

**GENERAL COURT-MARTIAL  
NAVY-MARINE CORPS TRIAL JUDICIARY  
WESTERN JUDICIAL CIRCUIT**

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UNITED STATES	)	
	)	GENERAL COURT-MARTIAL
	)	
v.	)	<b>GOVERNMENT ARGUMENT ON</b>
	)	<b>DEFENSE MOTION FOR APPROPRIATE</b>
Frank D. Wuterich	)	<b>RELIEF (ABATE PROCEEDINGS UNTIL</b>
XXX-XX-XXXX	)	<b>ATTORNEY CLIENT RELATIONSHIP</b>
Staff Sergeant	)	<b>WITH DETAILED COUNSEL (LTCOL</b>
U.S. MARINE CORPS	)	<b>VOKEY) IS RESTORED )</b>
	)	

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28 April 2011

**ARGUMENT**

**UNLIKE THE FACTS IN *HUTCHINS*, SSGT WUTERICH'S ATTORNEY CLIENT RELATIONSHIP (ACR) WITH MR. VOKEY REMAINED INTACT UNTIL BEING SEVERED BY THE MILITARY JUDGE ON 13 SEPTEMBER 2010.**

The defense motion incorrectly conflates the issue of Mr. Vokey's change in status from "detailed" to "civilian" defense counsel with an actual severance of the Attorney Client Relationship (hereinafter ACR). The accused's ACR with and Mr. Vokey remained intact from its formation until it was properly severed by the Military Judge on 13 September 2010 pursuant to R.C.M. 506(c). (Record pg. 813). After being advised of the fact that an irreconcilable conflict had arisen between Mr. Vokey and the accused, the military judge held: "the court specifically finds that there is not a way to ameliorate the issue, and the only way for this issue to be satisfied is to release Mr. Vokey from further participation in the case." (Record pg. 813). It is the government's position that no evidence was presented on 25 April 2011 that would necessitate disturbing any of the military judge's existing finding of fact and conclusions of law.

The defense argues that there was an improper severance of the ACR between Mr. Vokey and the accused on 11 March 2008. In support of their argument, the defense relies in part on the recent opinion of *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). However, the facts that led to the erroneous severance in the *Hutchins* trial are distinguishable from the facts here. Here, the ACR between Mr. Vokey and the accused survived Mr. Vokey's departure from active duty in November 2008.

The accused allowed Mr. Vokey to retire because it was understood that Mr. Vokey would continue to represent SSgt Wuterich after LtCol Vokey's retirement, just as Mr. Faraj has done. Mr. Vokey represented the accused until 13 September 2010. Prior to that, Mr. Vokey made appearances on 22 March 2010, 23 March 2010, and 24 March 2010. On 26 March 2010, Mr. Vokey was not present. Pursuant to R.C.M. 813, the military judge noted Mr. Vokey's absence, the reason for his absence, and obtained a waiver from the accused. (Record pg. 677). At the next Article 39a U.C.M.J. session, held on 26 August 2010, Mr. Vokey was absent. And again, pursuant to R.C.M. 813, the military judge inquired into Mr. Vokey's whereabouts. (Record pg. 709). Mr. Puckett represented that Mr. Vokey was absent due to illness. (Record pg. 709). Mr. Puckett indicated that "Staff Sergeant Wuterich would be waiving his presence." (Record pg. 709). The military judge then asked the accused, "So Staff Sergeant Wuterich, I guess, at this time, if I am correct, you have four attorneys: Mr. Vokey, Mr. Puckett, Mr. Faraj, all civilian counsel of course – and Major Marshall; is that correct?" (Record pg. 709). To which the accused replied: "Yes, sir." (Record pg. 709). On 27 August 2010, Mr. Vokey appeared on behalf of the accused, and sat at counsel table. (Record pg. 759). On 13 September 2010, Mr. Vokey was again present and represented the accused, along

with his several other attorneys. (Record pg. 793). At the Article 39a U.C.M.J. session of 13 September 2010, upon application, and for good cause, the Military Judge released Mr. Vokey from any further participation in the case. (Record pg. 813).

