007, LtCol Vokey was relieved from his position as Regional Defense Counsel by the Colonel Favors, the Chief Defense Counsel of the Marine Corps at the time. (R. 68, Sep. 13, 2010.) Support for LtCol Vokey's reinstatement was gathered in the form of letters and assistance from Major General Mattis, USMC, the Convening Authority in Appellant's case. (R. 68-69, 71, Sep. 13, 2010.) Eventually, General Walker, the Staff Judge Advocate to the Commandant, and LtCol Vokey talked on via phone, and General Walker informed LtCol Vokey he was reinstated as Regional Defense Counsel. (R. 71, Sep. 13, 2010.)

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.)

Mr. Vokey testified that he had been a judge advocate for 12 years, was aware that the Navy-Marine Corps Court of Criminal Appeals had established timelines for interlocutory appeals, and understood in February 2008 that the interlocutory appeal, and subsequent possible appellate litigation, could extend for many months, and even that CBS could have sought to remove the interlocutory issue to Article III courts. (R. 48-54, Sep. 13, 2010.)

Mr. Vokey testified that in July 2008, when he verbally sought the extension until August 2008, he knew at that time that the appellate litigation "was going to take awhile." (R. 56, Sep. 13, 2010.) The written request he submitted on May 17, 2008, however, contained no information about "months and months" of delay, but asked for an August 1, 2008, retirement date citing that "it is still uncertain as to when the trial will begin," hence "I believe that a 1 July retirement date is no longer sufficient." (Appellate Ex. CXVII at 27.)

Mr. Vokey testified his phone conversation in mid-July 2008 was with Colonel Patrick Redmon, Deputy Director of the Marine Corps Manpower office that handles retirement processing; Colonel Redmon is not a judge advocate. (R. 36, 57-58, 65-66, Sep. 13, 2010.) During that conversation, Mr. Vokey believed

that Colonel Redmon informed him no further extensions would be granted after August 2010. (R. 36-37, 57-58, Sep. 13, 2010; Appellate Ex. CI at 3.)

LtCol Vokey testified he sought no written relief, nor did he seek assistance from the LSSS OIC or other parties in the leadership chain of the Staff Judge Advocate to the Commandant, from what he testified later he believed to be an oral denial. (R. 65, Sep. 13, 2010.) The Defense introduced an e-mail into evidence from Col Redmon to a civilian working for him stating: "Like I said last week, I don't want to get into a situation where we (USMC collectively) are bumping this retirement date out '30 days at a time.'" (Appellate Ex. XCIV at 17.) Mr. Vokey agreed that this e-mail did not foreclose his seeking further modifications of his retirement date. (R. 46-47, Sep. 13, 2010.)

And despite the phone conversation with Colonel Redmon, on July 23, 2008, a week later, LtCol Vokey again submitted to Marine Corps Manpower yet another request to modify his retirement date. (R. 45, 57, Sep. 13, 2010.) In late July, 2008, this request was approved, moving LtCol Vokey's retirement date yet again from August 1, 2008, to November 1, 2008. (R. 45, 57-58, Sep. 13, 2010.) Mr. Vokey testified that a different Colonel approved this modification request, as Colonel Redmon was away from the office. (R. 58-59, Sep. 13, 2010; Appellate

Ex. CI at 3.) Mr. Vokey agreed that he sought no extension requests past November 1, 2008, submitted no written extension requests, and sought no relief from the Convening Authority, the Military Judge, or any other party. (R. 59-60, Sep. 13, 2010.)

Mr. Vokey testified that he had felt only a personal obligation to Appellant, and that his desire to assist Appellant on his case after retirement was unrelated to his having been formerly detailed to the case. (R. 69-70, Sep. 13, 2010.) LtCol Vokey never asked on the Record to be excused from representation before leaving active duty. (R. 70, Sep. 13, 2010.) Nor did LtCol Vokey seek excusal from Appellant. (R. 70, Sep. 13, 2010.)

