

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

Frank D. Wuterich,)	PETITION FOR EXTRAORDINARY
Staff Sergeant (E-6))	RELIEF IN THE NATURE OF A STAY
United States Marine Corps,)	OF COURT-MARTIAL PROCEEDINGS
Petitioner)	AND BRIEF IN SUPPORT
)	
v.)	Case No. _____
)	
)	
)	
David M. Jones)	
Lieutenant Colonel,)	
United States Marine Corps,)	
(in his official capacity as)	
Military Judge),)	
Respondent.)	

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

COMES NOW Petitioner Staff Sergeant (SSgt) Frank D. Wuterich, United States Marine Corps, by and through his undersigned counsel, and pursuant to Rule 20 of the Joint Courts of Criminal Appeals Rules of Practice and Procedure files this petition for extraordinary relief in the nature of a stay of court-martial proceedings and brief in support.

Relief Sought

Petitioner seeks a stay of his court-martial proceedings pending: (1) the military judge's issuance of findings of fact and conclusions of law concerning his e-mailed denial of Petitioner's motion for appropriate relief arising from the severance of his attorney-client relationship with detailed

military counsel; and (2) Petitioner's filing of a petition for extraordinary relief challenging that denial.

Statement of the Issue

Where an accused's attorney-client relationship with his detailed military defense counsel was severed due to the Marine Corps' refusal to extend the detailed military defense counsel on active duty and where the military judge summarily denies a motion for appropriate relief, should this Court stay the proceedings until: (1) the military judge issues findings of fact and conclusions of law; and (2) the accused files a petition for extraordinary relief challenging that ruling?

Summary of Argument

This Court should stay Petitioner's court-martial proceedings to provide an opportunity for Petitioner to seek extraordinary relief arising from the severance of his attorney-client relationship with his original detailed military defense counsel.

Thirty-one days after holding a hearing on Petitioner's motion for extraordinary relief arising from the severance of his attorney-client relationship with his original detailed military defense counsel, the military judge sent the parties an e-mail summarily denying that motion. He explained that he would put his ruling on the record on 2 November, the day before member selection in Petitioner's contested court-martial is scheduled to commence.

Waiting for the military judge to rule immediately before the commencement of Petitioner's contested court-martial would deprive the defense of any realistic opportunity to challenge that ruling by filing a petition for extraordinary relief with this Court. This Court should issue a stay of proceedings to ensure that Petitioner has the ability to vindicate his fundamental right to "*the continuation of an established attorney-client relationship.*" *United States v. Hutchins*, 68 M.J. 623, 627 (N-M. Ct. Crim. App.) (en banc), *certificate for review filed*, 69 M.J. 180 (C.A.A.F. 2010) (quoting *United States v. Baca*, 27 M.J. 110, 118 (C.M.A.1988)) (emphasis supplied by *Hutchins*).

A stay is particularly appropriate because Petitioner will likely succeed if he is able to file a petition for extraordinary relief challenging the denial of his motion. The severance of his attorney-client relationship was impermissible under the law provided by this Court's recent landmark en banc ruling in *United States v. Hutchins*. Additionally, military appellate case law establishes that extraordinary relief is appropriate to address the kind of interference with an accused's counsel rights that this case presents.

A stay of proceedings is also appropriate because if the trial were to be held and it were determined later that an improper severance occurred, the remedy would be reversal of the

findings and sentence. It would be undesirable to devote the considerable resources necessary to try this case only to have to try it again if an appellate court were to rule that there was an improper severance of Petitioner's attorney-client relationship with his detailed military defense counsel.

A stay is further appropriate because the law governing Petitioner's claim is still under active development. The Judge Advocate General of the Navy certified this Court's *Hutchins* ruling to the Court of Appeals for the Armed Forces, which heard oral argument in the case on 13 October 2010. The Court of Appeals for the Armed Forces' ruling in that case may make even more apparent that Respondent Judge Jones erred by denying Petitioner's motion for appropriate relief.

A stay of proceedings is further appropriate to preserve the military justice system's appearance of fairness. The Marine Corps took the extraordinary step of allowing the lead prosecutor in this case - a mobilized reservist - to enter "sanctuary" status, which will allow him to remain on active duty long enough to obtain an active duty retirement. Yet the Marine Corps refused to take the far more modest step of approving Petitioner's military defense counsel's request to push back their retirement dates to avoid severing their attorney-client relationships with Petitioner. This creates the appearance - and perhaps the reality - that the Government has

exploited its control over personnel decisions to protect its own continuity of counsel while scuttling Petitioner's.

