**WESTERN JUDICIAL CIRCUIT**
**NAVY-MARINE CORPS TRIAL JUDICIARY**

| | | |
|---|---|---|
| UNITED STATES<br><br>v.<br><br>FRANK D. WUTERICH<br>XXX XX 3312<br>Staff Sergeant<br>U.S. Marine Corps | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | GENERAL COURT MARTIAL<br><br>**DEFENSE MOTION FOR APPROPRIATE RELIEF TO ABATE PROCEEDINGS UNTIL ATTORNEY CLIENT RELATIONSHIP WITH DETAILED COUNSEL –LTCOL COLBY VOKEY- IS RESTORED**<br><br>15 April 2010 |

I.

**Procedural History**

Charges were preferred against SSgt Wuterich on December 1, 2006 and were referred for trial by general court-martial on December 27, 2007. The Accused is charged with several offenses arising from his actions during combat operations on a patrol in Haditha, Iraq on November 19, 2005. Specifically, he is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice in violation of Articles 92, 119, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 919, 928, and 934 (2000).

SSgt Wuterich's case has been the subject of two government appeals pursuant to Article 62, UCMJ. *See United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App.), *vacated*, 67 M.J. 63 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (en banc), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009). Trial is currently scheduled to begin on June 27, 2011 at Camp Pendleton, California.

On September 13 and 14, 2010, a hearing on a motion to dismiss the charges or for other appropriate relief arising from the loss of LtCol Vokey as his detailed military defense counsel

was held. On October 22, 2010, the military judge denied the defense's motion and informed the parties that the ruling would be placed on the record on November 2, 2010.

On October 25, 2010, the Accused petitioned the Navy-Marine Corps Court of Criminal Appeals for extraordinary relief in the nature of a stay of proceedings. On October 26, 2010, the military judge issued findings of fact and conclusions of law. On October 27, 2010, the Navy-Marine Corps Court denied the Accused's petition for a stay "without prejudice to the Plaintiff's ability to petition for relief from the military judge's denial of the motion for appropriate relief."

On October 28, 2010, SSgt Wuterich petitioned the Navy-Marine Corps Court for a writ of mandamus. His petition asked for a declaration that his right to continuation of his established attorney-client relationship with his original detailed military defense counsel was violated and sought appropriate relief. The following day, the Navy-Marine Corps Court denied the petition without prejudice to SSgt Wuterich's right to raise the matter during the ordinary course of appellate review.

On February 24, 2011, the Accused petitioned the Court of Appeals for the Armed Forces for a writ appeal seeking to have CAAF declare that SSgt Wuterich's right to continued representation by LtCol Vokey was violated and order proceedings abated until LtCol Vokey is restored as the SSgt Wuterich's-Accused's counsel. *Wuterich v. Jones*, Misc Docket No. 11-8009/MC.

On March 30, 2011, CAAF heard oral arguments on the Accused's petition. On April 4, 2011, CAAF issued its ruling holding that "[i]n the context of an interlocutory appeal, and the narrowly limited authority to issue a writ of mandamus under *Cheney*, it is neither necessary nor appropriate for this Court to take such action prior to consideration of these matters by the military judge at the ongoing trial." CAAF Order of April 4, 2011 at 3-4. The Court's holding

rested on the finding that the accused failed to ask the trial judge for the relief sought from the CAAF, to abate the proceedings unless the Government restores the Accused's attorney-client relationship with LtCol Vokey by appropriate means, including (but not limited to) recalling LtCol Vokey to active duty.

## II. Relief Sought

The Accused now seeks to have this Court: (1) declare that SSgt Wuterich's right to the continuation of an established attorney-client relationship was violated; and (2) abate the court-martial proceedings until LtCol Colby Vokey, USMC (Ret.) is restored as SSgt Wuterich's defense counsel. If the Government will not fashion an appropriate remedy to restore the attorney-client relationship, then the charges must be dismissed.

## III. Statement of Facts

### A. LtCol Vokey's representation of SSgt Wuterich

On January 17, 2007, LtCol Vokey was detailed to represent SSgt Wuterich. *See* Appellate Exhibit XCIV at 130, ¶ 2. LtCol Vokey was detailed to the case by LtCol Simmons, who was then the Marine Corps' Regional Defense Counsel Pacific. *See* Sept. 13, 2010 Article 39(a) session transcript at 31. At approximately the same time LtCol Vokey was detailed to this case, Maj Haytham Faraj was also detailed to represent SSgt Wuterich. *See* Appellate Exhibit XCIV at 130, ¶ 2.

LtCol Vokey served as SSgt Wuterich's detailed defense counsel for more than a year and a half before he commenced terminal leave. LtCol Vokey's work on SSgt Wuterich's behalf

included a visit to the scene of the alleged offenses accompanied by SSgt Wuterich and a videographer. *See* Appellate Exhibit CI at 2.

> LtCol Vokey personally interviewed critical Iraqi witnesses in videotaped depositions in Iraq during a site visit in January 2008. He alone has established the rapport with these witnesses who will be crucial for cross examination during the trial. He walked over the ground and through the houses where the deaths at issue in the case occurred in Haditha, Iraq.

