IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. Wuterich, Staff Sergeant (E-6), United States Marine Corps, Appellant, v. David M. Jones, Lieutenant Colonel, United States Marine Corps, In his official capacity as Military Judge, and The United States, Appellees.	) WRIT APPEAL PETITION FOR REVIEW) OF NAVY-MARINE CORPS COURT OF) CRIMINAL APPEALS' DECISION ON) APPLICATION FOR EXTRAORDINARY) RELIEF)) Crim.App. Misc. Dkt. No.) 200800183))) USCA Misc. Dkt. No. _____)))

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

Preamble

The Appellant hereby prays for a writ of mandamus ordering Appellee Judge Jones to abate general court-martial proceedings against Appellant until the Government has restored Appellant's attorney-client relationship with his previous detailed military defense counsel.

In denying Appellant's motion to abate proceedings until his attorney-client relationship with LtCol Vokey (Ret.) is restored, Appellee Judge Jones made numerous factual and legal errors. The most significant of those errors, which he made repeatedly, is his clearly erroneous view that there was no interruption in Appellant's attorney-client relationship with LtCol Vokey in 2008, when LtCol Vokey retired from active duty.

On the contrary, the record definitively proves that there was an interruption in the attorney-client relationship beginning when LtCol Vokey commenced terminal leave on August 6, 2008 and continuing at least into March 2009. Nevertheless, in ruling on Appellant's motion to abate proceedings, Appellee Judge Jones made and repeatedly relied on the clearly erroneous finding that there was no interruption in the attorney-client relationship. By making and relying on that clearly erroneous finding, Appellee Judge Jones abused his discretion, resulting in an erroneous deprivation of Appellant's right to proceed to court-martial with his counsel of choice.

Appellee Judge Jones further erred by minimizing the importance of LtCol Vokey's status as Appellant's only counsel to visit the site of the alleged offenses, the significance of which this Court's precedent recognizes. Appellee Judge Jones' ruling is thus at odds with precedent which he was duty-bound to follow. Other flaws infect his ruling, such as misconstruing a Department of Defense Instruction and relying on a canceled Secretary of the Navy Instruction. These and numerous other errors in his ruling demonstrate that Appellee Judge Jones' denial of Appellant's motion to abate proceedings is legally indefensible. And the Navy-Marine Corps Court's ruling below was similarly flawed.

Appellant has a right to be represented by LtCol Vokey (Ret.) at his court-martial. This Court should, therefore, issue a writ of mandamus ordering Appellee Judge Jones to abate court-martial proceedings against Appellant until the United States restores his attorney-client relationship with LtCol Vokey (Ret.).

I.

History of the Case

Charges were preferred against Appellant on December 1, 2006 and were referred for trial by general court-martial on December 27, 2007. Appellant 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, 10 U.S.C. §§ 892, 919, 928, and 934 (2000). Appellant's case has been the subject of two government appeals pursuant to Article 62, UCMJ. *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); *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).

Trial on the merits is currently scheduled to begin on November 30, 2011 at Camp Pendleton, California.

On October 25, 2010, Appellant filed a petition for extraordinary relief in the nature of a stay of proceedings with the Navy-Marine Corps Court of Criminal Appeals. On October 27, 2010, the Navy-Marine Corps Court denied that petition "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, Appellant filed a petition for a writ of mandamus before the lower court, seeking a declaration that his right to continuation of his established attorney-client relationship with his original detailed military defense counsel was improperly severed and seeking appropriate relief. The following day, the Navy-Marine Corps Court denied the petition without prejudice to the right to raise the matter during the ordinary course of appellate review.

Appellant filed a writ appeal with this Court on November 5, 2010. *Wuterich v. Jones*, 69 M.J. 425 (C.A.A.F. 2010). On December 20, 2010, this Court vacated the Navy-Marine Corps Court's decision and remanded the case to that court to "1) obtain the transcripts of the Article 39(a) sessions held on September 13 and 14, 2010, both sealed and unsealed; 2) determine whether the sealed portion should remain sealed; and

3) determine whether the military judge abused his discretion in determining that good cause existed to sever the attorney-client relationship." *Wuterich v. Jones*, 69 M.J. 456 (C.A.A.F. 2010). On January 7, 2011, the Navy-Marine Corps Court issued an opinion concluding that "the military judge did not abuse his discretion in granting Mr. V's motion to withdraw." *Wuterich v. Jones*, No. NMCCA 200800183, 2011 WL 49614 (N-M. Ct. Crim. App. Jan. 7, 2011).

On April 4, 2011, on consideration of Appellant's previous writ appeal, this Court denied relief without prejudice. *Wuterich v. Jones*, 70 M.J. 82 (C.A.A.F. 2011) (summary disposition).

On May 25, 2011, Appellant filed a petition for extraordinary relief in the nature of a stay of proceedings with the Navy-Marine Corps Court. On May 27, 2011, that court granted a stay of proceedings until further order. On May 31, 2011, the military judge issued findings of fact and conclusions of law. On June 7, 2011, Appellant moved for access to a transcript on an ex parte hearing in this case. The Government filed no response to that motion. In an order dated June 23, 2011 but not received by Appellant's counsel until June 29, 2011, the Navy-Marine Corps Court denied that motion. On June 9, 2011, Appellant moved to propound interrogatories. The Government opposed

that motion. In an order dated June 23, 2011 but not received by Appellant's counsel until June 29, 2011, the Navy-Marine Corps Court denied that motion.

On July 7, 2011, Appellant filed a petition for a writ of mandamus before the Navy-Marine Corps Court. On July 11, 2011, the Navy-Marine Corps Court issued a show cause order. The court heard oral argument on August 8, 2011. On August 25, 2011, the Navy-Marine Corps Court denied Appellant's petition for extraordinary relief without prejudice to Appellant's right to raise the issue on direct appeal. *Wuterich v. United States*, NMCCA No. 200800183, 2011 WL 3726640 (N-M. Ct. Crim. App. Aug. 25, 2011) [Appendix]. The Court also dissolved its stay of court-martial proceedings.

With the exception of the motions filed with the military judge, the previous petition for extraordinary relief and writ appeal noted above, and the denied petition for extraordinary relief giving rise to this writ appeal, no prior actions have been or are pending seeking the same relief in this or any other Court.

II.

Relief Sought

Appellant seeks a writ of mandamus ordering Appellee Judge Jones to abate court-martial proceedings until Appellant's

attorney-client relationship with LtCol Vokey (Ret.) has been restored.

III.

Jurisdictional Basis for Relief Sought

The Supreme Court has recognized that "military appellate courts" are "empowered to issue extraordinary writs . . . in aid of [their] existing statutory jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Because Appellant is being tried by a general court-martial authorized to impose a dishonorable discharge and more than a year of confinement, this case falls within this Court's potential appellate jurisdiction. *See* Article 67, Uniform Code of Military Justice, 10 U.S.C. § 867 (2006). A Court is authorized to issue relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), in cases falling within its potential appellate jurisdiction. *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966); *In re Tennant*, 359 F.3d 523, 528 (D.C. Cir. 2004).

IV.

