IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. WUTERICH Staff Sergeant (E-6) United States Marine Corps, Appellant	ANSWER TO APPELLANT'S WRIT APPEAL PETITION Crim.App. Dkt. No. 200800183
v.	USCA Misc Dkt. No. 11-8009/MC
UNITED STATES Appellee	

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

PREAMBLE

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

I

HISTORY OF THE CASE

Charges were preferred against Appellant on December 1, 2006, and referred to trial by general court-martial on December 27, 2007. Appellant is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice in violation of Articles 92, 119, 128, and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 892, 919, 928, and 934 (2000).

Appellant's case was the subject of two Government appeals pursuant to Article 62, UCMJ. *See United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App.), *vacated*, 67 M.J. 63 (C.A.A.F.

2008), *cert. denied*, 130 S. Ct. 52 (2009); *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (*en banc*), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009). Trial on the merits is currently scheduled to begin on January 24, 2011, at Camp Pendleton, California.

On September 13 and 14, 2010, the Military Judge held a hearing on Appellant's motion to dismiss the charges or for other appropriate relief arising from his loss of LtCol Vokey as his detailed military defense counsel. On October 22, 2010, the Military Judge sent counsel for the parties an e-mail announcing that he had denied the defense's motion and would put his ruling on the record on November 2, 2010.

On October 25, 2010, Appellant petitioned the Navy-Marine Corps Court of Criminal Appeals for extraordinary relief in the nature of a stay of proceedings. On October 26, 2010, the Military Judge issued Findings of Fact and Conclusions of Law. On October 27, 2010, the Navy-Marine Corps Court denied Appellant's petition for a stay "without prejudice to the Plaintiff's ability to petition for relief from the military judge's denial of the motion for appropriate relief."

On October 28, 2010, Appellant petitioned the Navy-Marine Corps Court for a writ of mandamus. His petition asked for a

declaration that his right to continuation of an attorney-client relationship with one of his original detailed military defense counsel, LtCol Vokey, had been violated, Appellant and sought appropriate relief. The following day, the Navy-Marine Corps Court denied the petition without prejudice to Appellant's right to raise the matter during the ordinary course of appellate review. No other actions have been filed or are pending seeking the same relief in this or any other court.

Jurisdictional Statement

This Court has jurisdiction to determine whether it has jurisdiction to act on Appellant's writ for extraordinary relief and to issue all writs necessary or appropriate in aid of its existing statutory jurisdiction. 28 U.S.C. § 1651(a).

II

ISSUE PRESENTED

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

CONTINUATION OF AN ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP BEEN VIOLATED?

III

STATEMENT OF FACTS

On January 11, 2007, LtCol Vokey was detailed to Appellant's case as detailed defense counsel. (Tab E to Writ Appeal Petition (Military Judge's Findings of Fact ("Findings") at 2, Oct. 25, 2010).) On January 17, 2007, Maj Faraj was also detailed to Appellant's case as detailed defense counsel. (Findings 2.) Within 21 days of being detailed, LtCol Vokey submitted a voluntary retirement request pursuant to 10 U.S.C. § 6323, which was approved and at approval LtCol Vokey's retirement was scheduled to occur on April 1, 2008. (Findings 2.) On February 18, 2007, Maj Faraj submitted a voluntary retirement request, which was approved and at approval was scheduled to occur on May 1, 2008. (Findings 4.)

Charges were referred against on December 27, 2007, against Appellant. (Findings 1.) Trial was set for March 2008. In February 2008, the Military Judge quashed a subpoena seeking outtakes from an interview that the CBS show 60 minutes had taped with Appellant, and the Government filed an Article 62 appeal, resulting in a stay of court-martial proceedings.

On June 20, 2008, the Navy-Marine Corps Court of Criminal

Appeals reversed the military judge's order quashing the subpoena to 60 Minutes. *United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App. 2008). Appellant submitted a petition to this Court seeking review of the Navy-Marine Corps 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 Navy-Marine Corps Court's decision while also reversing the military judge's quashal of the subpoena. Trial did not resume during that appeal.