Appellate Exhibit XCIV at 131, ¶ 9. Before becoming a judge advocate, LtCol Vokey had served as a Marine Corps artillery officer. *Id*. at 1. In that capacity, he served as a battery executive officer in combat during Operation Desert Storm, receiving the Combat Action Ribbon. *Id*. LtCol Vokey provides this synopsis of his role on the defense team:

> I believe I was a key member of the defense team and invaluable to the preparation of the defense in this case. I was the only attorney of SSgt Wuterich's current defense team that traveled to Iraq to conduct a site visit. I walked through the houses where the alleged crimes occurred. I walked through the town of Haditha and took photos. I traveled by foot and vehicle along routes Viper and Chestnut. I studied the terrain, visibility from the roads, distances to the houses and environmental conditions. I deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses that were present but unknown. Throughout the period of the site visit and the conduct of depositions, I was accompanied by SSgt Wuterich who provided . . . key information and assisted me in my survey of the area and my interview of the witnesses.
>
> I also took on a sizable portion of the case preparation. I interviewed numerous witnesses who are located in the U.S. I spent hundreds of hours getting to know SSgt Wuterich and his family to better understand his character and personality so that I may genuinely advocate for my client.

Appellate Exhibit CI at 3-4.

**B. The Government's denial of LtCol Vokey's request to remain on active duty to continue to represent SSgt Wuterich**

Trial in this case was originally set for early March 2008. Approximately 14-months before trial was to begin, both LtCol Vokey and Maj Faraj submitted retirement requests. *See*

Sept. 13, 2010 Article 39(a) session transcript at 32. LtCol Vokey was originally assigned a retirement date of May 1, 2008, which he understood would allow him sufficient time to complete SSgt Wuterich's court-martial, which was scheduled to be tried in March 2008. *Id*. at 32-34. **Due to the retirement dates the defense team repeatedly objected on the record to any delay, and this concern was repeatedly noted on the record by the military judge.** (January 9, 2008 Article 39(a) at 13; February 1, 2008 Article 39(a) at 16, 17, 20, 28; February 14, 2008 Article 39(a) at 15; February 22, 2008 Article 39(a) at 32, 33).

In February 2008, however, after the military judge quashed a subpoena seeking outtakes from an interview that the CBS television show 60 Minutes taped with SSgt Wuterich, the Government filed an Article 62 appeal, resulting in an automatic stay of court-martial proceedings. *See generally United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App. 2008). That automatic stay was not lifted until June 20, 2008, when the Navy-Marine Corps Court of Criminal Appeals reversed the military judge's order quashing the subpoena to 60 Minutes. *Id*. Ten days later, SSgt Wuterich submitted a petition to the Court of Appeals for the Armed Forces seeking review of the Navy-Marine Corps Court's decision. *See United States v. Wuterich*, 66 M.J. 498 (C.A.A.F. 2008). CAAF heard oral argument in the case on September 17, 2008 and issued an opinion on November 17, 2008. *See United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). That decision vacated the Navy-Marine Corps Court's decision while also reversing the military judge's quashal of the subpoena. While not formally stayed during the proceedings before CAAF, the trial did not resume during that appeal.

Because the prosecution appeal threatened to push SSgt Wuterich's trial date past his retirement date, LtCol Vokey took immediate steps seeking to ensure that he would be able to continue representing SSgt Wuterich as his military defense counsel.

Due to LtCol Vokey's billet as Regional Defense Counsel, and the requirement to staff the billet with another LtCol judge advocate once LtCol Vokey retired, LtCol Vokey's efforts to remain on active duty and his impending retirement were known to LtCol Jameson, the OIC of the Legal Services Support Section at Camp Pendleton, the Convening Authority, LtGen Helland, and his SJA, Chief Defense Counsel of the Marine Corps Col Favors and SJA to the Commandant BGen Walker. LtCol Vokey was informed that retirement extension requests must be routed through the administrative chain of command of Headquarters and Support Battalion to Marine Corps Manpower. (September 13, 2010 Article 39(a) at 57, 60, 65, 67)

During the March to April 2008 timeframe, LtCol Vokey sought and received an extension of his retirement date until June 1, 2008. Sept. 13, 2010 Article 39(a) session transcript at 34. This extension disrupted LtCol Vokey's previous plans for transitioning to a civilian career. His wife and children left Camp Pendleton in May 2008 to live with his parents in Texas. *Id*. at 33. LtCol Vokey moved into a travel trailer at Lake O'Neill and continued to work on SSgt Wuterich's case. *Id*. at 35. From May to August 6, 2008, LtCol Vokey lived in the trailer, which he was required to move from camp site to camp site every five to seven days, as he continued to work on SSgt Wuterich's case and seek extensions of his retirement date. *Id*. at 35-36.