Issue Presented

SHOULD THIS COURT ORDER COURT-MARTIAL PROCEEDINGS ABATED PENDING THE RESTORATION OF APPELLANT'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL WHERE: (1) THE MILITARY JUDGE DENIED A MOTION TO RESTORE THE ACCUSED'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL; (2) THAT FORMER DETAILED DEFENSE COUNSEL WAS APPELLANT'S ONLY COUNSEL WHO HAS VISITED THE SCENE OF THE ALLEGED OFFENSES; (3) A SITE VISIT BY APPELLANT'S CURRENT COUNSEL IS IMPOSSIBLE; (4) THE MILITARY JUDGE CONCLUDED THAT ERROR OCCURRED IN THE TERMINATION OF THE FORMER DETAILED DEFENSE COUNSEL'S STATUS; (5) THE MILITARY JUDGE CONCLUDED THAT THAT ERROR WAS HARMLESS BECAUSE THE FORMER DETAILED DEFENSE COUNSEL CONTINUED TO REPRESENT APPELLANT WITHOUT INTERRUPTION; AND (6) THE MILITARY JUDGE'S FINDING OF UNINTERRUPTED REPRESENTATION IS CLEARLY ERRONEOUS?

V.

Statement of Facts

A. LtCol Vokey represented Appellant for more than 18 months before severing the attorney-client relationship upon beginning terminal leave

LtCol Vokey believes he formed an attorney-client relationship with Appellant on "the day he was charged," which was December 21, 2006. Transcript of 25 April 2011 Article 39(a) Session at 44. LtCol Vokey had spoken with Appellant on one or two occasions before that. *Id.* On January 17, 2007, LtCol Vokey was formally detailed to represent Appellant by LtCol Simmons, who was then the Marine Corps' Regional Defense Counsel Pacific. Appellate Exhibit XCIV at 130, ¶ 2; 13 Sept. 2010 Article 39(a) session transcript at 31. Six days before

LtCol Vokey was detailed to this case, Maj Haytham Faraj had also been detailed to represent Appellant. Appellate Exhibit XCIV at 130, ¶ 2.

LtCol Vokey served as Appellant's detailed defense counsel for more than a year and a half before he began terminal leave. LtCol Vokey's work on Appellant's behalf included a visit to the scene of the alleged offenses accompanied by Appellant and a videographer. 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*. Lt Col 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. LtCol Vokey terminated representation of Appellant on August 6, 2008, upon commencing terminal leave

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. 13 Sept. 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 Appellant's court-martial, which was scheduled to be tried in March 2008. *Id.* at 32-34. In February 2008, however, after the previous military judge in this case quashed a subpoena seeking outtakes from an interview that the CBS television show "60 Minutes" taped with Appellant, 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 reversed the military judge's order quashing the subpoena. *Id.* Ten days later, Appellant submitted a petition to this Court seeking review of the lower court's decision. *United States v. Wuterich*, 66 M.J. 498 (C.A.A.F. 2008). This Court issued its opinion on November 17, 2008. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). That decision vacated the lower court's decision while also reversing the military judge's quashal of the subpoena. While not formally stayed during the proceedings before this Court, the trial did not resume during that appeal.

Because the prosecution appeal threatened to push Appellant's trial date past his retirement date, LtCol Vokey took steps seeking to ensure that he would be able to continue representing Appellant as his military defense counsel. During the March to April 2008 timeframe, he sought and received an extension of his retirement date until June 1, 2008. 13 Sept. 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 her parents in Texas. *Id.* at 33. LtCol Vokey moved into a travel trailer at Lake O'Neill and continued to work on Appellant'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 Appellant'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. Colonel Patrick Redmon of the Manpower Management Officer Assignment (MMOA) office at Headquarters Marine Corps refused a subsequent telephonic request from LtCol Vokey for a further extension, instructing LtCol Vokey to submit an Administrative Action form with an endorsement by a general officer or the military judge in the *Wuterich* case if LtCol Vokey wanted to remain in his billet longer. Finding of Fact 2 from 25 April Motion.[1] LtCol Vokey did not submit such an Administrative Action form or seek the assistance of the military judge, the officer-in-charge of the Legal Services Support Section, or any senior judge advocate. *Id.*, Finding of Fact 4. He instead asked MMOA for an extension of his retirement date until November 1, 2008 not for the purpose of representing Appellant, but rather to out-process, for travel, and for terminal leave. 13 Sept. 2010 Article 39(a) session transcript at 37, 57-58. That request was approved. *Id.*

[1] LtCol Vokey (Ret.) disputes Col Redmon's testimony on this point. But because the military judge credited Col Redmon's testimony on this point, and because that finding of fact does not appear to be clearly erroneous, Appellant adopts it for purposes of this writ appeal only.

LtCol Vokey left the Camp Pendleton area and ceased representing Appellant on August 6, 2008. *Id.* at 37. LtCol Vokey was officially retired on November 1, 2008. Supplemented Finding of Fact 2. LtCol Vokey "assumed that leaving active duty severed the attorney-client relationship." Transcript of 25 April 2011 Article 39(a) Session at 101.

On the same day that LtCol Vokey began terminal leave, the Convening Authority delegated defense counsel detailing authority to the Regional Defense Counsel West, who is stationed at Camp Pendleton, California. Appellate Exhibit CXVI; Transcript of 25 April 2011 Article 39(a) Session at 115. The Regional Defense Counsel West when LtCol Vokey began terminal leave was LtCol Patricio Tafoya. *Id.* LtCol Tafoya never released LtCol Vokey from the *Wuterich* case. Transcript of 25 April 2011 Article 39(a) Session at 103, 116. Nor did any other detailing authority ever release LtCol Vokey from the *Wuterich* case. *Id.* at 102. Nor did LtCol Vokey ever appear before any Court to be excused from his role as Appellant's detailed military defense counsel before or upon beginning his terminal leave. 13 Sept. 2010 Article 39(a) session transcript at 70. Nor did Appellant ever release him. 13 Sept. 2010 Article 39(a) session transcript at 70.

C. During the break in LtCol Vokey's representation of Appellant, LtCol Vokey accepted employment that led to Appellee Judge Jones' September 13, 2010 ruling that LtCol Vokey was irreconcilably conflicted from further representation of Appellant

LtCol Vokey sent out approximately 300 resumes, but received only two or three job offers. 13 Sept. 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 19 November 2005. *Id.* at 10.

LtCol Vokey has never engaged in active representation of Sgt Salinas. *Id.* at 14. Rather, the firm screened LtCol Vokey from the case to ensure that there would be no actual conflict. *Id.* LtCol Vokey believes that the firm no longer represents Sgt Salinas. Finding of Fact 6 from 25 April Motion; *see also* 13 Sept. 2010 Article 39(a) session transcript at 14 (indicating that the firm no longer represents Sgt Salinas).

LtCol Vokey (Ret.) made no appearances on Appellant's behalf and was not retained to represent Appellant between the time he left active duty and March of 2009. Transcript of 25 April 2011 Article 39(a) Session at 103. An email sent on 4 March 2009 by Neal Puckett, Esquire, to Judge Meeks stated, in relevant part, "Mr. Vokey and SSgt Wuterich are in the process of making arrangements for Mr. Vokey to rejoin the defense team,

but I do not believe that relationship has been formalized." Government Argument on Defense Motion for Appropriate Relief (Abate Proceedings Until Attorney Client Relationship with Detailed Defense Counsel (LtCol Vokey) Is Restored at Encl. 1 (filed 28 April 2011).