During these proceedings, LtCol Vokey submitted four requests to delay his initial retirement date of April 1, 2008, which were granted. (Findings 3.) LtCol Vokey sought no further extensions of his ultimate retirement date of November 1, 2008. (Findings 3.) Maj Faraj likewise submitted two requests to delay his initial retirement date of May 1, 2008, which were granted. (Findings 4.) Maj Faraj retired on August 1, 2008, after being on active duty for 22 years, and sought no further extensions. (Findings 4.)

Before Maj Faraj's retirement, Appellant was being represented by a Civilian Defense Counsel, Mr. Neal Puckett. (Findings at 4.) Upon retirement in August 2008, Maj Faraj

entered the employ of Mr. Puckett's law firm and continued to represent Appellant alongside Mr. Puckett. (Findings 4.)

In October 2008, while on terminal leave, LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP ("Fitzpatrick"). (Findings 3.) Prior to October 2008, the Fitzpatrick law firm had already established an attorney-client relationship with Sgt Hector Salinas, UCMC, an alleged co-conspirator in Appellant's case. (Findings 3.) LtCol Vokey was verbally informed, upon hiring, that Sgt Salinas "did not have a conflict with the firm's hiring LtCol Vokey . . ." (Findings 3.) No evidence suggested the firm possessed a written waiver from Sgt Salinas of this potential conflict of interest. (Findings 3.) Nor did LtCol Vokey, or later Mr. Vokey, secure a waiver from Appellant regarding the conflict. (Findings 3.)

On November 1, 2008, LtCol Vokey retired at 20 years and 7 months of active duty service. (Findings 3.) LtCol Vokey, and upon retirement Mr. Vokey, represented Appellant without interruption until September 14, 2010. (Findings 3.)

Between 2008 and 2009, after the retirement of his original detailed defense counsel, Captain Nute Bonner, USMC, became Appellant's Individual Military Counsel. (Findings 5; Record 2 (Tab D to Writ Appeal Petition).) Additionally, during that

time period LtCol Patricio Tafoya, USMC, was detailed to serve as Associate Defense Counsel alongside the Individual Military Counsel. (Findings 5; Record 2.) And, Appellant retained another Civilian Defense Counsel, Mr. Mark Zaid. (Findings 4.) In July 2010, an additional Associate Defense Counsel, Maj Meredith Marshall, USMC, was detailed to Appellant's case to represent Appellant alongside Civilian Defense Counsel Mr. Puckett, Mr. Zaid, Mr. Vokey, and Mr. Faraj. (Findings 4-5.)

On August 26, 2010, the Defense moved the Military Judge to dismiss all charges for violation of Appellant' right to detailed counsel. (Appellant's Motion to Dismiss, Aug. 26, 2010.) In a 39(a) session on September 13 and 14, 2010, the Defense asked for an *ex parte* hearing with the judge "regarding the continued representation [by] Mr. Vokey on the case, given the potential conflict involved." (Findings 3.)

The Military Judge attempted to secure Appellant's approval of removing Mr. Vokey from the Defense team given this conflict, but "was stymied by the defense." (Findings 3-4.) Thus, the Military Judge *sua sponte* disqualified Mr. Vokey from further representation of Appellant based on the "irreconcilable conflict of interest" in Mr. Vokey's employment by the same law firm that represented Appellant's co-accused, Sgt Salinas.

(Findings 6, 12.) On October 26, 2010, the Military Judge denied the Defense's August 26 motion to dismiss all charges, and issued written Findings of Fact and Conclusions of Law.