LtCol Vokey sought and received another extension of his retirement date until July 1, 2008. *Id*. at 34-35. When LtCol Vokey determined that SSgt Wuterich's court-martial would not be tried before that date, he contacted Col Patrick Redmon, the Deputy Director of Headquarters Marine Corps' Manpower section, to obtain a much longer extension which would allow him to remain on the case through the completion of appellate litigation and through the completion of trial. *Id*. at 36. Col Redmon denied this request, and instead chastised LtCol

Vokey for seeking a further extension, and made derogatory remarks about lawyers. *Id*. Col Redmon admonished LtCol Vokey that he would not be extended any longer to represent SSgt Wuterich. *Id*. at 37, 45-46, 56-57. He declared, "You're gone 1 August." *Id*. at 37. LtCol Vokey understood that Col Redmon controlled whether he would remain on active duty. *Id*. at 65-66. At that point, LtCol Vokey believed he had no choice but to leave active duty. *Id*. at 37. LtCol Vokey subsequently sought an extension of his retirement date not for the purpose of representing SSgt Wuterich, but rather to out-process, for travel, and for terminal leave. *Id*. at 37, 57-58. That request was approved by an officer filling Col Redmon's position while Col Redmon was away from the office performing Temporary Additional Duty. *Id*.

A de facto severance of the attorney-client relationship occurred once LtCol Vokey left the Camp Pendleton area and ceased representing SSgt Wuterich on August 6, 2008. *Id*. at 37. LtCol Vokey was officially retired on November 1, 2008. Finding of Fact 2. The record does not currently indicate what communications, if any, LtCol Vokey had with his detailing authority as SSgt Wuterich's counsel – the Regional Defense Counsel Pacific – before effectively terminating his representation of SSgt Wuterich. The defense intends to call the Regional Defense Counsel Pacific on August 6, 2008 as a necessary witness to provide additional facts concerning LtCol Vokey's de facto withdrawal as SSgt Wuterich's detailed defense counsel.

**C. The military judge's review of the improper severance**

LtCol Vokey ceased representing SSgt Wuterich once he began terminal leave. LtCol Vokey never appeared before any Court to be excused from his role as SSgt Wuterich's detailed military defense counsel before the de facto severance. *See* Sept. 13, 2010 Article 39(a) session transcript at 70. Nor did SSgt Wuterich ever release him from serving in those roles. *Id*. Rather, at the first post-severance Article 39(a) session, on 11 March 2009, the military judge noted

LtCol Vokey's absence, and noted that he had retired and treated the attorney-client relationship as having been severed: "[R]epresenting [SSgt Wuterich] 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 . . . **There has been some discussion that he may be retained in this case in the capacity as civilian counsel, but that has not occurred**. . . ." (March 11, 2009 Article 39(a) session at 3)(emphasis added). There was no evidence presented on the record that LtCol Vokey had been properly relieved by any competent authority, nor did the military judge advise SSgt Wuterich that the proceedings could be abated and the Government compelled to recall LtCol Vokey or restore the attorney-client relationship in some other way.

Nevertheless, the military judge presented the severance of the attorney-client relationship as a *fait accompli,* and gave SSgt Wuterich the following advice as to his right to counsel: "Now, previously, you had been detailed Lieutenant Colonel Vokey while he was on active duty in the United States Marine Corps. He has been relieved is my understanding because he's no longer on active duty in the United States Marine Corps. **Now, there's no way the government can compel him to be present** . . . **Now, you have the right, of course, to retain him, but that's something completely between you and Lieutenant Colonel Vokey.**" (March 11, 2009 Article 39(a) session at 3)(emphasis added). The Government counsels present at the Article 39(a)—LtCol Erickson, Maj Plowman and (then) Capt Gannon—accepted the military judge's description of the scope of their authority, and did not correct or challenge the military judge's assertion that there was nothing the Government could do to retain LtCol Vokey as SSgt Wuterich's detailed defense counsel. *Id.*

### D. LtCol Vokey's post-retirement representation of SSgt Wuterich

After he was told in July 2008 that any future extension request would be denied, LtCol Vokey began looking for work in preparation for his upcoming retirement. He sent out approximately 300 resumes, but received only two or three job offers. *See* Sept. 13, 2010 Article 39(a) session transcript at 38, 62-63. The most attractive of these offers was from the law firm of Fitzpatrick, Hagood, Smith and Uhl, LLP, which he accepted. *Id*. at 40. That firm represented Sgt Hector Salinas, who was also involved in the events in Haditha on November 19, 2005. *Id*. at 10.