LtCol Yetter from Manpower testified that once Marine officers cross 18 years of service, "not only do they count against active duty end strength, they're counting against the grade tables, plus they also have a fiscal consideration . . . it does effect everything in its totality." (R. 27, Sep. 13, 2010.) He testified that there is a "total number of officers that [the Marine Corps] can have in [a] particular grade on active duty any one time. And by law, the Marine Corps is required to maintain and stay within those parameters . . . So all those things are taken into consideration when those packages are being routed [through Manpower]." (R. 28, Sep. 13, 2010.)

LtCol Yetter was unaware of what the Marine Corps' officer numbers were in 2009. (R. 28, Sep. 13, 2010.) However, documentation introduced in September 2010 supported that LtCol Vokey's replacement was inbound Summer 2008, hence the May 1 to June 1, 2008, and June 1 to July 1, 2008, retirement modifications had "no negative impact." (Appellate Ex. CXVII at 25, 30.)

LtCol Vokey submitted no extension requests after the July 2008 request extending his retirement date to November 1, 2008, and thus no similar documentation is available as to the "negative impact" or lack thereof on any decision Manpower might have made on further extension requests. (R. 59-60, Sep. 13, 2010.) However, in August 2008, Mr. Puckett signed a declaration claiming that: "LtCol Vokey has been officially told by Headquarters, U.S. Marine Corps, that he will not be permitted to extend his active duty service . . ." (Declaration of Mr. Puckett at 2, Aug. 28, 2008; Appellate Ex. XCIV at 131.)

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.) Mr. Vokey testified that when he was hired, the firm was already representing Sgt. Salinas, a co-defendant in Appellant's case. (R. 10, Sep. 13, 2010.) However, there was no discussion about the possible conflict between the firm's representation of Sgt. Salinas and Mr. Vokey's attorney-client

relationship with Appellant. (R. 10, Sep. 13, 2010.) Mr. Vokey testified he was simply "transitioning," and while he worked on Appellant' case later, at the time of hiring the conflict did not occur to him. (R. 10-11, Sep. 13, 2010.) Sgt. Salinas had been given immunity by the Government on December 17, 2007.

Mr. Vokey then returned as a civilian to assist Appellant. (R. 40, Sep. 13, 2010.) After Mr. Vokey's departure and before an 802 conference that occurred February 23, 2009, LtCol Patricio Tafoya, USMC, was detailed as replacement counsel for Appellant after Mr. Vokey's departure, and also became the Regional Defense Counsel. (R. 63, Sep. 13, 2010; R. 6, Mar. 11-12, 2009.) Captain Nute Bonner was also requested by, and between sometime before March 11, 2009, became Appellant's Individual Military Counsel. (Military Judge's Findings 5, Oct. 26, 2010; Record 2 (Tab D to Appellant's Writ Appeal Petition).)

LtCol Tafoya informed the Military Judge that as of March 2009, no definitive decision had been reached about whether Mr. Vokey would represent Appellant in a civilian capacity. (R. 3, Mar. 10, 2009.) Several weeks later, on March 22, 2009, the Defense informed the Military Judge that Mr. Vokey was indeed on the defense team, but Appellant waived Mr. Vokey's presence. (R. 5-6, Mar. 22, 2010.) Despite this, after a court recess for lunch, Mr. Vokey sat at counsel table with Appellant. (R. 64, Mar. 22, 2010.) Mr. Vokey then informed the Military Judge that

he had continued to represent Appellant 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 Appellant waived his presence. (R. 1, Mar. 26, 2010.) Mr. Vokey testified around June or July of 2010, the conflict with his firm's concurrent representation of Sgt. Salinas dawned on him as problematic: "It was only later as pretrial preparations got even closer that that became apparent." (R. 10-11, Sep. 13, 2010.) It was at this time——June or July of 2010——that pretrial preparations "got closer," Mr. Vokey testified. (R. 11, Sep. 13, 2010.)