Finally, in this case - where the original charges were preferred almost four years ago and where the prosecution has already obtained two stays of proceedings to pursue evidence that is largely redundant with other evidence already in its possession - the modest delay resulting from a stay of proceedings to ensure protection of Petitioner's fundamental right to continuity of representation would be inconsequential.

A balance of the interests implicated thus decisively favors staying the court-martial proceedings to allow Respondent Judge Jones' denial of Petitioner's motion to be challenged via a petition for extraordinary relief once Respondent Judge Jones has issued his findings of fact and conclusions of law in support of his ruling.

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 Petitioner 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 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (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).

Military appellate courts' authority to stay court-martial proceedings is well-established.¹ This Court has exercised that authority to stay court-martial proceedings on many occasions.²

¹ See, e.g., *United States v. Savala*, 69 M.J. 178 (C.A.A.F. 2010) (granting motion to stay sentencing hearing pending Court of Appeals for the Armed Forces' resolution of interim appeal); *United States v. Neal*, 68 M.J. 177 (C.A.A.F. 2009) (granting motion to stay trial proceedings until further order of the Court); *Webb v. Hogg*, 67 M.J. 382 (C.A.A.F. 2009) (granting appellant's motion to stay proceedings pending further order of the Court); *United States v. Aguilar*, 66 M.J. 291 (C.A.A.F. 2008) (granting stay of court-martial proceedings); *United States v. Ratliff*, 65 M.J. 468 (C.A.A.F. 2007) (staying court-martial proceedings pending further order of the Court).

² See, e.g., *Thomas v. United States*, No. NMCCA 200700261, 2007 WL 1775121 (N-M. Ct. Crim. App. Apr. 27, 2007) (noting that "[o]n 23 March 2007, we granted the petitioner's request for a stay until further order of this Court"); *Black v. United States*, No. NMCCA 200600043, 2006 WL 1370962 (N-M. Ct. Crim. App. May 15, 2006) (noting that the petitioner "requested a stay of proceedings pending this court's resolution of these, issues, which we granted"); *Leon v. United States*, No. NMCCA 200501632, 2006 WL 83416 (N-M. Ct. Crim. App. Jan. 6, 2006) (noting that "we granted the petitioner's request for a stay until further order of this court"); *Graves v. United States*, No. NMCCA 200501108, 2005 WL 2105406 (N-M. Ct. Crim. App. Aug. 26, 2005) (noting that "[w]e issued an Order staying the proceedings").

Previous History

Charges were preferred against Petitioner on 21 December 2006 and referred for trial by general court-martial on 27 December 2007. Petitioner is charged with several offenses arising from his actions during combat operations on a patrol in Haditha, Iraq on 19 November 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). Petitioner'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 3 November 2010 at Camp Pendleton.

No prior actions have been filed or are pending seeking the same relief in this or any other court.

Statement of Facts

No record of trial is currently available in this case. The facts set out below are established by the evidentiary hearing that was held on 20 and 21 September 2010.

A. LtCol Vokey's representation of Petitioner

In January 2006 – almost a year before charges against Petitioner were sworn and almost two years before the charges were referred for trial by a general court-martial – both Lieutenant Colonel (LtCol) Colby Vokey and Major (Maj) Haytham Faraj were detailed to represent Petitioner. At the time of his detailing, LtCol Vokey was serving as the Regional Defense Counsel for the Western Region. Maj Faraj was the Senior Defense Counsel at Legal Team Echo, Camp Pendleton, California. Both officers were scheduled to retire from active duty on February 1, 2008.

Upon being detailed to the case, then-LtCol Vokey began to prepare Petitioner's case for possible trial by court-martial. He and Maj Faraj interviewed witnesses, read investigation reports, consulted with experts, and prepared to visit the scene of the alleged offenses. LtCol Vokey conducted regular and frequent meetings with Petitioner. LtCol Vokey also interviewed many witnesses. And he participated in representing Petitioner at the Article 32 investigation hearing.

On 18 February 2008, LtCol Vokey traveled along with Petitioner to Haditha, Iraq to investigate the case. LtCol Vokey walked through the houses where the alleged offenses occurred. He walked through the town of Haditha and took photographs. He traveled by foot and vehicle along Routes Viper

and Chestnut. He studied the terrain, visibility from the roads, distances to the houses, and environmental conditions. He deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses. Throughout the site visit and the conduct of the depositions, Petitioner accompanied LtCol Vokey, providing him with key information and assisting him in his survey of the area and his witness interviews. LtCol Vokey is the only defense counsel for Petitioner who has ever conducted such a site visit.