LtCol Vokey has never engaged in active representation of Sgt Salinas. *Id*. at 14. Rather, Fitzpatrick Hagood specifically screened LtCol Vokey from the case to ensure that there would be no actual conflict. *Id*. The firm no longer represents Sgt Salinas. *Id*. As described by Government counsel, a "Chinese wall" was erected within the firm and LtCol Vokey never had access to any privileged information concerning Sgt Salinas. *Id.*

After the cessation of LtCol Vokey's attorney-client relationship with SSgt Wuterich in 2008, LtCol Vokey did not resume representation of SSgt Wuterich until March 2010, when he made a brief appearance as a pro bono civilian at a March 22, 2010 Article 39(a). (March 22, 2010 Article 39(a) session at 64); *see also* (March 22, 2010 Article 39(a) session at 9)(Military judge notes that LtCol Vokey did not participate in prior telephonic 802 sessions). LtCol Vokey was also present at Article 39(a) sessions on May 13 and 14, 2010, although he did not actively participate in the proceedings. After those Article 39(a) sessions, the defense team began intensive trial preparations. While reviewing the facts surrounding Sgt Salinas' participation in the events of November 19, 2005, the defense team realized that the development of facts at trial could lead to a conflict of interest with LtCol Vokey, due to Fitzpatrick Hagood's prior representation of Sgt Salinas. LtCol Vokey and the defense team then determined that LtCol

Vokey could not continue representing SSgt Wuterich while a member of Fitzpatrick Hagood. The substance of those discussions would divulge attorney-client privileged information and will not be included in this motion.

## IV. Discussion.

**WHETHER AN ACCUSED'S RIGHT TO COUNSEL IS VIOLATED WHEN HIS DETAILED MILITARY COUNSEL, OVER THAT COUNSEL'S OWN OBJECTIONS, IS DISCHARGED FROM ACTIVE DUTY SEVERING THE ATTORNEY-CLIENT RELATIONSHIP WITHOUT THE EXPRESS CONSENT OF THE ACCUSED AND BARRING A SHOWING OF GOOD CAUSE FOR THE SEVERANCE OF THE RELATIONSHIP.**

### A. The military right to counsel

The right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system. *See United States v. Palenius*, 2 M.J. 86 (C.M.A. 1977). An existing attorney-client relationship cannot be terminated without the accused's consent merely for the convenience of the Government. *See United States v. Murray*, 20 C.M.A. 61, 42 C.M.R. 253 (1970). In the absence of an accused's consent, good cause must be shown on the record. *See* R.C.M. 505; R.C.M. 506. "Good cause" is defined as "extraordinary circumstances that render virtually impossible the continuation of the established relationship." *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978). That does not include the administrative convenience of the Government. *See, e.g., United States v. Spriggs*, 52 M.J. 235 (C.A.A.F. 2000). Notably, defense counsel are not fungible items. "Although an accused is not fully and absolutely entitled to counsel of choice, he is absolutely entitled to retain an established relationship with counsel in the absence of demonstrated good cause." *United States v. Baca*, 27 M.J. 110, 118 (C.A.A.F. 1988). In its decision in *Hutchins,*

CAAF held that end of active service is not per se good cause for severing an attorney-client relationship.

### B. The de facto severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey upon LtCol Vokey's commencement of terminal leave was erroneous

SSgt Wuterich's attorney-client relationship with LtCol Vokey was not properly severed upon LtCol Vokey's commencement of terminal leave on August 6, 2008. Yet, as the record definitively establishes, LtCol Vokey stopped representing SSgt Wuterich upon commencing terminal leave and did not act as SSgt Wuterich's counsel for more than eighteen months thereafter. *See* Sept. 13, 2010 Article 39(a) session transcript at 10-11; March 11, 2009 Article 39(a) session transcript at 2-3; March 22, 2010 Article 39(a) transcript at 64. And the military judge who was then presiding over SSgt Wuterich's court-martial improperly presented that severance to SSgt Wuterich as a *fait accompli*. *See* March 11, 2009 Article 39(a) session transcript at 2-4.

CAAF recently observed that "R.C.M. 505(d)(2)(B) and 506(c), which provide the primary authority for severance of an attorney-client relationship, authorize four options." *Hutchins*, 69 M.J. at 289. None of those four options authorized a severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey upon the latter's commencement of terminal leave.

1. *Excusal by the detailing authority for good cause shown on the record*

First, CAAF explained, "The detailing authority may excuse detailed defense counsel '[f]or other good cause shown on the record.' R.C.M. 505(d)(2)(B)(iii)." *Id*. This Rule was not satisfied in this case for several reasons. First, the record does not indicate that the detailing authority ever excused LtCol Vokey. LtCol Vokey was detailed to this case by the Regional Defense Counsel Pacific, who was LtCol Simmons when LtCol Vokey was detailed. Sept. 13,

2010 Article 39(a) session transcript at 41. At the time of his detailing to represent SSgt Wuterich, LtCol Vokey served in the Regional Defense Counsel-West billet. He turned over that billet to LtCol Tafoya in the Spring of 2008. *Id*. at 64. The record contains no indication that either LtCol Simmons nor his predecessor, LtCol Jones, or the convening authority that delegated detailing authority to Regional Defense Counsel-Pacific ever excused LtCol Vokey as detailed defense counsel.

Second, there was no showing of any kind on the record before SSgt Wuterich's attorney-client relationship with LtCol Vokey was severed. LtCol Vokey testified that he never went on the record to ask to be excused before leaving active duty. *Id*. at 70. Indeed, there was no mention on the record of LtCol Vokey withdrawing from the case until after the attorney-client relationship had already been severed for more than seven months.