Thus 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 his 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' case, if anything, but Mr. Vokey testified that: "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,* outside the presence of the Government, 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 your 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.)

Mr. Faraj stated in September 2010 that he intended to file an unlawful command influence motion, based on the disparate treatment by the Convening Authority in keeping the prosecution team together when Marine Corps end strength required that the leave the Marine Corps, but not expending the same effort to keep the Defense team together. (R. 7, Sep. 14, 2010.) The Military Judge set the due date for that motion as September 29, 2010. (R. 7, Sep. 14, 2010.) No such motion was filed, and several days thereafter the Defense informed the Military Judge they did not intend to file a command influence motion.

Appellant submitted, in late 2009, a "Consent to Delay Attendant to Appellate Process," agreeing that "any and all delay resulting from Government's (appeal) [sic] would not prejudice the accused in any way." (Appellant's Consent to Delay, Nov. 1, 2009.) Appellant's Defense team also informed the Military Judge in September 2010 that they had "recovered" the fruits of Mr. Vokey's previous work on Appellant'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 I 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.)

IV

REASONS WHY THE WRIT SHOULD NOT ISSUE

APPELLANT DOES NOT DEMONSTRATE THAT THE MILITARY JUDGE'S DISQUALIFICATION OF MR. VOKEY FOR A CONFLICT OF INTEREST IS A CLEAR ABUSE OF DISCRETION OR A JUDICIAL USURPATION OF POWER. THUS, APPELLANT FAILS BOTH TO DEMONSTRATE BOTH THAT RELIEF CANNOT BE HAD WITHOUT RESORT TO EXTRAORDINARY RELIEF AND THAT HE HAS A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF HE REQUESTS.

A. Appellant invited this error and cannot now object.

As argued in the Government's initial Answer, Appellant invited the situation he now claims as error by accepting the services of Mr. Vokey as a civilian, post-retirement, without clear determination of in what capacity Mr. Vokey would represent Appellant. Rather, Appellant permitted Mr. Vokey to "linger" as civilian counsel providing assistance, without requesting that he extend yet again on the one hand, and without requiring Mr. Vokey, the Defense team, and the Court to firmly establish Mr. Vokey's formal role in the court-martial process. By tacitly accepting Mr. Vokey's unclear status for over two years, presumably resulting in the present situation——though the contents of the sealed exhibit are unknown to the Government——Appellant invited Mr. Vokey's excusal in September 2010 for good cause. *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).

Second, Appellant's Defense team invited the error, while knowing the length of time that appellate litigation could take, by filing a consent to appellate delay, claiming no prejudice resulted from the delay, and also by not actually requesting further extension from Marine Corps Manpower sufficient to cover the eventual end of the appellate litigation. Third, rather than opposing the severance, both Mr. Vokey and members of Appellant's team presented ethical conflict to the Military Judge in September 2010 as "more than one of appearances," and one that was "not a sham," that prevented Mr. Vokey's continued service, in addition to whatever matters were presented to the Military Judge *ex parte*. (R. 10-14, Sep. 13, 2010.) As argued previously, having invited this error, Appellant cannot now claim it as error.

B. Appellant has not demonstrated an indisputable right to relief on grounds that the Military Judge clearly erred in finding no severance in the attorney-client relationship between June 2008 and March 2009, or that he suffered prejudice from any severance.

Whether or not 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.*

1. The Military Judge erred under R.C.M. 813 by not documenting, on the Record, the reasons for the absence of LtCol Vokey as detailed military counsel.