On 11 March 2009 – after the Government's first Article 62 appeal but before its second – an Article 39(a) session was held to hear motions. During that session, Judge Meeks briefly addressed LtCol Vokey's status:

> 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.

11 March 2009 Article 39(a) session transcript at 2-3 (from the record in *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)). Judge Meeks then gave Appellant this advice regarding his right to continued representation by LtCol Vokey:

> MJ: 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.

11 March 2009 Article 39(a) session transcript at 3.

During an Article 39(a) session on March 22, 2010 – after the litigation concerning the second Article 62 appeal was complete – LtCol Vokey first made an appearance as civilian counsel. Transcript of 22 May 2010 Article 39(a) session at 64. After that appearance, the defense team realized that an imputed conflict existed between LtCol Vokey and Appellant. 13 Sept. 2010 Article 39(a) session transcript at 11.

D. Appellee Judge Jones grants LtCol Vokey (Ret.)'s request to withdraw

At an Article 39(a) session held on September 13, 2010, LtCol Vokey (Ret.) asked to withdraw from the case. *Id.* at 9. LtCol Vokey made the request because he worked at a law firm that represented Sgt Salinas at the time he was hired. *Id.* at 10. LtCol Vokey stated that a conflict became apparent about June or July of 2010 as a result of pretrial preparation in Appellant's case. *Id.* at 11. Following some discussion, the military judge held an ex parte unrecorded session with Appellant's counsel. *Id.* at 18. After the ex parte session, the military judge stated to LtCol Vokey: "After having discussed the issue with the defense counsel, Mr. Vokey, it's my understanding that you are making a request to be excused and to

withdraw from this case under R.C.M. 506(c)." *Id.* at 20. LtCol Vokey replied, "That's correct, Your Honor, because I don't have a choice." *Id.* The military judge then announced: "Based 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." *Id.*

The military judge then proceeded to hear evidence on the defense's Motion for Appropriate Relief to Dismiss All Charges and Specifications for Violation of Right to Detailed Counsel.

In an e-mail to counsel with the subject "Ruling on Motion" dated October 22, 2010, Appellee Judge Jones wrote: "The Defense motion seeking relief based on the violation of right to detailed counsel is DENIED. I will put the Ruling on the record when we meet for court on the morning of 2 November." On the following duty day – Monday, October 25, 2010 – Appellant petitioned the Navy-Marine Corps Court for extraordinary relief in the nature of a stay. The following day, Appellee Judge Jones sent an e-mail to counsel for the parties with findings of fact and conclusions of law subject to further revision. This ruling stated, in part:

> 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 2010, 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. After hearing the defense's request, including the desires of Mr. Vokey, the Court was constrained to release 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. . . . Until being released at the 13 September 2010 Article 39(a) session, Mr. Vokey had continued to represent the accused.

Finding of Fact 6, Findings of Fact and Conclusions of Law, Motion to Dismiss for Violation of Right of Detailed Counsel (26 October 2010); *see also* Finding of Fact 15 (referring to the military judge's "finding of an irreconcilable conflict of interest"); Analysis/Conclusions of Law at p. 18 ("his actions have created in irreconcilable conflict of interest in proceeding as the accused's attorney").

Appellant's previous petition for writ of mandamus to the lower court and previous writ appeal to this Court followed the military judge's issuance of those Findings of Fact and Conclusions of Law.

E. Appellee Judge Jones denied a defense motion for abatement of proceedings until Appellant's attorney-client relationship is restored

Following this Court's ruling on the previous writ appeal, on April 15, 2011, Appellant filed a motion to abate proceedings until his attorney-client relationship with LtCol Vokey (Ret.) is restored. The Government filed a written opposition on April 22, 2011.

Appellee Judge Jones held an Article 39(a) session to receive evidence and hear argument on the motion on April 25-26, 2011. Following the hearing, on April 29, 2011, the Government submitted additional evidence and argument.

In an email to counsel dated May 20, 2011, Appellee Judge Jones denied the motion while indicating that he had not yet completed his findings of fact and conclusions of law.

On May 25, 2011, Appellant sought a stay of proceedings from the Navy-Marine Corps Court. On May 27, 2011, that Court ordered a stay of proceedings pending further order. The court also ordered Appellee Judge Jones to produce his findings of fact and conclusions of law no later than June 13, 2011.

On May 31, 2011, Appellee Judge Jones issued findings of fact and conclusions of law in support of his denial of Appellant's motion to abate proceedings.

VI.

Reasons Why this Writ Appeal Should Be G19ranted

A. Summary of Argument

Appellant has always wanted LtCol Vokey's representation, but his attorney-client relationship with LtCol Vokey has been interrupted twice. The first interruption occurred on August 6, 2008, when LtCol Vokey began terminal leave. The military judge ruled that error occurred in connection with the termination of LtCol Vokey's status as Appellant's detailed defense counsel.

But the military judge concluded that the error was harmless because, in the military judge's view, LtCol Vokey continued to provide Appellant with uninterrupted representation until the military judge severed the attorney-client relationship on September 13, 2010 due to a conflict of interest. But that ruling was clearly erroneous. The record proves that LtCol Vokey stopped representing Appellant when he began terminal leave on August 6, 2008 and had not rejoined the defense team by March 2009. During that crucial break in representation, LtCol Vokey obtained civilian employment that later led the military judge to interrupt Appellant's attorney-client relationship with LtCol Vokey a second time. When the military judge interrupted the attorney-client relationship the second time, he concluded that "an irreconcilable conflict of interest" precluded LtCol Vokey from representing Appellant. That conclusion was incorrect. The imputed conflict that currently precludes LtCol Vokey's representation of Appellant is not "irreconcilable"; rather, it can be eliminated in numerous ways including, but not limited to, recalling LtCol Vokey to active duty. The military judge abused his discretion when he re-severed Appellant's attorney-client relationship with LtCol Vokey based on an erroneous legal conclusion concerning the reconcilability of the imputed conflict.

Appellant would be uniquely prejudiced by the loss of LtCol Vokey from the defense team because, unlike LtCol Vokey, none of Appellant's current counsel has visited the scene of the alleged offenses. This Court's case law recognizes a counsel's visit to the crime scene as particularly significant. Moreover, given the military and political situation in Iraq, it is now impossible for any of Appellant's current counsel to conduct such a site visit or replicate LtCol Vokey's other work for Appellant in Al Anbar Province.