A showing of good cause on the record must be made before the termination occurs to preserve the military judge's "critical role" in the counsel excusal process. *Hutchins*, 69 M.J. at 289. The timing matters. The military judge's "good cause" determination preserves the accused's statutory and regulatory rights to detailed counsel only if it is made before the severance occurs. The Judge Advocate General of the Navy recognized this in a comment to the Navy Rules of Professional Conduct. JAGINST 5803.1C, Professional Conduct of Attorneys Practicing Under the Cognizance and Supervision of the Judge Advocate General (9 November 2004). Comment (2) to Navy Rule of Professional Conduct 1.16 explains that an attorney representing an accused in a naval court-martial "shall continue such representation until properly relieved by competent authority," and that once trial begins, that competent authority is the military judge. *Id*. at R. 1.16, comment (2). Accordingly, under R.C.M. 505(d)(2)(B)(iii), no

excusal of counsel is authorized until the military judge has determined that good cause has been shown for the severance. That did not occur here.

Third, even if retroactive determinations of good cause for severance were permissible, one did not occur here. All that was said on the record in the first court-martial session following the severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey was that LtCol Vokey had retired. The military judge then erroneously stated that there was no way the Government could compel LtCol Vokey to remain on the case, apparently accepting retirement as *per se* good cause.

Fourth, there was no good cause for severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey. An End of Active Service date is not *per se* good cause for termination of an attorney-client relationship. *Hutchins*, 69 M.J. at 290 ("Our case law does not establish separation from active duty as necessarily establishing good cause in every case"). In *Hutchins*, CAAF observed that "[a]lthough separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case." *Id*. at 290-91. CAAF held that under the contextual circumstances of that case, the record did "not establish a valid basis for" termination of the detailed assistant defense counsel's representation of the accused. *Id*. at 293. The contextual circumstances in this case reveal that termination of representation by LtCol Vokey was even less justified than the termination of representation by Capt Bass in *Hutchins*.

Like *Hutchins*, this case involves extremely serious charges. And LtCol Vokey represented SSgt Wuterich for a longer period before his retirement than Capt Bass had represented Sgt Hutchins before Capt Bass's EAS. Furthermore, LtCol Vokey's role in SSgt Wuterich's representation was far more critical to the defense than was Capt Bass's role in

*Hutchins*. LtCol Vokey was the senior detailed defense counsel while Capt Bass was merely an assistant detailed defense counsel. And more importantly, LtCol Vokey was the only counsel on SSgt Wuterich's defense team to visit the crime scene. This makes him comparable to Capt Provine in the *Eason* case, who was indispensible because he had "unique knowledge of the case which no one else on the defense team possessed," in part because he was in Vietnam where the offenses allegedly occurred and the civilian defense counsel had "never journeyed to Vietnam." *United States v. Eason*, 21 C.M.A. 335, 339, 45 C.M.R. 109, 113 (1971); *Hutchins*, 69 M.J. at 290, 292 (citing *Eason*).

It is inconceivable that LtCol Vokey's unique knowledge gained on his site-visit to Haditha would not become highly relevant during a court-martial specifically about what occurred in Haditha. Indeed, deprivation of LtCol Vokey would be irreparably prejudicial. If LtCol Vokey does not participate in SSgt Wuterich's trial, no one will ever know what contributions he would have made. As a result of his extensive on-site investigation of the case, LtCol Vokey knows facts that SSgt Wuterich's other counsel do not. He has first-hand knowledge of the terrain, the alleged crime scene and the witnesses, all informed by his background as a Marine Corps combat arms officer. This knowledge makes him unique among Staff Sergeant Wuterich's counsel and SSgt Wuterich's remaining counsel cannot know when, where, how — or even if — their ignorance of facts known only to LtCol Vokey will affect the case. Similarly, appellate Courts would also lack LtCol Vokey's unique knowledge and will therefore be unable to determine post hoc the impact his presence would have had on the trial.

As referenced above, "good cause" for this severance cannot be found in the Government's refusal to grant LtCol Vokey further extensions to his retirement date, where both LtCol Vokey and SSgt Wuterich explicitly sought to delay LtCol Vokey's retirement to allow

him to continue his representation. Any argument that the manpower needs of the Marine Corps prevented LtCol Vokey's continued service and thereby provided good cause for severance is disingenuous. LtCol Yetter, a Deputy Branch Head for Manpower testified at the September 13, 2010 Article 39(a) session that the Marine Corps was *under* authorized strength for field grade officers. (September 13, 2010 Article 39(a) session at 28). Accordingly, the Government's refusal to extend LtCol Vokey was not mandated by statute, and was a instead purely discretionary action.