IV

REASONS WHY THE WRIT SHOULD NOT ISSUE

> HERE, (1) RELIEF CAN BE HAD DURING THE ORDINARY COURSE OF APPEAL, AND (2) APPELLANT DOES NOT DEMONSTRATE THAT THE MILITARY JUDGE'S REJECTION OF THE APPLICABILITY OF *HUTCHINS* TO THIS CASE, OR HIS DISQUALIFICATION OF MR. VOKEY FOR A CONFLICT OF INTEREST, IS A CLEAR ABUSE OF DISCRETION OR A JUDICIAL USURPATION OF POWER. THUS, APPELLANT FAILS TO DEMONSTRATE BOTH THAT RELIEF CANNOT BE HAD WITHOUT RESORT TO EXTRAORDINARY RELIEF, AND THAT HE HAS A CLEAR AND INDISPUTABLE RIGHT TO THE RELIEF HE REQUESTS.

The issuance of an extraordinary writ is in large part a matter of discretion of the court to which the petition is addressed. *See Roche v. Evaporated Milk Ass'n*, 319 U.S. 21 (1943); *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n. 8 (1964); *Parr v. United States,* 351 U.S. 513, 520 (1956). Here, Appellant first requested a writ from the Navy-Marine Corps Court of Criminal Appeals, which declined to issue such a writ, and Appellant now appeals the lower court's decision. The issuance of any extraordinary writ, moreover, is a "drastic" remedy that should be granted "only in truly extraordinary

situations." *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983); *see Gray v. Mahoney*, 39 M.J. 299, 304 (C.M.A. 1994).

Extraordinary writs may not be employed as a substitute for relief obtainable during the ordinary course of appellate review, even though hardship may ensue from delay. "[W]hatever may be done without the writ may not be done with it." *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953); *see also United States v. Snyder*, 18 C.M.A. 480, 483 (C.M.A. 1969); *United States v. Frischholz*, 16 C.M.A. 150 (C.M.A. 1966) (petitions for extraordinary relief not substitutes for normal appellate process). The All Writs Act "is a residual source of authority to issue writs that are not otherwise covered by statute." *Pennsylvania Bureau of Correction v. U.S. Marshals*, 474 U.S. 34, 42-43 (1985).

"Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue *ad hoc* writs whenever compliance with statutory procedures appears inconvenient or less appropriate." *Id.* at 43. If alternative remedies are available, resort to the All Writs Act is "out of bounds, being unjustifiable either as 'necessary' or as 'appropriate.'" *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999). "The All Writs Act invests a court with a

power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law." *Id.* (citations omitted). "Mandamus is intended to provide a remedy for a petitioner only if he has exhausted all of the avenues of relief and only if the respondent owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (internal punctuation omitted).

Appellants bear the burden of showing that they have a clear and indisputable right to the extraordinary relief that they have requested. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 314 (1957). To merit relief under the powers granted this Court by the All Writs Act, appellants must demonstrate that the complained of actions were more than mere error, but rather demonstrate a clear abuse of discretion or constitute a usurpation of judicial power. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 217 (1945); *Bankers Life & Casualty Co.*, 346 U.S. at 383. In the context of writs of mandamus and prohibition, military courts have read this rule to require appellants to establish a ruling or action that is contrary to statute, settled case law, or valid regulation. *See, e.g., Dettinger v. United States*, 7 M.J. 216, 224 (C.M.A. 1979); *McKinney v. Jarvis*, 46 M.J. 870 (Army Ct. Crim. App. 1997).

A. Appellant fails to demonstrate he has exhausted his administrative remedies by requesting that Mr. Vokey seek a return to active duty and termination of his employment with the conflicting firm.