Because error occurred and Appellant is harmed by that error, this Court should order court-martial proceedings abated until the United States restores Appellant's attorney-client relationship with LtCol Vokey (Ret.). Several possible means exist to restore that relationship. This Court can and should leave it to the United States to determine which of those means to implement. Appellant notes, however, that Appellee Judge Jones was wrong to reject the *possibility* of LtCol Vokey's involuntary recall to active duty as one such means – a rejection that, among many other problems, relied in part on a canceled Secretary of the Navy Instruction. The existence of this means proves that there is no "irreconcilable" bar to restoring Appellant's attorney-client relationship with LtCol Vokey (Ret.). And the Navy-Marine Corps Court was wrong to think that LtCol Vokey's state ethics rules might limit his

representation of Appellant if LtCol Vokey were to be recalled to active duty. The Texas Disciplinary Rules of Conduct's choice of law provisions indicates that Texas would defer to the Department of the Navy's Rules to regulate LtCol Vokey's representation of an accused in a Marine Corps court-martial. Additionally, judge advocates – including, no doubt, those licensed in Texas – routinely represent servicemembers who have conflicts with other clients being represented by other judge advocates in the same office. There is no reason to believe that LtCol Vokey would choose to disobey his ethical duty to zealously represent his client as well as chose to commit the criminal offense of dereliction of duty by refusing to obey an order to represent Appellant if recalled to active duty.

Finally, a violation of an accused's counsel rights is peculiarly appropriate for redress via a writ.

B. Introduction

A military accused has a right to continued representation by a detailed military defense counsel unless and until that relationship is properly severed. *See United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). In this case, two severances of Appellant's attorney-client relationship with Appellant occurred. Neither was legally proper.

The first severance occurred in connection with LtCol Vokey's retirement from active duty. On August 6, 2008, LtCol

Vokey stopped representing Appellant upon commencing terminal leave. 13 Sept. 2010 Article 39(a) session transcript at 10-11. When an Article 39(a) session was held seven months later, in March 2009, LtCol Vokey was not in an attorney-client relationship with Appellant. 11 March 2009 Article 39(a) session transcript at 2-3. The severance of the attorney-client relationship that occurred upon LtCol Vokey's commencement of terminal leave on August 6, 2008 was improper.

A second erroneous severance of Appellant's attorney-client relationship with LtCol Vokey (Ret.) occurred on September 13, 2010 when Appellee Judge Jones ordered the attorney-client relationship severed due to what he erroneously characterized as an "irreconcilable conflict of interest." At some unspecified point after March 11, 2009, Appellant and LtCol Vokey (Ret.) reformed an attorney-client relationship. The military judge ordered that relationship severed because he concluded that LtCol Vokey (Ret.) had an "irreconcilable" conflict that prevented his further representation of Appellant. 13 Sept. 2010 Article 39(a) session transcript at 21; Supplemented Finding of Fact 6. That conclusion, however, was erroneous. LtCol Vokey's conflict was not irreconcilable. Rather, the potential limitation on LtCol Vokey's representation of Appellant arose solely from an imputed disqualification, not an actual conflict. *See* 13 Sept. 2010 Article 39(a) session

transcript at 14. One simple solution to the imputed disqualification – a solution that is entirely within Appellee United States' control – is to recall LtCol Vokey (Ret.) to active duty. Once recalled, the imputed disqualification bar would vanish and LtCol Vokey could resume his representation of Appellant without limitation. Appellee Judge Jones' determination that there was an irreconcilable conflict that required LtCol Vokey's withdrawal from the case was thus influenced by an erroneous view of the law and was, therefore, an abuse of discretion. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

C. The military judge correctly concluded that the severance of Appellant's attorney-client relationship with LtCol Vokey upon LtCol Vokey's commencement of terminal leave was erroneous

Appellant's attorney-client relationship with LtCol Vokey was not properly severed upon LtCol Vokey's commencement of terminal leave on August 6, 2008. The military judge in the case at that time was Judge Meeks, the same military judge who presided over the trial in *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). And Judge Meeks made the same mistakes in this case that led this Court to conclude in *Hutchins* that "the record of trial does not establish a valid basis for" the relevant defense counsel's termination of participation in the case. *Id.* at 284. As Appellee Judge Jones concluded in his May

31, 2011 findings of fact: "The previous judge in the case did not make a proper inquiry, on the record, regarding the excusal of the accused's two detailed counsel from active duty . . . ." Supplemental Finding of Fact 18. Appellee Judge Jones continued:

> [Appellant] has never excused either [LtCol Vokey or Maj Faraj] from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey (before 13 September 2010) 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.

Id.

Appellee Judge Jones subsequently explained the error that occurred in greater detail:

> Clearly, there was error back in March 2009 when there was not an official severance of the attorney-client relationship pursuant to R.C.M. 505(d)(2)(B) and 506(c). There was no excusal by: 1) the detailing authority; 2) excusal by express consent of the accused; 3) application for withdrawal by the defense counsel; or 4) by appointment of individual military counsel. "The military judge has a critical role in this process." *United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F. 2011). Although the previous military judge did have a colloquy with counsel, he did not do a correct analysis of the loss of a detailed defense counsel with the parties. (Record of Trial 405.-6 [sic]).

Findings of Fact and Conclusions of Law at p. 25.

Appellee Judge Jones subsequently added that Judge Meeks "stated, 'Now, there's no way the government can compel [LtCol Vokey] to be present' to the accused. Post-*Hutchins*, this can

now be viewed, in hindsight, as an error by the military judge." *Id.* at p. 28 n.5.

These legal conclusions by Appellee Judge Jones are certainly correct under *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Particularly in light of his long service on the case and his visit to the scene of the alleged offenses, LtCol Vokey's participation is crucial to the defense. This case thus falls within the *Hutchins* caveat that while "separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case." *Id.* at 291. Indeed, Appellee Judge Jones himself previously recognized that LtCol Vokey is an "indispensible part of the team," especially in light of his site visit to Haditha with Appellant. 13 Sept. 2010 Article 39(a) Session Transcript at 12. During that site visit, LtCol Vokey personally interviewed numerous witnesses, making him irreplaceable on the defense team when they testify at trial. *See* Appellate Exhibit XCIV at 131, ¶ 9. But his site visit is not all that makes LtCol Vokey indispensible. LtCol Vokey devoted approximately 18 months of full-time work to preparing to litigate Appellant's case. *See generally* Appellate Exhibit CI at 3-4. That preparation cannot be replicated by another counsel. Other relevant factors in this case include the seriousness of the offenses with which Appellant is charged,

the trial venue's remoteness from the scene of the alleged offenses, the continuity of representation by the Government, and the extraordinary lengths to which the Government went to continue its own counsel in this case on active duty and on station, including allowing the lead trial counsel in the case – LtCol Sean Sullivan – to reach sanctuary status.

This Court's recent *Hohman* decision confirms that error occurred. *See United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011) (per curiam). There, this Court observed that the detaching defense counsel "did not seek the permission of the military judge to withdraw from representation in the ongoing trial *as required by the applicable rules*, see Dep't of the Navy, Judge Advocate General Instr. 5803.1C, para. 16e(2) (Nov. 4, 2004)." *Id.* at 99 (emphasis added). In this case, the detaching defense counsel failed to comply with that same requirement. Error thus occurred in this case. If that error harmed Appellant, then relief is necessary. The military judge concluded that there was no such harm, but his basis for making that ruling is clearly erroneous.