And in stark contrast to Col Redmon's refusal to grant LtCol Vokey a further extension of his retirement date to continue representing SSgt Wuterich, the Marine Corps took the highly unusual — and potentially costly — step of extending the reservist trial counsel's time on active duty. This placed him in a "sanctuary" status from which he could then complete 20 years of active service and qualify for an active duty pension. *See* Sept. 13 Article 39(a) session at 22-27. And while Col Redmon was intransigent in his approach with LtCol Vokey, he manifested an entirely different attitude toward the trial counsel. In his endorsement of LtCol Sullivan's sanctuary request, Col Redmon noted that there was no valid active-duty requirement which could be used to justify granting LtCol Sullivan sanctuary. *See* Col Redmon endorsement, dtd 16 May 2009. Nevertheless, he indicated that "we should plan on finding an active duty requirement" and "as long as DC, M&RA 'gets credit' for filling a valid requirement (even with a USMCR officer), then I guess it is legit." *Id.* Thus, even when regular application of Manpower rules would have prevented LtCol Sullivan from being granted sanctuary, with the positive support of LtGen Helland, LtGen Mattis, and BGen Walker the requirements would be adjusted by the Government to ensure continuity of the trial team.

The Government took similar steps to ensure that the other trial counsel remained on the case as well. His tour at his duty station was extended beyond the normal length, allowing him to continue to represent the United States here. Thus, the United States exercised its authority in unusual — and potentially costly — ways to promote its own continuity of counsel, but refused to do a routine retirement extension to preserve SSgt Wuterich's continuity of counsel. Moreover, at no time during these proceedings has the Government cited any actual or perceived prejudice it would have incurred by extending LtCol Vokey's retirement date.

Accordingly, good cause was not shown on the record to allow LtCol Vokey to withdraw from the case upon commencing terminal leave.

*2. Excusal of defense counsel with the express consent of the accused*

This is not a case where excusal occurred with the express consent of the accused pursuant to R.C.M. 506(c). *See Hutchins*, 69 M.J. at 289-90. On the contrary, LtCol Vokey testified that SSgt Wuterich had never excused him from further representation. *See* Sept. 13 Article 39(a) session transcript at 70.

3. *Application for withdrawal by the defense counsel for good cause*

LtCol Vokey did not apply to the military judge to be allowed to withdraw for good cause shown under R.C.M. 506(c) before departing on terminal leave. Accordingly, severance of the attorney-client relationship was not authorized under that rule. *See Hutchins*, 69 M.J at 290.

4. *Excusal upon appointment of individual military counsel*

Finally, SSgt Wuterich's loss of LtCol Vokey's representation did not occur upon a granted request for individual military counsel. *See id*.

Since the de facto severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey that resulted from LtCol Vokey's commencement of terminal leave was not authorized by

any of the permissible bases, that severance was legally erroneous. And as in *Hutchins*, the military judge presiding over the case when LtCol Vokey began his terminal leave (who was the same military judge as in *Hutchins*) failed in his duty at the March 11, 2009 Article 39(a) session to ensure that the record reflected good cause for the detailed defense counsel's withdrawal and that the accused was properly advised concerning his right to object to that counsel's withdrawal. Instead, the military judge erroneously concluded that EAS was *per se* good cause for severance, and then gave a factually and legally erroneous advisement to SSgt Wuterich concerning his right to counsel.

Permitting the Government to discharge military counsel, thereby terminating an accused's right to detailed counsel, would render the right to detailed counsel meaningless. If the relationship could be severed by governmental actions, such as severance of the attorney-client relationship through an involuntary discharge or even a voluntary discharge of detailed counsel, it would give the Government the unhindered power to take certain actions that would inevitably result in the release of counsel. Reassignments, deployments, delays, transfers, and discharges would all enable the Government to manipulate the process to rid itself of effective defense counsel. Even if the Government did not act with a nefarious purpose, the appearance of impropriety would cast grave doubt on the military justice system. *See United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). Permitting such an outcome from governmental action eviscerates the right to detailed counsel. Government counsel and Convening Authorities unhappy with a vigorous defense, as was happening in this case and as previously occurred in the Hamdaniya[1] case of *U.S. v. Trent Thomas*, could simply

[1] Mr. Faraj represented Cpl Trent Thomas in a murder trial arising out of events in Hamdaniya, Iraq. That case was tried against the same trial team which demonstrated visible consternation when the members returned findings and a sentence favorable to the defense.

file interlocutory appeals, delay trials to await defense counsel's discharge or cause the transfer of defense counsel to sever the attorney -client relationship.

Accordingly, this Court should find that SSgt Wuterich was denied his right to continued representation by LtCol Vokey as his detailed defense counsel. Moreover, this improper deprivation of SSgt Wuterich's counsel rights was not cured by LtCol Vokey's ultimately abortive attempt 18 months later to return as a civilian counsel. The UCMJ guarantees continued representation with a *detailed defense counsel*. The Government stripping that defense counsel of his rank and pay, and having him attempt to continue representation on a *pro bono* basis from 1500 miles away is hardly consistent with the text or spirit of Article 38. Military courts have consistently held that, "[o]nce entered into, the relationship between the accused and his appointed military counsel may not be severed or **materially altered** for administrative convenience." *United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975)(emphasis added) (quoting *United States v. Murray*, 20 C.M.A. 61, 62, 45 C.M.R 253, 254 (1970)); *see also, e.g., United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978); *United States v. Tellier*, 13 C.M.A. 323, 32 C.M.R 323 (1962); *United States v. Dickinson*, 65 M.J. 562, 566 (N-M. Ct. Crim. App. 2006). By definition, an attorney-client relationship is "materially altered" when it is forcibly and improperly changed from detailed defense counsel status to status as a *pro bono* civilian.