LtCol Vokey was also responsible for a sizable portion of the case preparation. He interviewed numerous witnesses who are located in the United States. And he spent literally hundreds of hours getting to know Petitioner and his family to better understand his character and personality to enhance advocacy on his behalf.

- B. The Government's denial of LtCol Vokey's request to remain on active duty to continue to represent Petitioner

Trial in this case was originally set for early March 2008. Recognizing that their planned retirement dates would render them unavailable to serve as detailed defense counsel at trial, both LtCol Vokey and Maj Faraj requested to extend their active service until 1 May 2008, to allow sufficient time to complete the scheduled trial.

In February 2008, after the military judge quashed a subpoena seeking outtakes from an interview that the CBS television show 60 Minutes taped with Petitioner, the Government filed an Article 62 appeal, resulting in an automatic stay of court-martial proceedings.

On 20 June 2008, this Court reversed the military judge's order quashing the subpoena to 60 Minutes. Ten days later, Petitioner submitted a petition to the Court of Appeals for the Armed Forces seeking review of this Court's decision. *United States v. Wuterich*, 66 M.J. 498 (C.A.A.F. 2008). The Court of Appeals for the Armed Forces heard oral argument in the case on 17 September 2008 and issued an opinion on 17 November 2008. That decision vacated this Court's decision while also reversing the military judge's quashal of the subpoena. While not formally stayed during the proceedings before the Court of Appeals for the Armed Forces, the trial did not resume during that appeal.

During the March to April 2008 timeframe, both LtCol Vokey and Maj Faraj sought and were granted further extensions of their active duty time until 1 June 2008.

Maj Faraj subsequently sought and was granted another extension on his active duty time until 1 August 2008.

LtCol Vokey sought and was granted two additional extensions, resulting in a retirement date of 1 November 2008.

But Col Patrick Redmon - the Deputy Director of Headquarters Marine Corps' Manpower section - warned LtCol Vokey that further requests for extensions would be denied. Lt Col Vokey explained to Col Redmon that his extensions were necessary to allow him to continue to represent Petitioner as he was required to do based on the Uniform Code of Military Justice and his obligations to his client established by his state bar's rules of professional responsibility. Col Redmon was not persuaded and directed LtCol Vokey to conduct a turnover with his relief. LtCol Vokey shared Col Redmon's response with Maj Faraj. Both LtCol Vokey and Maj Faraj then ceased their efforts to obtain further extensions of their active duty retirement dates.

During the period when he remained uncertain as to how long he would be permitted to extend on active duty, LtCol Vokey sent his family to his home state of Texas. LtCol Vokey moved a towable trailer to the camp grounds at Lake O'Neill aboard Camp Pendleton to live in as he awaited trial. LtCol Vokey was devoted to representing Petitioner and Petitioner was wholly satisfied with that representation. With Petitioner as his sole client, LtCol Vokey devoted all his working hours to preparing the case. After Col Redmon made his final denial of LtCol Vokey's extension request, LtCol Vokey packed the remainder of his personal effects and left the Camp Pendleton area in August of 2008. He called Petitioner to notify him that he was being

forced to leave. Petitioner was left wondering what happened to his lawyers, and voiced that concern.

Maj Faraj resigned his commission with an effective date of 1 August 2008 and left active duty.

LtCol Vokey was officially retired on 1 November 2008.

Neither LtCol Vokey nor Maj Faraj appeared before any Court to be excused from further representation of Petitioner.

The original military judge, LtCol Meeks, conducted no inquiry of Petitioner regarding the excusal of his two detailed counsel.

The Officer in Charge of the 1st Marine Logistics Group's Legal Services Support Section, LtCol Mark Jamison, was aware of both Maj Faraj and LtCol Vokey's impending departures from active duty.

Col Joyce, who was then the Chief Defense Counsel of the Marine Corps, was informed by LtCol Vokey of his attempt to extend on active duty for the purpose of continuing to represent Petitioner. Col Joyce reported to the Staff Judge Advocate to the Commandant of the Marine Corps [hereinafter "SJA to CMC"].