D. Appellant was harmed by a break in representation upon LtCol Vokey's commencement of terminal leave

Having correctly found error, Appellee Judge Jones proceeded to conclude that the error was harmless. But he based his conclusion on a clearly erroneous factual finding. He

wrote: "[T]he denying of the detailed status of Mr. Vokey is harmless error where the underlying attorney-client relationship remains intact. *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009). Such was the case in the accused's case." Findings of Fact and Conclusions of Law at p. 25. On the contrary, the record definitively establishes that there was a break in LtCol Vokey's representation of Appellant.[2] The following portions of the record document that break:

(1) An email sent on March 4, 2009 by Neal Puckett, Esquire, to Judge Meeks stated, in relevant part, "Mr. Vokey and

[2] Beyond this factual error, Appellee Judge Jones' finding also misconstrues *Wiechmann*. Specifically, the error in *Weichmann* was found to be harmless solely because the severed counsel continued to fully participate in all critical stages of trial, and, further, any resulting defects in his representation were explicitly waived through the pretrial agreement and guilty plea. *Wiechmann*, 67 M.J. at 463. In this case, unlike in *Wiechmann*, Appellant has *not* waived the error related to LtCol Vokey's improper severance, and, moreover, LtCol Vokey was fully severed and can no longer assist during the critical stages of trial. Finally, Appellee Judge Jones' reliance on *Wiechmann* overlooks that even if LtCol Vokey were to have continued as a *pro bono* civilian counsel, rather than as an active-duty counsel, the improper change to the nature of his attorney-client relationship with Appellant would have still been legal error. This Court has 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, 42 C.M.R 253, 254 (1970)). *See also United States v. Iverson*, 5 M.J. 440 (1978); *United States v. Tellier*, 13 C.M.A. 323, 32 C.M.R 323 (1962). An attorney-client relationship is "materially altered" when it is improperly changed from detailed defense counsel status to status as a *pro bono* civilian.

SSgt Wuterich are in the process of making arrangements for Mr. Vokey *to rejoin the defense team*, but I do not believe that relationship has been formalized." Government Argument on Defense Motion for Appropriate Relief (Abate Proceedings Until Attorney Client Relationship with Detailed Defense Counsel (LtCol Vokey) Is Restored at Encl. 1 (filed 28 April 2011) (emphasis added). That email demonstrates that LtCol Vokey had left the defense team. If he had not, there would have been no need for him to rejoin it. This is a contemporaneous document – written more than a year before the lower court's *Hutchins* decision – that compellingly demonstrates the state of the defense team in March 2009. LtCol Vokey (Ret.) was not on the defense team at that point.

(2) One week later, on March 11, 2009, Judge Meeks discussed LtCol Vokey's status with LtCol Tafoya:

> 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.

11 March 2009 Article 39(a) session transcript at 2-3 (from the record in *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)). Once again, this is a compelling contemporaneous account of LtCol Vokey's status. This colloquy also occurred more than a year before the lower court's *Hutchins* decision. At the time, there would not have appeared to be any tactical significance to the question of whether there was a break in Appellant's attorney-client relationship with LtCol Vokey. These contemporaneous accounts, free from any subconscious desire by either party to promote a particular answer to the question of LtCol Vokey's status, are highly credible. The record thus definitively indicates that a break in representation did occur.

(3) At the September 13, 2010 motions session, LtCol Vokey stated that upon commencing terminal leave, he ceased representing Appellant. *See* 13 Sept. 2010 Article 39(a) session transcript at 10-11; *see also id*. at 37.

(4) At the April 25, 2011 Article 39(a) session, LtCol Vokey testified that he "assumed that leaving active duty severed the attorney-client relationship." Transcript of 25 April 2011 Article 39(a) Session at 101. Such an assumption is consistent with the break in representation that Mr. Puckett's March 4, 2009 email and LtCol Tafoya's March 11, 2009 colloquy with Judge Meeks document.

(5) At the April 25, 2011 Article 39(a) session, LtCol Vokey testified that he was not retained by and made no appearances of behalf of Appellant between when he left active duty and March 2009. Transcript of 25 April 2011 Article 39(a) Session at 101. Again, that testimony is consistent with contemporaneous documentation from March 2009.

The break in representation is further corroborated by the fact that LtCol Vokey did not participate in any of the telephonic R.C.M. 802 conferences with Appellee Judge Jones between LtCol Vokey's retirement and March 2010. *See* 22 March 2010 Article 39(a) session transcript at 9.

Despite this evidence conclusively proving that there was a break in LtCol Vokey's representation of Appellant, Appellee Judge Jones found that there was not. Appellee Judge Jones found that "[u]pon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused . . . ." Supplemented Finding of Fact 4. That finding of fact is clearly erroneous. The Navy-Marine Corps Court's conclusion below that "the attorney-client relationship may have been strained but it was never completely severed" is similarly erroneous. *See Wuterich*, No. NMCCA 200800183, slip op. at 5.

The military judge's clearly erroneous finding of fact that LtCol Vokey provided Appellant with continuous representation substantially influenced Appellee Judge Jones' denial of the

motion to abate proceedings. Throughout his ruling, Appellee Judge Jones repeated and relied on his clearly erroneous finding that LtCol Vokey provided continuous representation to Appellant after LtCol Vokey left active duty.[3] Thus, the entire basis for Appellee Judge Jones' ruling is wrong.

E. Appellant is prejudiced by the loss of LtCol Vokey's representation

Appellant is severely prejudiced by the error in terminating LtCol Vokey's status as his detailed defense

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[3] *See, e.g.*,: (1) Supplemented Finding of Fact 6 ("Until being released at the 13 September 2010 Article 39(a) session, Mr. Vokey had continued to represent the accused, albeit in a much reduced role."; (2) Supplemented Finding of Fact 10 ("Therefore, until Mr. Vokey was released by the Court in September 2010, both original defense counsel became, in effect, civilian counsel of record and continued to represent the accused."); (3) Supplemented Finding of Fact 16 ("LtCol Vokey continued to represent the accused, albeit in a much more limited fashion until he was released in September 2010 by the Court . . . ."); (4) 31 May 2011 Findings of Fact and Conclusions of Law at p. 25 ("The attorney-client relationship existed until 15 September 2010 . . . ."); (5) 31 May 2011 Findings of Fact and Conclusions of Law at p. 27 ("Eventually, both officers elected to retire and continue representing the accused as civilian attorneys."); (6) *id.* at p. 28 n.5 ("Certainly it can be argued that the defense team had decided to release LtCol Vokey from his detailed defense counsel status but that his attorney-client relationship would continue in a civilian capacity, just as it did for Mr. Faraj."); (7) *id.* at p. 29 (Mr. Vokey continued to represent the accused for almost two years from his hiring at the law firm, albeit in a more limited fashion."); (8) *id.* ("When an attorney-client relationship persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel."); (9) *id.* at 46 ("With no end in sight for the appellate litigation, the defense counsel both assumed they had to retire, but would continue to represent the accused as civilian attorneys.").

counsel. It was only as a result of that erroneous severance that LtCol Vokey accepted employment that led to Appellee Judge Jones' September 13, 2010 ruling that LtCol Vokey was under an irreconcilable conflict leading to his second removal from Appellant's defense team. The Navy-Marine Corps Court thus erred below when it reasoned that once Appellant and LtCol Vokey reformed their attorney-client relationship, "any severance of the attorney-client relationship due to LtCol Vokey's retirement was rendered irrelevant and any possible error on the part of the Government for effectuating his retirement was vitiated and rendered harmless." *Wuterich*, No. NMCCA 200800183, slip op. at 5. Had Appellant's attorney-client relationship with LtCol Vokey not been improperly severed in August 2008 and had the Government extended LtCol Vokey on active duty, as LtCol Vokey requested and Appellant desired, LtCol Vokey would not have entered into the status that Appellee Judge Jones would rely upon to re-sever the attorney-client relationship on September 13, 2010. Thus, all of the prejudice resulting from Appellant's loss of LtCol Vokey as his counsel flows directly from what Appellee Judge Jones determined was an improper severance in 2008.