LtCol Vokey was absent when trial sessions resumed in March 2009. The Military Judge, as Appellant correctly points out, did not reflect the reasons for LtCol Vokey's absence on the Record, as required under R.C.M. 813(c). *See United States v. Hutchins,* 2011 CAAF LEXIS 25, at *22 (C.A.A.F. Jan. 11, 2011). However, as argued below, the Military Judge in September 2010 did not err in concluding that the attorney-client relationship continued from June 2008 through September 2010. *See United States v. Weichmann,* 67 M.J. 456, 463-64 (C.A.A.F. 2009). Thus, no harm resulted from any error in failing to document LtCol Vokey's retirement from active duty and the detailing of replacement counsel under R.C.M. 505(d)(2)(B)(iii), or otherwise excuse Mr. Vokey, until September 2010.

2. Despite not documenting LtCol Vokey's retirement and detailing of replacement counsel correctly on the Record, Appellant cannot demonstrate an indisputable right to relief on grounds that the Military Judge clearly erred in determining there was no "break" in the attorney-client relationship from August 2008 to March 2009.

The Military Judge found that Mr. Vokey's attorney-client relationship with Appellant continued from LtCol Vokey's retirement in 2008 through September 2010. (Findings 5.) Appellant fails to fulfill his burden to demonstrate an

indisputable right to relief based on error in this finding. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 314 (1957).

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 Appellant since departing active duty (R. 65, Mar. 22, 2010); (2) as Appellant admits, trial was automatically stayed from February 2008 to June 30, 2008, and from Appellant's petition to this Court ten days later, in July 2008, through March 2009, no trial proceedings were held (Appellant's Supplemental Brief at 6-7), and a continuance had been granted in September 2008 due to the appellate litigation (R. 6, Mar. 11-12, 2009); and, (3) Appellant identifies no lapsed duties that might evidence a severance in the attorney-client relationship between Mr. Vokey during the period from July 2008 until March 2009.

3. Even if a severance occurred between August 2008 and March 2009, Appellant cannot demonstrate an indisputable right to relief based on prejudice.

Although Appellant claims that the absence of a "good cause" documentation disturbs the Military Judge's critical role in excusing counsel, any error in doing so must nonetheless be tested for prejudice. *Hutchins*, 69 M.J. at *32; *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009); *United States v. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004). As stated in Judge Ryan's concurrence to *Weichmann,* the core of the Sixth Amendment

right to counsel remains "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare for trial." 67 M.J. at 465. A defendant's Sixth Amendment right to counsel is not violated every time such opportunities are restricted. *Id.* (citing *Morris v. Slappy,* 461 U.S. 1, 11, 13-14 (1983)).

This Court in *Hutchins* again applied its recent precedent in *Wiechmann* and *Rodriguez*, which analyzed interference with the attorney-client relationship for whether the defense has established that the error produced material prejudice to the substantial rights of the accused. *Hutchins,* 2011 CAAF LEXIS 25, at *32. In *Hutchins,* this Court found that the Sixth Amendment right to counsel was not implicated, and prejudice could be tested, where: (a) the appellee had the assistance of multiple counsel throughout the proceedings; (b) after the assistant detailed defense counsel departed, a replacement assistant defense counsel was detailed; (c) the military judge granted a continuance to facilitate preparation by the new detailed counsel; and, (d) "the personnel action leading to the severance . . . resulted from a request initiated by the assistant defense counsel." *Id.* at 30.

Here, for the period from August 2008 through March 2009, the Record supports Appellant's similar situation. First, Appellant points to no interference with the effective

assistance of multiple counsel, including all of civilian, detailed military, and individual military counsel, between August 2008 and March 2009. Appellant had the assistance of multiple counsel: Individual Military Counsel Capt Bonner, Detailed Counsel LtCol Tafoya, Mr. Faraj, Mr. Zaid, Mr. Puckett. (R. 1-3, Mar. 11, 2009.)

Second, the Record indicates that there was an 802 conference on February 23, 2009, and that there was a court session on March 10 and 11, 2009, but that by March 22, 2009, Mr. Vokey had returned to counsel table. (R. 64, Mar. 22, 2010.) Appellant does not concede there was no "severance," but agrees that "sometime after March 2009" the attorney-client relationship was "reformed." (Appellant's Supplemental Brief at 19, 28.) Third, during this period, appellate litigation was ongoing, and as previously noted little movement occurred at trial; court sessions were sparse.