SSgt Wuterich continues to be prejudiced by the Government's material alteration of his attorney-client relationship with LtCol Vokey, and also with Mr. Faraj. Detailed counsel have several advantages that are unavailable to civilian counsel. Detailed counsel have the advantage of proximity to witnesses, the advantage of having an office space adjacent to the courthouse, the authority inherent to the rank of two field grade officers to request resources, witnesses and

engage in trial negotiations, the irreplaceable impact the credibility, respect and command presence of an attorney in uniform decorated with numerous personal awards and campaign ribbons would have on a panel of jurors, and the loss of ready access to the tens of thousands of documents located at offices adjacent to the courthouse. Both LtCol Vokey and Mr. Faraj live in different states than the state in which the court-martial is being held. The defense team in this case was assigned a file room in the defense building to store and organize their case files. They were also assigned a defense clerk, an NCO whose sole duty was to keep files organized and manage the case file. When both detailed counsel left the case, the clerk assigned to the case was also reassigned. The case file was left in the file room to be taken over by a new detailed counsel who was not assigned until July of 2010, who is located at a base about 30 miles away, and who was assigned to satisfy the military judge's constant inquiries of the government as to why no detailed counsel was yet assigned as late as May of 2010. The files have since been moved; some have disappeared, and what remains lack any sense of organization.

Continuity on the prosecutor's side, on the other hand, continued undisturbed. The same Trial Counsel remain on the case supported by an army of assistants. They continue to be located at the same building aboard the same base with access to witnesses and evidence. Although the defense has no access to the trial counsel's files, one can only imagine that after two years, their case file would be even more organized and their trial preparations complete.

That said, as it stands SSgt Wuterich's attorney-client relationship with LtCol Vokey was not merely "materially altered," as it has in fact been fully severed. And the improper severance in 2008 is inextricably intertwined with the second severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey that was ordered on September 13, 2010. Due to Col Redmon's refusal to extend LtCol Vokey's retirement date, LtCol Vokey was required to enter into civilian

employment to provide for his family, causing an eighteen-month break in representation. And it was this civilian employment that led to the imputed conflict. If this second erroneous severance is not cured by restoration of a financially viable and conflict-free attorney-client relationship between SSgt Wuterich and LtCol Vokey, an independent remedy would be necessary for the improper severance/material alteration of the attorney-client relationship that occurred on August 6, 2008.

### C. The Government has the ability to correct its improper severance of the attorney-client relationship between LtCol Vokey and SSgt Wuterich

A second erroneous severance of SSgt Wuterich's attorney-client relationship with LtCol Vokey occurred on September 13, 2010. On that date, the military judge granted LtCol Vokey's request to withdraw, thereby severing the SSgt Wuterich's attorney-client relationship with him. The military judge granted the withdrawal because he perceived, based in part on representations of the defense team, an irreconcilable conflict that prevented LtCol Vokey from continuing to represent SSgt Wuterich. The Defense now views the position it previously took on this issue as incorrect.

Under the applicable rules of professional responsibility, although an imputed conflict of interest currently does exist, that conflict is not irreconcilable; the conflict is imputed rather than actual. Under the Texas Rules of Professional Conduct, Rule 1.09, Conflict of Interest: Former Client paragraph (b), a lawyer who has associated or becomes a member of a firm may not represent a client if other members of the firm would also be prohibited from representing a client. Such disqualification is imputed to all members of the firm. An imputed disqualification dissolves, however, if an attorney severs his association with a firm, but only if that lawyer did not obtain client confidential information as contemplated under Rule 1.10 of the Texas Rules.

In this case, the record establishes that the conflict that currently affects LtCol Vokey's representation of SSgt Wuterich is solely an imputed disqualification arising from his law firm's former representation of Sgt Salinas. *See* Sept. 13, 2010 Article 39(a) session transcript at 14. There is no actual conflict that limits LtCol Vokey's representation of SSgt Wuterich. On the contrary, the firm carefully screened off LtCol Vokey from the *Salinas* case, thereby ensuring that no actual conflict could develop. *Id*. Hence, if LtCol Vokey were to be recalled to active duty or retained to represent SSgt Wuterich independent of his firm, any imputed disqualification from his firm's representation of Sgt Salinas would dissolve.

As the United States Court of Appeals for the Fifth Circuit has held, under both the Texas Disciplinary Rules of Professional Conduct and the ABA Model Rules of Professional Conduct, an imputed disqualification persists after a lawyer has a left a firm only if the departing lawyer "actually acquired confidential information about the former firm's client or personally represented the former client." *In re ProEducation Intern., Inc*., 587 F.3d 296, 301 (5th Cir. 2009). Because neither of those exceptions applies here, once LtCol Vokey is recalled to active duty, he would no longer be limited in representing SSgt Wuterich due to any imputed disqualification arising from his firm's former representation of Sgt Salinas.