First, Appellant fails to demonstrate that relief may not be had without resort to extraordinary relief. Because Mr. Vokey was released from representation due to a conflict of interest and yet Appellant insists that Mr. Vokey remain part of his defense team, Appellant has failed to demonstrate first that he has asked, and Mr. Vokey has agreed, to voluntarily request the military to permit him to re-enter active duty from retirement, and that the military has denied Mr. Vokey's request; or, second, that he has asked, and Mr. Vokey has declined to voluntarily request the military to permit his to re-enter active duty from retirement. As Appellant concedes he was never misadvised about his rights to detailed defense counsel, Appellant's request for relief must be denied. Until Mr. Vokey submits a formal request to re-enter active duty and that request is denied, that is, until Appellant exhausts his administrative remedies, application for extraordinary relief is inappropriate and must be denied. As Appellant concedes no unlawful command influence is at work, Mr. Vokey's retirement was voluntary and his choice alone——not a denial by any

authority empowered to yet again extend Mr. Vokey's retirement date.

B. Appellant fails to demonstrate that the ordinary course of appeal will not resolve this issue. On direct review, the distinctions between this case and *Hutchins* permit testing for prejudice. The application of Article 27 and R.C.M. 505(d)(2)(B) support the change of detailed defense counsel by the designated detailing authority, and the later *sua sponte* disqualification of Mr. Vokey for conflict of interest.

Second, Appellant fails to demonstrate that the ordinary course of appeal cannot resolve his concerns. The Military Judge's *sua sponte* ruling at trial to remove Mr. Vokey as counsel because of a conflict of interest may be reversed for abuse of discretion. *United States v. Strother,* 60 M.J. 476, 478 (C.A.A.F. 2005) ("We review a military judge's decision on a motion to disqualify counsel for an abuse of discretion.") *Cf. Flanagan v. United States*, 465 U.S. 259, 268 (1984) (refusal to disqualify counsel for conflicts of interest can give rise to presumption of prejudice). Likewise, the Detailing Authority's detailing of Substitute Defense Counsel in 2008 after LtCol Vokey's retirement may, as argued in Section C, *infra,* be tested for prejudice upon direct review, given both the inapplicability of *Hutchins* to this case, as well as the application of the mandate of Article 59(a) to this case. Thus extraordinary

relief now is unnecessary.

Here, should trial on the merits begin and Appellant find himself prejudiced by the absence of Mr. Vokey, Appellant remains able to assign errors in briefing before the Navy-Marine Corps Court of Criminal Appeals, and may petition to raise those matters further before this Court. At this stage of trial——pre-trial on the merits——nothing Appellant cites supplies adequate cause to interrupt the commencement of trial with the assistance of his current team of counsel including Civilian Defense Counsel Mr. Puckett, Mr. Zaid, and Mr. Faraj, in addition to Associate Defense Counsel Maj Marshall.

C. Appellant fails to demonstrate an indisputable right to the relief requested.

1. Appellant invited this error by endorsing the appointment of substitute defense counsel and accepting Mr. Vokey's services as civilian defense counsel for two years post-retirement and substitution.

Finally, Appellant fails to demonstrate an indisputable right to the relief requested. Most importantly, Appellant invited this error, thus cannot raise this issue on appeal or now. *United States v. Wells*, 519 U.S. 482, 488 (1997) ("'[A] party may not complain on appeal of errors that he himself invited or provoked the [lower] court . . . to commit.'"). Tacit acceptance of a course of conduct can constitute invited

error. *See, e.g., Ridge v. Cessna Aircraft Co.*, 117 F.3d 126, 129 (4th Cir. 1997) (defendant invited error by tacitly agreeing to jury's use of model aircraft). Appellant concedes he made no objection to any military court in 2008 when the JAG-designated Detailing Authority replaced LtCol Vokey and Maj Faraj with substitute detailed defense counsel. Appellant concedes he made no demand of any party that then-LtCol Vokey delay his retirement a fifth time, or that he requested that Mr. Vokey be recalled to active duty immediately. Appellant concedes he was advised correctly about his statutory rights to counsel.