Fourth, as evidenced by the multiple continuances in this case, the Military Judge has granted continuances such that Appellant's team of multiple counsel can prepare for eventual trial. And fifth, LtCol Vokey's retirement request, several extensions of his retirement date, search for civilian employment, and accommodations for his family during his transition to civilian life, all directly caused whatever reverberations in the attorney-client relationship between

August 2008 and March 2009. Thus under *Hutchins* and *Weichmann*, no prejudice occurred from any failure to accurately document detailing of replacement counsel.

C. Appellant cannot demonstrate an indisputable right to relief based on an abuse of discretion by the Military Judge in finding a conflict of interest. Moreover, whether Mr. Vokey returns to active duty or not, the conflict of interest will prevent his representation of Appellant.

1. This case, like *Hutchins*, involves no intentional interference by the Government with the attorney-client relationship, and no Government denial of a request by the defense to continue as counsel.

LtCol Vokey, like Captain Bass in *Hutchins*, did not ask for an extension past November 1, 2008. Rather than submitting an official request to extend his retirement date, setting forth any additional justification or repeating previous justifications, LtCol Vokey decided to seek no further extension to represent Appellant as detailed defense counsel. (R. 37, 57-58.) And Mr. Vokey testified that no formal extension request had ever been denied. Mr. Vokey testified that one at least one previous occasion, Colonel Redmon in July 2008 had indicated verbally that an extension would be denied, but then formally the extension request was granted in writing. (R. 58, Sep. 13, 2010.) The Military Judge's finding was thus not clearly erroneous that LtCol Vokey knowingly and voluntarily sought no

further extensions of the ultimate retirement date of November 1, 2008. (Findings 3, 12-13.)

Furthermore, the Defense understood at the time that nothing nefarious had transpired. As Mr. Faraj stated, before the lower Court's initial opinion in *Hutchins* and at the time Mr. Vokey and he left active duty, it was routine practice for all parties, including the defense, prosecution, and judge, to accept that EAS or retirement excused detailed counsel without specific action on the Record. (R. 13-14, Sep. 14, 2010.) Nobody believed that retirement, or expression of displeasure by Manpower about repeated delays in retirement, was "interference" with the attorney-client relationship: when EAS or retirement occurred, Mr. Faraj summarized, "[one] was no longer required to work [a] case." (R. 14, Sep. 14, 2010.)

The Military Judge's findings were not clearly erroneous in finding Appellant's claim of intentional interference lacking. LtCol Vokey did not get what he did not ask for.

2. Although the Government initially believed that Appellant should first request Mr. Vokey to voluntarily return to military active duty, the conflict that exists while Mr. Vokey works at his firm would travel with him should be called to active duty. Appellant cannot demonstrate an indisputable right to relief based on an abuse of discretion by the Military Judge in finding a conflict of interest that necessitated excusing Mr. Vokey from this case.

As argued in its initial Answer, Appellant fails to demonstrate an indisputable right to relief based on an abuse of discretion by the Military Judge in disqualifying Mr. Vokey on grounds of a conflict of interest. Moreover, although the Government initially believed that Appellant should request Mr. Vokey's return to active duty, a review of precedent has caused the Government to now oppose Mr. Vokey's return to active duty.

The Supreme Court has endorsed trial courts' primary role in assessing conflicts of interest and refusing to allow attorneys to represent defendants due to either actual or potential conflict of interest. *Wheat v. United States*, 486 U.S. 153, 164 (1988), *reh. den.* 487 U.S. 1243 ("that presumption [of attorney of choice] may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court"). Federal courts have forbidden representation of co-defendants by

all members of law firms, even after waiver by the clients, because of potential conflicts of interest. *See, e.g, United States v. Stewart,* 185 F.3d 112, 122 (3d Cir. Pa. 1999); *United States v. Dempsey*, 724 F. Supp. 573 (N.D. Ill. 1989).