Appellant will be severely harmed if LtCol Vokey is not sitting at his counsel table during the trial. In his most recent ruling, Appellee Judge Jones minimized the importance of

LtCol Vokey's representation of Appellant. He concluded, "There is little prejudice to the defense in losing the services of Mr. Vokey." Supplemented Finding of Fact 21. He reasoned that "[t]he defense team has a videographer, who went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any relevant videos or maps of the area involved in the incident." *Id*. He later added, "Just because Mr. Vokey did a site visit to Iraq and worked on the case does not mean the accused can't get a fair trial unless Mr. Vokey is sitting at counsel table." 31 May 2011 Findings of Fact and Conclusions of Law at 47. Appellee Judge Jones overlooked that the key question is not whether Appellant can receive a fair trial without LtCol Vokey, but whether he is harmed by the errors that resulted in his loss of representation by LtCol Vokey. And the answer to that question is yes.

While Appellee Judge Jones minimized the significance of LtCol Vokey's status as the only counsel on the defense team who visited the scene of the alleged offenses, controlling case law establishes that status's significance. In *Eason*, this Court held that even though the accused was represented by civilian counsel, the detailed defense counsel was indispensible to the defense team. The *Eason* Court explained that the detailed defense counsel 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). Here, Appellee Judge Jones himself previously recognized LtCol Vokey as an "indispensible part of the team" because of his visit with Appellant to the scene of the alleged offenses. 13 Sept. 2010 Article 39(a) session transcript at 12. His conclusion made on May 31, 2011 that "[t]here is little prejudice to the defense in losing the services of Mr. Vokey," Supplemented Finding of Fact 21, conflicts with his own previous assessment of LtCol Vokey's significance to Appellant's representation.

LtCol Vokey's crucial role on the defense team distinguishes this case from both *Hutchins* and *Hohman*, where the severed defense counsel played peripheral roles on the defense team. In *Hutchins*, the critical reason this Court held that there was no prejudice was because "[n]one of the issues under the initial responsibility" of the improperly severed counsel "involved matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remained on the defense team." *Hutchins*, 69 M.J. at 292. Here, LtCol Vokey's site visit and extensive specialized preparation for this case is exactly the type of unique knowledge and expertise counsel in *Hutchins* did not have. This case is *Hutchins* with prejudice.

LtCol Vokey's status as Appellant's only counsel to have visited the scene of the alleged offenses takes on added significance in light of military and geopolitical considerations, which make it impossible for any of Appellant's current counsel to visit the site of the alleged offenses in Al Anbar Province, Iraq. Being deprived of LtCol Vokey's knowledge of the purported crime scene – with the added advantage of LtCol Vokey's knowledge as a veteran combat arms officer – is an irreparable loss to the defense team.

F. Appellee Judge Jones erred when he severed Appellant's attorney-client relationship a second time based on his erroneous determination that an "irreconcilable" conflict prevents LtCol Vokey from ever representing Appellant

A second erroneous severance of Appellant's attorney-client relationship with LtCol Vokey (Ret.) occurred on September 13, 2010. On that date, the military judge granted LtCol Vokey's request to withdraw, thereby effectively severing the Appellant's attorney-client relationship with him for a second time. The military judge granted the withdrawal due to what he perceived to be an irreconcilable conflict that prevented LtCol Vokey from continuing to represent Appellant. The military judge's characterization of the conflict as "irreconcilable," however, was legally erroneous. And that error led the military judge to improperly order Appellant's attorney-client relationship with Appellant severed rather than taking

appropriate action to preserve the attorney-client relationship, as dictated by controlling precedent. *See*, *e.g.*, *Iverson*, 5 M.J. at 442-43 ("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 record establishes that the conflict that currently affects LtCol Vokey's representation of Appellant is solely an imputed disqualification arising from his law firm's former representation of Sgt Salinas. *See* 13 Sept. 2010 Article 39(a) session transcript at 14. While Appellee Judge Jones concluded that there was an actual conflict, he reached that conclusion on the basis that LtCol Vokey has an adverse interest with Sgt Salinas and he works for a firm that represents Sgt Salinas. *See* 31 May 2011 Findings of Fact and Conclusions of Law at 31.[4] That is the very definition of an imputed disqualification. *See* ABA Model Rule of Professional Conduct 1.10. LtCol Vokey has no personal conflict as he does not now represent and has never represented Sgt Salinas. But for the fact that other members of his firm represented Sgt Salinas, he would be free to represent

[4] Appellee Judge Jones made no findings of fact suggesting that LtCol Vokey had acquired any privileged information concerning Sgt Salinas, nor would any such finding have been supported by the record.

Appellant without limitation. The military judge thus clearly erred by concluding that an actual conflict exists. There is no actual conflict that limits LtCol Vokey's representation of Appellant. On the contrary, the firm screened off LtCol Vokey from the *Salinas* case, thereby preventing an actual conflict from developing. 13 Sept. 2010 Article 39(a) session transcript at 14. To the extent that a conflict exists, it is an imputed conflict. And that imputed disqualification could be resolved in a number of ways, thereby vindicating Appellant's right to continued representation by LtCol Vokey. *See Iverson,* 5 M.J. at 442-43.

If proceedings were to be abated, it would be up to Appellee United States to choose the optimal method of restoring Appellant's attorney-client relationship with LtCol Vokey. Appellee United States routinely procures trial defense counsel services through numerous means, several of which could allow Appellant's attorney-client relationship with LtCol Vokey to be reestablished. But the existence of merely one such means is sufficient to disprove Appellee Judge Jones' characterization of any conflict purportedly barring LtCol Vokey from representing Appellant as "irreconcilable." One such obvious means is recalling LtCol Vokey to active duty. Although Appellee Judge Jones rejected this possibility, *see* 31 May 2011 Findings of

Fact and Conclusions of Law at pp. 43-44, his analysis was permeated with error.