Both LtCol Vokey and Maj Faraj belonged to Headquarters and Services Battalion, which is a subordinate unit of Marine Corps Base, Camp Pendleton. When LtCol Vokey and Maj Faraj requested extensions, either formally or informally, such requests were forwarded through their administrative chain of command at

Headquarters and Services Battalion, Marine Corps Base, Camp Pendleton.

Petitioner has never released LtCol Vokey and Maj Faraj as his counsel. Petitioner has never wanted to release either of them and does not desire to do so to this day. Rather, he affirmatively desires and requests that both LtCol Vokey and Maj Faraj continue to represent him as detailed defense counsel.

The current military judge has never conducted an inquiry of Petitioner regarding the excusal of his two detailed defense counsel.

C. The Government's extension of the trial counsel to allow him to enter "sanctuary" status

LtCol Sean Sullivan is the lead trial counsel in this case. He is a Reserve officer who was mobilized for the specific purpose of prosecuting Petitioner and other Marines for actions during or arising in connection with combat operations in Haditha, Iraq on 19 November 2005. Upon his mobilization for active duty, LtCol Sullivan was made head of a special prosecution team known as "Legal Team Charlie," which was created for the specific purpose of trying alleged war crime cases arising from the combat operations in Haditha, as well as unrelated alleged war crimes allegedly committed in Hamdaniya, Iraq. Legal Team Charlie was made up at various times of

between 8 and 10 prosecutors, several of whom are mobilized reserve officers.

In March of 2009, LtCol Sullivan sought and obtained sanctuary so that he may continue serving as an active duty officer until he becomes eligible for retirement. To obtain sanctuary, an officer must submit an application for sanctuary along with endorsements supporting that request. LtCol Sullivan's sanctuary application included endorsements from General John Mattis, Commander, Joint Forces Command; LtGen Helland, Commander, United States Marine Corps Forces Central Command; Brigadier General Walker, SJA to CMC; and LtCol Jamison, the 1st Marine Logistics Group Legal Services Support Section's OIC.

Another trial counsel in the case, Major N. L. Gannon, USMC, has been kept in the same location for over four years to prosecute the case, another unusual personnel decision that has the effect of promoting the Government's continuity of counsel in this case.

D. LtCol Vokey's post-retirement representation of Petitioner

After his final extension request was denied, Lt Col Vokey received a job offer in October 2008 with the law firm of Fitzpatrick, Hagood, Smith and Uhl, LLP. That firm represented Sgt Hector Salinas. Sgt Salinas was alleged to have shot at

individuals in Haditha on 19 November 2005. Sgt Salinas was also the only Marine to witness a sniper firing from the vicinity of one of the houses in Haditha. It was at Sgt Salinas's recommendation that Petitioner's platoon leader authorized the clearing of the Iraqi houses to the south of the site of the initial attack on the Marines.

Recognizing the conflict between his representation of Petitioner and employment with the law firm representing a witness who may be adversarial in the case, LtCol Vokey discussed with Petitioner the fact that a conflict now existed.

On 22 March 2009 - after the Government's first Article 62 appeal but before its second - an Article 39(a) session was held to hear motions. LtCol Vokey or Maj Faraj were both present as civilian counsel, though neither filed a notice of appearance. Petitioner was also represented by civilian defense counsel Neal Puckett, Esq., and Mark Zaid, Esq., along with LtCol Patricio Tafoya and Captain Nute Bonner as military defense counsel.

During Article 39(a) sessions on 13 and 14 May 2010 - after the litigation concerning the second Article 62 appeals was complete - LtCol Vokey made an appearance as a civilian counsel though he did not actively participate. After that appearance, the defense team realized the conflict that now existed between LtCol Vokey and Petitioner.

E. The defense's litigation of the severance of attorney-client relationship issue

On 26 August 2010, the defense filed a Motion for Appropriate Relief to Dismiss All Charges and Specifications for Violation of Right to Detailed Counsel. The Government filed its opposition on 13 September 2010.

Respondent Judge Jones held an Article 39(a) session to receive evidence and hear argument on the motion on 20 and 21 September 2010.

Thirty-one days after the motion hearing, in an e-mail to counsel with the subject "Ruling on Motion" dated 22 October 2010, 5:28:16 AM EDT, Respondent 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."

Reasons this Court Should Issue a Stay

It is necessary and appropriate for this Court to stay court-martial proceedings pending: (1) the military judge's issuance of findings of fact and conclusions of law concerning his denial of the defense's motion concerning severance of Petitioner's attorney-client relationship with his detailed military defense counsel; and (2) Petitioner filing a petition for extraordinary relief seeking this Court's review of the

merits of the counsel issue once those conclusions of law and findings of fact are available.