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

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

> (1) involves a substantially related matter in which that person's interests are materially and

directly adverse to the interests of another client of the lawyer or the lawyer's firm; or

(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

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

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

It matters not whether Mr. Vokey remains at his firm, or requests or is brought otherwise back to Active Duty——Mr. Vokey's conflict inheres in either situation. Here, prior to the long period of concurrent representation of both Appellant and Sgt Salinas, who has been provided immunity by the Government, the public Record does not evidence that Mr. Vokey or his firm either sought or obtained waivers from either defendant, or constructed a "Chinese Wall" in an attempt to seal-off Mr. Vokey from Sgt. Salinas' case. (Findings 3, 12-14; R. 10, Sep. 13, 2010.) Mr. Vokey realized the need for corrective action only in June or July of 2010. (R. 10, Sep. 13, 2010.)

And while Appellant is correct that Mr. Vokey might be legally protected from retaliation upon return to his employer, the concern is not his employment, but the integrity of the process. For a nearly two-year period Mr. Vokey worked for the same firm that represented Appellant's co-defendant, Sgt. Salinas, without evidence on the Record of precautions taken, and without awareness that a conflict of interest might arise from his firm's concurrent representation of the two co-accuseds. This Court may obviously review, *in camera,* the sealed exhibit reviewed by the Military Judge, containing a summary of Mr. Vokey's justification for believing he faced a conflict of interest that prevented him from further

representing Appellant. The Government does not speculate here as to that exhibit's contents.

This case involves no intentional interference and no denial of an extension request. In light of the Military Judge's role in safeguarding the integrity of the process, considering the contents of the sealed exhibit, and because the release for good cause of Mr. Vokey by the Military Judge in September 2010 is well-documented on the Record (R. 20-21, Sep. 13, 2010), the Military Judge did not err in excusing Mr. Vokey for good cause.

D. Appellant fails to demonstrate an indisputable right to relief based on his argument that testing for prejudice will demonstrate that Appellant suffered prejudice.

As in the analysis of any "severance" between August 2008 and March 2009, any erroneous severance in September 2010 must be tested for prejudice if this Court finds that Appellant had demonstrated an indisputable right to relief based on an abuse of discretion by the Military Judge in terminating the relationship for the conflict of interest.

Again, the facts align with those in *Hutchins*: (a) before and after September 2010, Appellant was assisted by multiple counsel, including Mr. Faraj, Mr. Zaid, Mr. Puckett, Captain Nute Bonner, USMC, and LtCol Patricio Tafoya, USMC, and after July 2010, Major Marshall; (b) Appellant successfully obtained a

continuance on August 7, 2008, to facilitate preparation by newly detailed counsel; and, (c) the personnel actions were initiated by LtCol Vokey: his retirement request fourteen months prior to trial was not a "mandatory retirement" (Appellate Ex. CXVII at 19-36), and he never applied for a fifth extension of his retirement. And, Mr. Vokey alone sought employment by the firm that represented Sgt. Salinas, causing the conflict leading to withdrawal. Thus, these matters do not implicate Appellant's Sixth Amendment right to counsel. *See Hutchins,* 69 M.J at 30.

Additional facts point to the absence of any prejudice. First, as Appellant notes, there was an automatic stay from February 2008 through June 30, 2008; this provided additional time for trial preparation and for new counsel to become competent to represent Appellant at trial. (Appellant's Supplemental Brief at 6.) Second, as Appellant also notes, from Appellant's petition to this Court in early July 2008, through March 2009, trial did not resume. (Appellant's Supplemental Brief at 7.)

Third, there has been little or no trial movement during the extended appellate litigation such that the absence of trial counsel has any evident impact, and trial counsel have been largely absent from the appellate processing. Trial has been continued repeatedly since the July 2008 petition to this Court to the present, and appellate litigation has been conducted

without evident participation on the Record of the trial-level counsel in this case.