First, recalling LtCol Vokey to active duty would eliminate any ethical issue concerning his representation of Appellant. If LtCol Vokey were recalled to active duty, he would be governed by the Navy Rules of Professional Conduct, JAGINST 5803.1C (9 Nov 04), not by the Texas Disciplinary Rules of Professional Conduct. *See* Navy Rule of Professional Conduct 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."). Thus, Appellee Judge Jones' extended analysis of the Texas Disciplinary Rules of Professional Conduct would become irrelevant. Indeed, the Texas Rules themselves support the conclusion that they would become irrelevant were LtCol Vokey to be recalled to active duty. Comment 3 to Texas Rule 8.05, the Rules' choice of law provision, explains:

> If the rules of professional conduct of this state and that [of] other jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction and these jurisdictions impose conflicting obligations. A related problem arises with respect to practice before a federal tribunal,

> where the general authority of the state to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them. In such cases, this state will not impose discipline for conduct arising in connection with the practice of law in another jurisdiction or resulting in lawyer discipline in another jurisdiction unless the conduct constitutes professional misconduct under Rule 8.04.

Thus, the Department of the Navy's Rules of Professional Conduct, not the Texas Rules, would govern LtCol Vokey if he were to be recalled to active duty.

Under the Navy Rules, LtCol Vokey would become a United States Government Attorney upon his recall. *See* JAGINST 5803.1C, ¶4.b (defining "covered USG attorneys" to include all active duty Marine Corps judge advocates). And there is no automatic imputed disqualification for United States Government attorneys under the Navy Rules. *See* R. 1.10. In fact, rejection of a per se imputed disqualification rule is a long-standing aspect of the military justice system that has been endorsed by the American Bar Association. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 343 (1977); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972).

The Navy-Marine Corps Court's opinion below theorized that if recalled to active duty, LtCol Vokey might refuse to represent Appellant despite being ordered to do so. *Wuterich*, No. NMCCA 200800183, slip op. at 7. Such a possibility is

farfetched since such a refusal would be both an ethical violation and a criminal offense under the Uniform Code of Military Justice. *See* Navy Rules 1.1 ("A covered attorney shall provide competent, diligent, and prompt representation to a client."); 1.3 ("A covered attorney shall act with reasonable diligence and promptness in representing a client"); Art. 92, UCMJ, 10 U.S.C. § 892 (2006) ("Any person subject to this chapter who . . . is derelict in the performance of his duties; shall be punished as a court-martial may direct."). Military lawyers, no doubt including many licensed in Texas, routinely represent clients who have conflicts with other clients represented by other judge advocates in the same office despite imputed disqualification provisions in their licensing states' rules of professional conduct. And the Navy Rules expressly tell those lawyers that the military's rejection of an imputed conflict disqualification rule trumps any state rule to the contrary. It is likely that during the course of his storied Marine Corps legal career, LtCol Vokey himself represented clients under circumstances inconsistent with Texas's imputed disqualification rule. There is no reason to believe that LtCol Vokey would refuse to do so again if recalled to active duty. Yet the Navy-Marine Corps Court described the wildly implausible scenario of LtCol Vokey declaring a work stoppage as the "most likely" outcome of Appellant's requested writ. *Wuterich*, No.

NMCCA 200800183, slip op. at 7. This Court should decline to assume that LtCol Vokey would fail to perform the duties he is ordered to execute. Indeed, the Navy-Marine Corps Court's doomsday scenario ignores that LtCol Vokey himself previously indicated his willingness to be recalled to active duty to represent Appellant. *See* Appellate Exhibit CXVII at 33.

Appellee Judge Jones' ruling also raised concerns about LtCol Vokey's ability to retain his employment with his current firm if he were recalled to active duty to represent Appellant. *See* 31 May 2011 Findings of Fact and Conclusions of Law at p. 41. For example, Appellee Judge Jones wrote: "Mr. Vokey is in a difficult position; he wants to help his client, but he doesn't seem to want to be recalled to active duty and leave (forfeit?) his job at the Fitzpatrick law firm." *Id.* Appellee Judge Jones overlooked that if LtCol Vokey were to be recalled to active duty to represent Appellant, he would have a statutory right to reemployment at the Fitzpatrick law firm with no resulting adverse effects. *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.”). Thus, representing Appellant in a retired recalled status would eliminate any conflict that might otherwise exist between LtCol Vokey’s employment interests and representing Appellant.

Appellee Judge Jones also questioned the United States’ ability to recall LtCol Vokey to active duty. But his analysis of this question was marred by misquotations and misconstructions of governing authorities as well as reliance on a canceled regulation.

Appellee United States 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 Appellee United States to restore Appellant’s attorney-client relationship with LtCol Vokey (Ret.) by recalling the latter to active duty.

The administrative burden of recalling one retired lieutenant colonel to active duty would be slight. But even if it were not, administrative inconvenience would not justify interference with the continuation of a properly formed

attorney-client relationship. "Although there may be a 'financial, logistical, [or] ... administrative burden' associated with providing representation by the military counsel with whom an accused has formed an attorney-client relationship, 'it is the duty and obligation of the Government to shoulder that burden where possible.'" *United States v. Spriggs*, 52 M.J. 235, 240 (C.A.A.F. 2000) (alterations in original) (quoting *Eason,* 21 C.M.A. at 340, 45 C.M.R. at 114).

Appellee Judge Jones' erroneous conclusion that LtCol Vokey could not be recalled to active duty[5] was based in part on a misconstruction of a Department of Defense Directive. He wrote: "Paragraph 4.2 of DOD Directive 1352.1 states that members of the Department of Defense should only use retirees to meet national security needs." 31 May 2011 Findings of Fact and Conclusions of Law at p. 43. Actually, it does not. It states: "The DoD Components and the Commandant of the U.S. Coast Guard shall plan to use as many retirees as necessary to meet national security needs." Dep't Defense Dir. 1352.1, ¶ 4.2 (16 July 2005). So rather than *limiting* the purposes for which retirees may be recalled, Paragraph 4.2 is actually a policy statement *encouraging* the recall of retirees. It does not prohibit the involuntary recall of retirees for purposes other than meeting

[5] *See* 31 May 2011 Findings of Fact and Conclusions of Law at p. 44.

national security needs. But even if it did, recalling LtCol Vokey to represent Appellant would qualify. The President of the United States has concluded that military justice is a national security function. The President has stated: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. I, ¶ 3 (2008 ed.) [hereinafter MCM]. Thus, recalling LtCol Vokey to active duty to play a key role in a court-martial would be a means of strengthening the United States' national security.

Appellee Judge Jones also sought to rely on SECNAVINST 1300.14B. 31 May 2011 Findings of Fact and Conclusions of Law at 24, 44. But that regulation was canceled pursuant to ALVAV 093/04, which listed SECNAVINST 1300.14B as an Instruction to be delegated to the Navy and Marine Corps and canceled upon publication of an appropriate replacement. The subject matter of SECNAVINST 1300.14B now appears to be governed by MCO 3000.19A (25 August 2010), which does not include the language upon which Appellee Judge Jones sought to rely from the canceled SECNAVINST. This once against demonstrates that Appellee Judge Jones' ruling was influenced by an erroneous view of the law.