Appellant invited this error by not objecting to Mr. Vokey's retirement, and indeed, by permitting Mr. Vokey to serve as civilian counsel of record without objection for two years, content with all of the above. The fact of Mr. Vokey's retirement was placed on the record as the "good cause" for the detailing of replacement defense counsel; but instead of litigating the issue and objecting that the detailing authority lacked "good cause," Appellant accepted the detailing of new defense counsel. Now, two years later, having endorsed both the detailing of substitute detailed defense counsel as well as Mr. Vokey's course of conduct and representation of him as a civilian, Appellant objects that Mr. Vokey should have not been

retired. Appellant, having invited this error, cannot now raise the error on appeal.

The Military Judge's distinction between this case and *Hutchins* further demonstrates Appellant's inability to demonstrate a right to relief. Properly analyzed, this case involves not a detailing authority's substitution of detailed counsel, and Appellant *does not claim* that the substitution of detailed defense counsel after Mr. Vokey's retirement was erroneous. Rather, Appellant claims merely that LtCol Vokey's "change of status" from active duty to retired was erroneous.

Finally, any error in this case arose after Mr. Vokey's November 2008 retirement was a *fait accompli*——at some indeterminate time a year or more post-retirement and between 2009 and September 2010, when the conflict of interest with Mr. Vokey's new employment became apparent. Thus Appellant objects now to a conflict caused by Mr. Vokey, the civilian, that became apparent to the Defense team only recently. Mr. Vokey is not now detailed military defense counsel, and has not been since 2008. Appellant never objected until now as to the propriety of the detailing authority detailing substitute detailed defense counsel. Thus any expansion of the "right to continuity" so enlarged by *United States v. Hutchins,* 68 M.J. 623 (N.M. Ct.

Crim. App. 2010), to include "Associate Counsel of Choice," would be inappropriate in Appellant's case.

2. The Military Judge properly enunciated the inapplicability of *Hutchins* to Appellant's case, given (a) Appellant' failure to point to any misadvice as to his rights to counsel under Articles 27 or 38, thus permitting Appellant's case to be tested for prejudice, and (b) Mr. Vokey's service to Appellant for two-years post-retirement.

The Military Judge clearly and correctly enunciated the inapplicability of the Navy-Marine Corps service court's *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010), precedent to this case. First, the Military Judge correctly noted that lower court's *Hutchins* opinion hinged on putative misadvice by the military judge as to the possibility of maintaining Captain Bass as the *Hutchins* appellant's attorney. (Findings 13.) Appellant, in contrast, concedes that in November 2008, he had no objection to Mr. Vokey's retirement, departure as detailed defense counsel, and subsequent service as civilian defense counsel. (*See also* Findings 7.) Unlike *Hutchins*, Appellant does not claim to have been misadvised by the Military Judge——rather, he claims that he should have been provided additional advice as to how he could encourage his detailed defense counsel to not retire from active duty. (Writ Appeal Petition 31.) Absent that misadvice, this case is not

Hutchins. *Hutchins,* 68 M.J. at 631 ("In view of the significant involvement of parties outside the defense team to the appellant's loss of Capt Bass' services, we . . . will, therefore, presume prejudice.").

Absent any misadvice by the Military Judge, according to the lower court's current precedent, Appellant's case falls into the lower court's reading of the "severance from within" and "client validation of severance" class of cases, which according to the lower court's opinion, is testable during the regular course of appeal for prejudice. *Hutchins,* 68 M.J at 630. As noted by the Military Judge in denying Appellant's motion, no structural error occurred here, thus reversal is not required. (Findings 15.) As noted above, Appellant concedes he was correctly advised as to his statutory rights to counsel, and Appellant also endorsed the detailing of substitute detailed defense counsel and accepted their services and Mr. Vokey's services as Civilian Defense Counsel without objection for two years. Thus, the Military Judge committed no abuse of discretion in finding the *Hutchins* decision inapplicable.