Throughout the course of the proceedings, Mr. Vokey was repeatedly referred to as counsel of record by the defense team. (Record pg. 709, 762, 763, 764). On 22 March 2010, when the military judge inquired as to whether Mr. Vokey had made a written notice of appearance in compliance with the Western Judicial Circuit Rules, Mr. Vokey replied, "no Sir, I just continue to represent Staff Sergeant Wuterich since active duty." (Record pg. 523). LtCol Vokey discussed his intent to retire from active duty with the accused. The accused was properly advised that Mr. Vokey was planning on transitioning to retirement. (AE XCIV pg. 5) The defense counsel assured the accused that Mr. Vokey, "would not abandon him, but that the relationship would not be as detailed counsel." (AE XCIV pg. 5). The assurances made to the accused before LtCol Vokey's retirement can only be interpreted as strong evidence of Mr. Vokey's intent to maintain the ACR, which **has been** done as evidenced by Mr. Vokey's continued appearances in the Article 39a U.C.M.J. sessions. Further evidence of the intent to continue the relationship between the accused and Mr. Vokey is contained in the 4 March 2009 email correspondence between Mr. Puckett and LtCol Meeks, the detailed military judge at that time. In the email, Mr. Puckett addresses the issue of counsel attendance, and the fact that the accused planned on waiving the presence of several of his counsel. Mr. Vokey's status was discussed in Mr. Puckett's email of 4 March 2009. Mr. Puckett indicted that "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.” (Enclosure 1, Mr. Puckett’s email of 4 March 2009). The military judge was thus made aware of the fact that Mr. Vokey would be absent at the 22 March 2009 Article 39a UCMJ session. A critically distinguishing fact between this case and *Hutchins* is that the detailed defense counsel in *Hutchins* **did not** continue to represent the accused as civilian defense counsel after his separation as did Mr. Vokey. Indeed, in *Hutchins*, Captain Bass was absent from trial entirely.

The issue is not status as “detailed” counsel but whether the ACR was severed. Here, the ACR has never been severed. The defense’s reliance on *Hutchins*, *Iverson*, and *Baca* to support their position that the Accused has a right to keep his chosen detailed counsel in “detailed” status, despite survival of the ACR, is misplaced. *See id.*; *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978). All three cases pertain to the right of the accused to continue an **established attorney-client relationship**.

The defense contends that Mr. Vokey was erroneously denied “detailed” counsel status when he was, allegedly, “forced” to retire. The facts, *infra*, do not support the contention that anyone was forced off of active duty or from continued representation of the accused. Based on the evidence, it appears that every request to modify Mr. Vokey’s retirement dates was approved. In July of 2008, Mr. Vokey did speak with Colonel Patrick Redmon, USMC, a representative from Headquarters USMC. Colonel Redmon informed LtCol Vokey that his numerous, short term retirement modification requests were administratively burdensome, and because of the administrative burden, Colonel Redmon directed LtCol Vokey to make any further modification requests in writing, with endorsements from a general officer, the military judge, convening authority, commander

or other official. LtCol Vokey failed to take the requisite action. He made no formal, written retirement modification request to any of the officials named above. Nor did Mr. Vokey request his command to intervene on his behalf. (Enclosure 2, Affidavit of Colonel Ingersoll). Instead of making a formal modification request, as Colonel Redmon directed, Mr. Vokey ceased his efforts to make any significant, long-term retirement modification requests in July of 2008, well before the appellate litigation related to the government's subpoena of the "outtakes" of the accused's interview with CBS was complete. Importantly, Mr. Vokey sought no relief from the court. The reason Mr. Vokey chose to cease his attempts to modify his retirement date was because he intended to continue to represent the accused after his retirement, as a civilian. This choice is significant as it critically distinguishes the facts in the *Hutchins* case (where there was no evidence that Captain Bass intended to continue to represent Sgt. Hutchins after his EAS, and where Captain Bass was absent from trial entirely).

It is also telling that LtCol Vokey did not seek the intervention of the General Mattis. It is difficult to understand why, if Mr. Vokey was in fact doing "everything possible" to remain on active duty in the summer of 2008, he did not contact General Mattis given his previous experiences in dealing with the General. In 2007, LtCol Vokey was relieved by the Chief Defense Counsel of the Marine Corps from his billet as Regional Defense Counsel, West. Subsequent to his relief, LtCol Vokey was contacted personally by General Mattis. General Mattis wanted to hear LtCol Vokey's side of the story. After speaking with LtCol Vokey on the phone, General Mattis intervened, and soon, LtCol Vokey was reinstated as the Regional Defense Counsel, West. This willingness of General Mattis to assist the defense was known to LtCol Vokey, and the

entire defense team. General Mattis also testified to this fact on cross-examination on 26 August 2010.

Defense Counsel (Mr. Faraj): General, you have gone to great lengths as a convening authority in these cases and the Hamdaniyah cases to ensure, as you put it, to be the convening authority for both the prosecution and the defense?

Witness (General Mattis): Exactly.