Counsel representing Appellant in the appellate litigation at this and the lower court in June 2008, November 2008, and November 2009 were Col Dwight Sullivan, USMCR, LT Kathleen Kadlec, JAGC, USN, and Major Christopher Broadston, USMC, all of whom are appellate attorneys in Washington DC. *United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App. 2008); *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008); *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App. 2009).

It was not until recently——after Mr. Vokey's final departure——that any of the trial counsel signaled involvement in the appellate processing of this case, as Col. Sullivan and Maj. Sripinyo were joined by both Mr. Puckett and Mr. Faraj. *Wuterich v. Jones*, 2011 CCA LEXIS 2 (N-M. Ct. Crim. App. Jan. 7, 2011). If Mr. Vokey's absence in the extended appellate litigation harmed Appellant, it is not evident on this Record.

Fourth, Appellant makes no claim that continuances have been insufficient to prepare his counsel adequately to represent him, or that his replacement detailed counsel have been denied the ability to conduct any of the case preparation that Appellant notes that LtCol Vokey conducted before retirement. (Appellant's Supplemental Brief at 4-5.) Fifth, Appellant submitted, in late 2009, a "Consent to Delay Attendant to

Appellate Process," agreeing that the delay from the appellate litigation had no prejudicial effect on Appellant. (Appellant's Consent to Delay, Nov. 1, 2009.) The litigation of the interlocutory appeal ended December 4, 2009, more than a year after LtCol Vokey's retirement. *United States v. Wuterich*, 68 M.J. 404 (C.A.A.F. Dec. 4, 2009)(petition for grant of review denied). Sixth, Appellant's own Defense team assured the Military Judge that they had already "recovered" the fruits of Mr. Vokey's previous work on Appellant's case to their benefit. (R. 15, Sep. 13, 2010.)

The core of the Sixth Amendment right to counsel remains "the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare for trial." *Weichmann,* 67 M.J. at 465. Appellant makes no claim of ineffective assistance of counsel. Thus, even if the ultimate severance of an attorney-client relationship with Mr. Vokey was in error, Appellant is unable to demonstrate an indisputable right to relief because of prejudice.

E. Even if there was a severance of counsel between August 2008 and September of 2010, unlike *Hutchins,* the Record contains ample information to document, post-facto, the reasons for LtCol Vokey's absence and the detailing of replacement counsel under R.C.M. 505(d)(2)(B)(iii).

An appellate court may affirm a lower court's ruling on alternate grounds. *Dandridge v. Williams*, 397 U.S. 471, 475-76

n. 6 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court"); *United States v. Lincoln*, 42 M.J. 315, 320 (C.A.A.F. 1995).

As argued in its initial Answer, "good cause" exists for the replacement of Mr. Vokey as detailed defense counsel by LtCol Tafoya, and subsequently Major Meredith Marshall, USMC. (Government Answer 19-27, Nov. 15, 2010.) Here, the Military Judge found good cause for a conflict of interest, but also may find good cause based on Mr. Vokey's retirement.

LtCol Tafoya, in March 2009, appeared and informed the Military Judge that he, as Regional Defense Counsel, had detailed himself to Appellant's case, and that the previous detailed counsel, LtCol Vokey, had retired. (R. 2-3, Mar. 11, 2009.) He also informed the Military Judge that Captain Nute Bonner, USMC, was Appellant's Individual Military Counsel. (R. 2, Mar. 11, 2009.) In addition, the Court sessions in September 2010 evinced testimony that Mr. Vokey's retirement was voluntary and that his intent was to retire and secure civilian employment. Thus, LtCol Vokey's replacement by the substitution of another detailed defense counsel was proper, and further provides basis to affirm the lower court's holding.

Conclusion

The Government respectfully requests this Court deny Appellant's Writ Appeal Petition.

/S/

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