- A. A stay is appropriate due to the fundamental importance of the continuation of an established attorney-client relationship

As this Court, sitting en banc, recently emphasized, "[T]he continuation of an established attorney-client relationship is fundamental in the military justice system." *Hutchins*, 68 M.J. ay 627 (quoting *Baca*, 27 M.J. at 118) (emphasis supplied by *Hutchins*). A stay is necessary to ensure that Petitioner is not erroneously tried while being deprived of his fundamental right to the continuation of his established attorney-client relationship with his original detailed military defense counsel, LtCol Colby Vokey, USMC (Ret.).

Furthermore, it is likely that Petitioner would prevail if proceedings were stayed to allow him to challenge Judge Jones' ruling via a petition for extraordinary relief. This Court has ruled that good cause to sever an attorney-client relationship "must be based on a 'truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship.'" *Hutchins*, 68 M.J. at 628 (quoting *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978)). This is not such a case. Rather, means existed to avoid Petitioner's loss of LtCol Vokey as his detailed military defense counsel. And means exist to restore LtCol Vokey to that status today, including

placing LtCol Vokey in a retired recalled status, which could also eliminate any imputed disqualification basis for LtCol Vokey's disqualification that might otherwise exist. See Navy Rule of Professional Conduct 1.10, JAGINST 5803.1C (9 Nov 2004).

In *Hutchins*, this Court concluded that "[n]o good cause existed to sever the attorney-client relationship." *Id.* The severance is even less justified in this case, where the original detailed military defense counsel repeatedly sought extension on active duty to facilitate his continued representation of Petitioner. And just as was the case in *Hutchins*, this is a homicide case in which the detailed military defense counsel "participated in [years] of defense consultation and planning efforts" during which he "participated in the ongoing development of trial strategy, contributed to the decision-making process which defined the anticipated contribution of each counsel, and earned the [accused's] trust." *Id.* at 629. Here, the severed counsel's importance was actually far greater to the defense team, since LtCol Vokey was the only defense counsel to travel to the site of the alleged offenses, view the alleged crime scene, and interview key witnesses.

As this Court held in *Hutchins*, "EAS, standing alone, cannot be used as a basis to sever an existing attorney-client relationship in this case after nearly a year of preparatory work and mere weeks before commencement of a general court-

martial for murder." *Id.* Nor can LtCol Vokey's separation over his own and Petitioner's objections be used as the basis for severing Petitioner's then-existing attorney-client relationship with LtCol Vokey. And the Government's responsibility for that severance is even greater here than in *Hutchins*, where the "trial defense counsel had not requested an extension of his service." *Id.*

Petitioner's likelihood of success is further demonstrated by the fact that interference with the right to counsel is one of the few areas of the law where military appellate courts have granted extraordinary relief since *Clinton v. Goldsmith*, 526 U.S. 529 (1999). For example, in *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (summary disposition), the Court of Appeals for the Armed Forces reversed this Court and 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), the Court of Appeals for the Armed Forces reversed this Court and ordered further proceedings to determine whether the accused's civilian defense counsel was disqualified from further representation because of a conflict of interest. A case such as this, which, like *Nguyen* and *Shadwell*, involves questions concerning 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.

- B. A stay is appropriate due to the extreme consequences of erroneously being tried following an improper severance of an attorney-client relationship

Staying the proceedings to allow Petitioner to challenge Judge Jones' ruling via a petition for extraordinary relief is also appropriate because the consequences of an erroneous ruling are so severe. This Court has observed that "[i]n cases involving severance of an existing attorney/client relationship by someone other than the appellant or the defense team," the Court of Appeals for the Armed Forces "has consistently opined that, due to the unique nature of defense counsel, appellate courts will not engage in 'nice calculations as to the existence of prejudice'... but will instead presume prejudice." *Hutchins*, 68 M.J. at 630 (quoting *Baca*, 27 M.J. at 119). This Court has, therefore, "held that it will not undertake a prejudice analysis when an existing attorney-client relationship was improperly severed, and will instead find that improper severance requires reversal." *Id.* (citing *United States v. Dickinson*, 65 M.J. 562, 566 (N-M. Ct. Crim. App. 2006); *Iverson*, 5 M.J. at 444). Thus, if Petitioner's case were to proceed to trial, if he were to be convicted, and then it was held during the normal course of appeal that his attorney-client relationship with LtCol Vokey

was improperly severed, the remedy would be to reverse the findings and sentence, thereby subjecting Petitioner to another trial. It is in no one's interest - not the Petitioner's, not the prosecution's, and not the military justice system's - to devote the considerable resources necessary to try Petitioner's case only to have that case reversed on a basis that could have been addressed via a petition for extraordinary relief before trial.