Second, the Military Judge properly pointed to the distinction between counsel removing himself entirely from the case in *Hutchins,* and Mr. Vokey retiring and remaining as

defense counsel in a civilian capacity for two years after retirement. (Findings 12.) The Military Judge thus properly found Appellant's citation of *United States v. Iverson,* 5 M.J. 330 (C.M.A. 1978), inapposite. The question before the *Iverson* court was whether an attorney-client relationship was necessary in order to fulfill the post-trial duties identified in *United States v. Goode,* 1 M.J. 3 (C.M.A. 1985). The *Iverson* court held that such relationship was required and in the absence of such relationship, the accused was not represented by someone functioning as "counsel for the accused." *Id.* at 441.

Here, Mr. Vokey continued to act for two years as Appellant's counsel. (Findings 5.) Because the lower court will be able to test for prejudice on direct review given Mr. Vokey's continual service as counsel until September 2010, the Military Judge correctly analyzed the Record and found that reversal is not required under either the *Hutchins* or *Iverson* precedents, and that testing for prejudice, there was none.

3. Finally, even absent the lower court's *Hutchins* precedent, (a) "continuity to counsel" under the Code exceeds any Federal right in that protects continuous effective representation regardless of indigence, not continuous representation by the same person; (b) "good cause" has historically permitted changes of detailed defense counsel by the designated detailing authority for military exigencies and extraordinary circumstances including retirement, resignation, sickness of self or relatives, and deployment; and, (c) absent unlawful command influence, strategic-level military manpower decisions must not be controlled by trial courts.

Third, even independent of the lower court's *Hutchins* decision, Appellant can demonstrate no indisputable right to the relief claimed, particularly in light of the lower court's incorrect decision. This Court in *United States v. Curtis*, 44 M.J. 106, 126 (C.A.A.F. 1996), rejected the argument that a military petitioner "is entitled to uninterrupted continuity of counsel unaffected by peacetime military personnel decisions." The *Curtis* court noted: "[w]hile we have been concerned with the continuity of counsel . . . the appropriate inquiry focuses not on the relationship between counsel and appellant but on whether appellant has enjoyed the effective assistance of counsel." *Id.* at 127 (internal citations omitted). Likewise in *United States v. Loving*, 41 M.J. 213, 298 (C.A.A.F. 1994), this Court rejected an appellant's argument objecting that "for both trial and appeal . . . continuity problems [were] caused by reassignments

and departures from active duty, and potential conflicts of interest." The *Loving* court analyzed the issue solely for competency of representation. *Id.* at 298-99.

Previous courts have adhered to a rule that any right of "continuity of counsel" under the Code is cut short by a change of detailed counsel by the detailing authority, tested upon challenge for "good cause," looking to the effect on needs of the military or other extraordinary circumstances. *See infra.* If *Hutchins,* the *United States v. Iverson,* 5 M.J. 330 (C.M.A. 1978), "virtually impossible" precedent and its progeny, and *Hutchins'* annulling of the R.C.M. 505(d)(2)(B) provision for substitution by designated detailing authorities, are properly set aside by a decision in the *Hutchins* case now pending before this Court, then Articles 27 and 38, and R.C.M. 505, alone clarify that Appellant has no right to the relief requested.

Mr. Vokey retired from active duty: not a routine event in the sense of a "daily" military occurrence, but rather, a once-in-a-career event that removes one from the rolls of active duty officers. That Mr. Vokey retired from active duty is amply placed on the Record, and the detailing of substitute Detailed Defense Counsel under R.C.M. 505(d)(2)(B) is based on "good cause" on the Record——Mr. Vokey's retirement. That Mr. Vokey

decided to serve voluntarily on Appellant's case for 2 additional years is of no moment to the "good cause" analysis.

Precedent arising from Paragraph 37a of the 1969 Code ("It is within the discretion of the convening authority to . . . detail a new . . . defense counsel in lieu of the personnel designated to perform those respective duties by the original convening order"), as well as from its 1983 successor R.C.M. 505(d)(2)(B)(iii), routinely have permitted changes of counsel by detailing authorities in situations like this.