There is also a second reason why recalling LtCol Vokey to active duty would resolve the issue. Once recalled to active duty, LtCol Vokey's conduct would be governed by the Navy Rules of Professional Conduct, even to the extent that they conflict with his state bar's rules of professional conduct. *See, e.g.*, Navy Rules of Professional Conduct Rule 8.5 comment (2) ("When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, these Rules supersede any conflicting rules applicable

in jurisdictions in which the covered attorney may be licensed."). The Navy Rules of Professional Conduct do not include a per se imputed disqualification rule. *See* Navy Rule 1.10. Thus, by placing LtCol Vokey's conduct under the cognizance of the Navy Rules rather than the Texas Rules, recalling LtCol Vokey to active duty would free him from the Texas Rules' imputed disqualification limitations.

Accordingly, this Court should direct the Government to take appropriate action to restore the attorney-client relationship. See, e.g., *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978) ("Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level.").

The Government has the legal authority to return LtCol Vokey to active duty. 10 U.S.C. § 688 permits the Secretary of the Navy, under regulations prescribed by the Secretary of Defense, to order a retired member to active duty. The Secretary of Defense, in turn, has provided the Service Secretaries with broad authority to recall retired members to active duty. *See* Dep't of Def Directive 1352.1 (16 July 2005). It is, therefore, completely within the power of the Government to restore SSgt Wuterich's attorney-client relationship with LtCol Vokey (Ret.) by recalling him to active duty. LtCol Vokey previously indicated his willingness to be recalled to active duty to continue representation of SSgt Wuterich. *See* Appellate Exhibit CXVII at 33.

Requiring the United States to exercise its authority to return LtCol Vokey to active duty would be particularly appropriate in this case, where the United States took extraordinary steps to promote its own continuity of counsel, and consistent with our highest court's precedent. *See Eason*, 45 C.M.R. 109; *United States v. Murray*, 20 C.M.A. 61, 42 C.M.R. 253 ( 1970)(holding

that the government was obligated to take affirmative personnel action to maintain an existing attorney-client relationship).

Finally, to the extent that possible adverse effects on LtCol Vokey's civilian employment should be considered in determining whether good cause existed to terminate his attorney-client relationship with SSgt Wuterich, he would be statutorily protected from any such adverse effects if he were to be recalled to active duty. *See* 38 U.S.C. § 4311 (2006) ("A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.").

This Court should order court-martial proceedings abated until the United States returns LtCol Vokey to SSgt Wuterich's defense team. There is no need to tell the United States precisely how it should restore SSgt Wuterich's attorney-client relationship with LtCol Vokey. The United States has shown itself perfectly capable of taking extraordinary steps to ensure that counsel are on active duty in Southern California to try this case when the United States considers it in its interest to do so. Abating proceedings until LtCol Vokey is returned to the defense team would, no doubt, result in the United States protecting SSgt Wuterich's rights with the same sort of vigor with which it has promoted its own continuity of counsel.

If the Government cannot or will not restore the attorney-client relationship, then the only remedy is dismissal of the charges; the Government must not be permitted to benefit from an action that was in clear and direct contravention of the law. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (holding that whatever remedies are available would be insufficient

because the government's objective of unseating the military judge had been achieved thus requiring a dismissal of the charges with prejudice); *United States v. Dickinson*, 65 M.J. 562 (N-M. Ct. Crim. App. 2006)(dismissing charges where Government improperly severed detailed counsel, even where accused had continuous representation of additional military counsel).

## V. Evidence.

### A. Exhibits

### B. Witnesses

a. LtCol Jameson

b. LtCol Redmon

c. Col Favors

d. BGen Walker

e. Col Ingersoll

f. LtCol Kumagai

g. LtGen Helland

h. Gen Mattis

i. Mr. Colby Vokey

j. LtCol David M. Jones

k. General James T. Conway

## VI. Relief Requested.

Wherefore, the accused, by and through undersigned counsel, requests that the court: (1) declare that SSgt Wuterich's right to the continuation of an established attorney-client relationship was violated; and (2) abatement of the court-martial proceedings until LtCol Colby Vokey, USMC (Ret.) is restored as SSgt Wuterich's defense counsel either on active duty or in a civilian capacity at Government expense or, in the alternative, an order directing the Government to fashion an appropriate remedy. If the Government will not fashion an appropriate remedy to restore the attorney-client relationship, then the charges must be dismissed.

## VII. Evidentiary Hearing and Oral Argument.

SSgt Wuterich invokes his right to have an evidentiary hearing and present argument on this written motion. R.C.M. 905(h).

By: /S/ 15 April 2011
Haytham Faraj Date
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 703-706-0442
Fax 202-280-1039
Email: Haytham@puckettfaraj.com

**CERTIFICATE OF SERVICE**

I certify that a copy of this document was served upon the Court and Government counsel on April 15, 2011.

By: ___/S/_____ __15 April 2011___
Haytham Faraj Date
1800 Diagonal Road
Suite 210
Alexandria, VA 22314
Tel 703-706-0442
Fax 202-280-1039
Email: Haytham@puckettfaraj.com