Moreover, Appellee Judge Jones adopted the Government's argument that recalling LtCol Vokey to active duty to represent a single accused would not be in the national defense interest. 31 May 2011 Findings of Fact and Conclusions of Law at 44 n.15. That view, however, is inconsistent with the view of the President of the United States. *See* MCM, Pt. 1, ¶ 3. Moreover, Appelee Judge Jones overlooked that if proceedings were abated until Appellant's attorney-client relationship with LtCol Vokey is restored, then recalling LtCol Vokey would not serve merely the interests of Appellant, but also the interests of the United States, since it would allow the United States to continue with its prosecution of Appellant. And the record establishes that a precedent exists for involuntarily recalling a retired Marine to active duty for the purpose of prosecuting him. *See* 31 May 2011 Findings of Fact and Conclusions of Law at 44 ("As indicated by the affidavit of Mr. Tate, Head of Retired List Maintenance and Support Section, Manpower Management Separations and Retirement (MMSR), there has only been one instance where a Marine was [involuntarily] recalled to active duty and that was to face court-martial himself."). If facilitating that one court-martial was in the interests of national defense, there is no reason why facilitating Appellant's court-martial would not also be. In fact, General Mattis has characterized the *Wuterich* case as "one of the most significant Marine Corps cases since

Vietnam." LtCol Sean Sullivan sanctuary package, Gen Mattis endrsmnt dtd 17 Mar 2009. Facilitating the trial of such a significant case would certainly be an authorized purpose for the Secretary of the Navy to involuntarily recall a retiree to active duty.

There can be no serious question that the Secretary of the Navy has the power to involuntarily recall LtCol Vokey to active duty for the purpose of representing Appellant at his court-martial. It may not even be necessary to involuntarily recall LtCol Vokey (Ret.) to active duty since he previously indicated his willingness to be recalled to active duty to once again represent Appellant. *See* Appellate Exhibit CXVII at 33. Recalling LtCol Vokey to active duty either voluntarily or involuntarily would eliminate any ethical limitations that might currently prevent his ability to represent Appellant. Accordingly, there is no irreconcilable conflict preventing the restoration of Appellant's attorney-client relationship with LtCol Vokey. Appellee Judge Jones therefore erred by concluding that such an irreconcilable conflict existed.

In denying Appellant's petition for extraordinary relief below, the Navy-Marine Corps Court observed that "[t]he Government has no responsibility to call LtCol Vokey back to active duty at this point." *Wuterich*, No. NMCCA 200800183, slip op. at 7. But Appellant did not ask the lower court to order

the Government to recall LtCol Vokey to active duty, nor does Appellant ask this Court to do so. Appellant has merely offered the possibility of LtCol Vokey's recall to active duty as one means of restoring his improperly severed attorney-client relationship. Several other possible means exist. If proceedings are ordered abated, it will be up to the Government to choose which of those means to implement.

G. Erroneous interference with an attorney-client relationship is uniquely appropriate for redress via a writ

This Court's case law establishes the appropriateness of resolving right-to-counsel issues through the mechanism of a petition for extraordinary relief. For example, in *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (summary disposition), this Court granted a writ appeal to allow continued post-trial representation by the accused's civilian defense counsel, who had previously represented the accused as an active duty Navy JAG Corps officer. And in *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003) (summary disposition), this Court ordered further proceedings to determine whether the accused's civilian defense counsel was disqualified from further representation because of a conflict of interest. *See also, e.g.*, *United States v. Wilson*, 54 M.J. 450 (C.A.A.F. 2001) (summary disposition) (granting writ appeal to allow current defense counsel to communicate with former defense counsel);

United States v. Schmidt, 60 M.J. 1 (C.A.A.F. 2004) (per curiam) (granting writ appeal to lift restrictions on an accused's communications with his counsel); *Lovett v. United States*, 64 M.J. 232 (C.A.A.F. 2006) (summary disposition) (granting mandamus petition to order the Judge Advocate General of the Air Force to provide appellate defense counsel "to represent Petitioner for the purposes of review of his court-martial under Article 67a, UCMJ").

A case such as this, which, like *Nguyen* and *Shadwell*, concerns the appropriateness of an attempt to sever an attorney-client relationship over the accused's objection, is demonstrably the type of rare case in which extraordinary relief is appropriate. It is far better for both parties to definitively resolve this issue now rather than have Appellant be tried with the specter of a re-trial due to the loss of LtCol Vokey's indispensible services lurking in the shadows of the trial courtroom.

H. Appellant did not invite the erroneous deprivation of his attorney-client relationship with LtCol Vokey

In its opinion denying relief below, the Navy-Marine Corps Court cited the invited error doctrine. *Wuterich*, No. NMCCA 200800183, slip op. at 6-7. But this Court's case law establishes that when an attorney-client relationship is improperly severed by the defense counsel's actions without the client's consent, the invited error doctrine does not apply. As the military judge found, Appellant has always wanted to retain LtCol Vokey as his counsel. *See, e.g.*, Finding of Fact 6, Findings of Fact and Conclusions of Law, Motion to Dismiss for Violation of Right of Detailed Counsel (26 October 2010) ("The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case."). And, as the military judge found, Appellant was not given legally required advice before, or even after, LtCol Vokey commenced terminal leave, thereby terminating his status as Appellant's detailed defense counsel. *See* Supplemental Finding of Fact 18; Findings of Fact and Conclusions of Law at p. 25, 28 n.5. LtCol Vokey's departure from the defense team was presented to Appellant as a fait accompli. *See* March 11, 2009 Article 39(a) session transcript at 2-3. Being presented with a fait accompli is hardly an invitation for a violation of one's rights. The violation of Appellant's right to continued representation by LtCol

Vokey occurred over Appellant's protestations, not at his invitation.

If LtCol Vokey's actions constituted invited error attributable to Appellant, then Capt Bass and Sgt Hutchins' other trial defense counsel would have similarly invited the error in *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Yet, in *Hutchins*, this Court did not apply invited error. Rather, it held that "the record of trial does not establish a valid basis for such termination under the circumstances of this case" and then performed a prejudice analysis. *Id.* at 284. That same course is appropriate in this case.

I. Appellant's right to counsel must not be made contingent on actions by third parties over whom Appellant has no control.

Finally, in its opinion denying extraordinary relief below, the Navy-Marine Corps Court observed, "We note that the record stands as anemic relative to any grant of waiver of conflict by the Petitioner – and that would have cured LtCol Vokey's ethical preclusion and realized Petitioner's ongoing desire for his representation." *Wuterich*, No. NMCCA 200800183, slip op. at 5. But that observation is, of course, wrong. Appellant's waiver of a conflict with Sgt Salinas would be meaningless without Sgt Salina's waiver of the conflict. Appellant's waiver would cure nothing. And Appellant has no means to compel Sgt Salinas to waive the conflict.

Appellant's right to continued representation by his counsel is not subject to veto by the actions or inactions of a third party over whom he has no control. Appellee United States – which is, unlike Sgt Salinas, a party in this case – has means available to restore Appellant's improperly severed attorney-client relationship with LtCol Vokey that are not subject to third parties' control. Appellee Judge Jones erred by refusing to abate the proceedings until Appellee United States implements one of those means.

Conclusion

For the foregoing reasons, this Court should issue a writ of mandamus requiring Appellee Judge Jones to abate further proceedings in this case until Appellant's improperly severed attorney-client relationship with LtCol Vokey is restored.

VII.

Appellees' Addresses, Telephone and Facsimile Numbers

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September 2, 2011

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September 2, 2011