To determine if counsel are *properly* changed——that is, if "good cause" exists——courts look to the reason for the change of counsel, and do not look to the nature of the relationship. *See, e.g., United States v. Miller*, 41 M.J. 647 (N-M. Ct. Crim. App. 1994); *United States v. Dahood*, 32 M.J. 852 {N.M.C.M.R. 1991); *United States v. Polk*, 27 M.J. 812 (A.F.C.M.R. 1988); *United States v. Lolagne*, 11 M.J. 556 (A.C.M.R. 1981) (pre-R.C.M. 505 (d) (2) (B)); *United States v. Harris*, 8 M.J. 668 (A.C.M.R. 1979); *United States v. Jones*, 4 M.J. 545 (A.C.M.R. 1977). Each of these cases found "good cause" sufficient to sustain the detailing authority's decision to change detailed defense counsel under R.C.M. 505.

The Navy-Marine Court in *United States v. Hultgren*, 40 M.J.

638 (N.M.C.M.R. 1994), found that deployment was sufficient military exigency and extraordinary circumstance "and that the detailing authority would have been remiss in his or her duties not to detail a substitute." And, the Coast Guard Court in *United States v. Garcia,* 68 M.J. 561 (C. G. Ct. Crim. App. 2009), found adequate good cause where substitute defense counsel was detailed when the original detailed defense counsel requested *voluntary* deployment orders to Iraq.

Thus up until *Hutchins,* proper substitution on resignation, retirement, deployment, and sickness would have been nearly indisputably proper. This is so: (1) despite the erroneous "virtually impossible" language in *Iverson;* (2) despite the erroneous "sliding scale" synthesis of past caselaw performed by the *Hutchins* court resulting in the integration of a prejudice analysis directly into the "good cause" analysis; and (3) despite the misguided notion suggesting that courts ignore Congress' mandate in Article 27(a) delegating the power to detail defense counsel.

Appellant's reprises that argument here, ignoring Article 27(a). However, that argument, that the Military Judge was the "detailing authority" under R.C.M. 505(d)(2)(B), is contradicted by clear law to the contrary. Article 27(a)(1), UCMJ, states

that "[t]he Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial." The Secretary of the Navy, in turn, in SECNAVINST 5430.27B, para. 4.a (Dec. 22, 1995), delegates to the Judge Advocate General of the Navy responsibility for the certification of Navy and Marine judge advocates to practice military justice in courts-martial. Finally, the Judge Advocate General of the Navy delegates detailing authority, in the Manual of the Judge Advocate General (JAGMAN), JAGINST 5800.7E w/ch 1-2, paragraph 0130(b) (1), for "Navy and Marine Corps judge advocates" to "the judge advocate's CO, OIC, or his designee." Appellant's citation to the explicitly non-binding commentary to the Navy's professional responsibility regulation is not only of no moment, but that analysis is incorrect, is not supported by the text of the commented-upon Professional Responsibility Rule, and would render R.C.M. 505(d)(2)(B)(iii) superfluous to R.C.M. 506(c).

Moreover, this Court should not seek to interfere in the strategic-level manpower decisions of the military services where misconduct or undue command influence is neither proven nor alleged. Appellant, understandably emboldened by the

Hutchins decision, imputes command influence to all the traditional "good cause" reasons to change counsel: "[p]ermitting the Government to discharge military counsel . . . [because of r]eassignments, deployments, delays, transfers, and discharges would all enable to the Government to manipulate the process to rid itself of effective defense counsel." (Appellant's Motion to Dismiss 8, Aug. 26, 2010.)

But "unlawful command influence" is a distinct assignment of error, and one Appellant concedes has not occurred. Resignations and retirements are strategic-level manpower decisions; deployments are strategic-level operational decisions. Appellant's assignment of error by innuendo and undertone of "endemic" command influence, without proof or actual allegation, reduces R.C.M. 505(f) to an absurdity.