- C. A stay is appropriate because the law in the area of improper severance of an accused's attorney-client relationship with his detailed military defense counsel is still developing

Staying Petitioner's court-martial proceedings is particularly appropriate because the law governing severance of an accused's attorney-client relationship with detailed military defense counsel is currently developing and could soon be altered in an unknown manner. Today, this Court's landmark en banc decision in *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App.) (en banc), provides the law governing the severance of Petitioner's attorney-client relationship with LtCol Vokey. But the Judge Advocate General of the Navy certified the *Hutchins* case to the Court of Appeals for the Armed Forces. *United States v. Hutchins*, 69 M.J. 180 (C.A.A.F. 2010). The Court of Appeals for the Armed Forces heard oral argument in *Hutchins* on 13 October 2010 and a decision is

pending. While Petitioner maintains that he should prevail on a petition for extraordinary relief addressing the merits of the counsel issue under this Court's decision in *Hutchins*, the Court of Appeals for the Armed Forces' ultimate decision in the case could make it even more apparent that Petitioner's rights have been violated and appropriate relief is necessary. Once again, it would squander considerable judicial resources to have Petitioner's trial commence – or possibly even conclude – only to be rendered a nullity by the Court of Appeals for the Armed Forces' *Hutchins* decision.

- D. A stay is particularly appropriate to allow Petitioner to attempt to vindicate his counsel rights due to the Government's disparate treatment of Petitioner's interest in continuity of counsel and that of the Government

Trial counsel are fungible. *United States v. Royster*, 42 M.J. 488, 490 (C.A.A.F. 1995). Defense counsel are not. *Id.* at 490 n.1. So it is anomalous that the Government went to extreme lengths to preserve continuity of the trial counsel in this case while failing to take far simpler steps to ensure Petitioner's uninterrupted representation by his original detailed military defense counsel.

In this case, the Government authorized the lead trial counsel – LtCol Sullivan, a mobilized Marine Reservist – to reach sanctuary status, which will allow him to continue on active duty until becoming retirement eligible. Yet the

Government refused to take the far more modest step of granting Petitioner's request to delay his retirement to avoid severing the attorney-client relationship between him and Petitioner.

The appearance - and perhaps the reality - that the Government exploited its power to protect its own continuity of counsel interests while scuttling Petitioner's further justifies a stay of proceedings to allow this Court to consider the counsel severance issue via a petition for extraordinary relief.

E. A stay of proceedings would not result in any prejudice to any party's interests

Given the years of delay that have already occurred in bringing this case to trial, a further modest delay to ensure that Petitioner's counsel rights are protected would be inconsequential.

Almost four years have passed since charges were preferred against Petitioner. The defense is responsible for almost none of the delay that has occurred in this case. From approximately February 2008 until December 2009, trial was delayed as the Government pursued two prosecution appeals seeking outtakes of a television interview with Petitioner when the key portions of that interview were already available to the Government. While the Government ultimately prevailed in that litigation, the importance of obtaining those outtakes pales in comparison to the protection of Petitioner's fundamental right to the

"continuation of an established attorney-client relationship."
Hutchins, 68 M.J. at 627.

Accordingly, a stay of proceedings will further important interests without causing any undue prejudice. A stay of proceedings is, therefore, appropriate to ensure that the law governing severance of an accused's attorney-client relationship with detailed military defense counsel is respected.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court stay his court-martial proceedings until: (1) Respondent Judge Jones issues findings of fact and conclusions of law in support of his denial of Petitioner's motion for appropriate relief arising from the severance of his attorney-client relationship with LtCol Vokey; and (2) Petitioner has filed a petition for extraordinary relief with this Court seeking a writ to protect his fundamental right not to have his ongoing attorney-client relationship with LtCol Vokey severed.

Respectfully submitted,

/S/

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Certificate of Service

I certify that this document was delivered to the Court, the Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on 25 October 2010. I also certify that this document was served electronically on the named respondent, LtCol David M. Jones, at david.m.jones5@usmc.mil on the same day.

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