Military personnel and assignment policies are just "the sort of thicket which court[s] have traditionally sought to avoid." *United States v. Caputo*, 18 M.J. 259, 265 (C.M.A. 1984) (superseded by statute) (citing *Chappell v. Wallace*, 462 U.S. 296 (1983); *Orloff v. Willoughby*, 345 U.S. 83, 73 (1953)). Any other result would permit the strategic-level manpower decisions of the Commandant of the Marine Corps to be modified by trial judges.

This makes a mockery of, and contradicts, the specific exception enumerated in R.C.M. 505(f)——military exigency or extraordinary circumstances that render counsel unable to proceed within a reasonable time——and R.C.M. 505(d)(2)(b)(iii), when considered alongside the definition of "detailing authority" by the Judge Advocate General of the Navy. And, Appellant makes no showing that a recall to active duty would be within a "reasonable time" such that substitute counsel's detailing was inappropriate. *See, e.g., United States v. Massey*, 14 C.M.A. 486, 489 (C.M.A. 1964) (affirming military judge's denial of 13-day continuance that was requested by the accused in order to prevent substitution of military defense counsel).

The "good cause" requirement of R.C.M. 505(f), either for substitution by designated detailing authorities under R.C.M. 505(d)(2)(B), or for excusals by military judges under R.C.M. 506(c), never was intended to, and does not by plain reading, (1) tie the military's hands in a way that makes it less flexible than a sedentary public defender's office with no military exigencies, with regard to substitutions and withdrawals of defense counsel, (2) require courts to become enmeshed in the intricacies of litigation of rules, or (3)

require military courts to direct detailing decisions for detailed military defense counsel *by name*. *See, e.g.,* Paragraph 37a, UCMJ (1969 ed.); Analysis to Chapter 8, Paragraphs 37b and 39e, UCMJ (1969 ed.) (describing how the 1969 language requiring placing "good cause" on the record for replacement of members by the convening authority——later mirrored in R.C.M. 505(d)(2)(B)—— is merely documentary, preserving the issue for appellate review).

Articles 27 and 38 of the Code, and R.C.M. 505(f), protect the Uniform Code's right to continuous representation by effective military counsel, regardless of the accused's indigence. To the extent that Appellant, and other cases, past or present, suggest that the Code protects a right to *named* detailed defense counsel unless "virtually impossible," those cases are not only contrary to the plain language of the Code and the R.C.M., but are antithetical to the highly flexible system of military justice that has for over six decades depends on an all-volunteer force of military officer attorneys, all of whom place their lives in harm's way to serve the United States.

Finally, the clear language of Article 59(a) requires testing for prejudice in all cases absent structural, that is constitutional, error. Article 59(a), UCMJ. Non-structural

constitutional error is tested for harmless error. *United States v. Chapman*, 386 U.S. 18, 22 (1967). Thus error alleged due to a non-constitutional statutory or regulatory right must likewise be subject to the mandatory testing of Article 59(a). *See United States v. Lane*, 474 U.S. 438, 446 n.9 (1986); *United States v. McCoy*, 31 M.J. 323, 327 (C.M.A. 1990) (Congress' statute requires a showing of prejudice before convictions may be set aside for legal error). Even if *Hutchins* is directly applicable to this case, superior precedent and the dictates of the Code point, again, to the appropriateness of testing for prejudice upon direct review, not in the context of an extraordinary writ.

For all the above reasons, Appellant fails to demonstrate a clear abuse of discretion or gross usurpation of power, and fails to prove an indisputable right to relief.

Conclusion

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

/s/

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I certify that this document was delivered electronically to the Court, and copies were served electronically upon Appellate Defense Counsel, Col Dwight SULLIVAN, USMCR, Maj Kirk SRIPINYO, USMC, Mr. Neal Puckett, Mr. Haytham FARAJ, and on Respondent Appellee LtCol David M. Jones, USMC, on this 15th day of November, 2010.

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