Defense Counsel (Mr. Faraj): In fact, I personally remember you calling me once and making sure –when I was still in uniform- that I had everything I needed as a defense counsel.

Witness (General Mattis): [the witness nods head in the affirmative].

Defense Counsel (Mr. Faraj): I got a personal call from you and you asked if I had everything I needed. And so you were going to great lengths to make sure that the process was fair?

Witness (General Mattis): I did my best.

Defense Counsel (Mr. Faraj): Is that fair –

Witness (General Mattis): Yes.

(Record pg. 495-496). The fact that LtCol Vokey never sought the assistance of General Mattis with modifying his retirement dates is strong evidence that Mr. Vokey, not Colonel Redmon or the government, made a decision to leave active duty and retire. The defense team was fully aware of General Mattis' willingness to assist the defense counsel. All they had to do was seek assistance. However, they did not.

**EVEN ASSUMING THAT THE DEFENSE COUNSEL'S TRANSITION FROM DETAILED COUNSEL STATUS TO CIVILIAN COUNSEL STATUS WAS ERRONEOUS, DENIAL OF DETAILED STATUS IS HARMLESS ERROR WHERE THE UNDERLYING ACR REMAINS INTACT.**

In *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009), the convening authority erroneously denied recognition of one of the accused's two detailed counsel.

Before the military judge restored the unrecognized counsel's "detailed" status on the eve of trial, that counsel was denied detailed counsel status during several critical pretrial stages. However, the ACR was never severed and the unrecognized counsel continued to provide his services to the defense team on pretrial matters. On appeal, the defense argued that LtCol Wiechmann's Sixth Amendment right to counsel had been violated by the refusal of the convening authority to recognize his counsel's detailed status, under the facts of that case. *Wiechmann* held that even an erroneous denial of detailed status is harmless error under the circumstances of an uninterrupted ACR. *United States v. Wiechmann*, 67 M.J. 456, 464-5 (C.A.A.F. 2009). Judge Ryan, filing a separate opinion concurring in the judgment explains, "[t]he core of this [Sixth Amendment right to counsel] has historically been, and remains today, 'the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare for trial,'" therefore, the Sixth Amendment does not rest upon the counsel's particular status. *Id.* at 465 citing *Kansas v. Ventris*, --- U.S. ---, 129 S.Ct. 1841, 1844-45 (2009). A defendant's Sixth Amendment right to counsel is *also* not violated every time these opportunities are restricted. *Id.* citing *Morris v. Slappy*, 461 U.S. 1, 11, 13-14 (1983). Therefore, even the negative implications of an attorney's erroneous denial of status, such as lack of access to the defendant or files, is not a per se violation of the Sixth Amendment.

Similarly situated to *Wiechmann*, the accused enjoyed a continuing relationship with Mr. Vokey after his retirement. The accused has benefited continuously from the services of Mr. Vokey since he was detailed in 2007 and continued to receive his services until being relieved by the military judge pursuant to R.C.M. 506(c) on 13 September 2010. Under *Wiechmann*, even an erroneous denial of a counsel's **detailed status** is

harmless error while the ACR survives. Here, there has been no error: LtCol Vokey requested retirement and set his retirement date for 1 April 2008. After seeking and receiving several modifications to his retirement date he voluntarily retired on 1 November 2008; commencing terminal leave on 6 August 2008. The ACR continued in 2009, until 13 September 2010, when he was properly relieved by the military judge. (Encl 2). (Record pg. 813). By Mr. Vokey's own representations to the Court, he continued to represent the accused. (Record pg. 523).

Further, there is no evidence that Mr. Vokey sought assistance with the denial of any modification request with the convening authority or the court. On 25 April 2011, Mr. Vokey testified that he was doing "everything possible" to remain on active duty in the summer of 2008. On 13 September 2010, on cross examination, Mr. Vokey explained his failure to seek relief from the military judge by stating that "there was no military judge. There was no court in session at the time." (Record pg. 852). However, LtCol Vokey was courtesy copied on several emails that were drafted in an attempt to arrange a telephonic R.C.M. 802 conference. Mr. Vokey's status was discussed as an agenda item in an email leading up to the R.C.M. 802 conference. And on 1 August 2008, the government, defense, CBS Broadcasting Inc. attorneys and the military judge held an R.C.M. 802 conference. On 7 August 2008, the defense filed a motion to continue the case, predicated in part on the need to give the newly detailed counsel time to acquaint himself with the facts of the case. (AE VI). Thus, despite Mr. Vokey's assertion that there was no military judge from whom he could seek redress, there was a military judge detailed to the case and on 1 August 2008, the defense participated in an R.C.M. conference with the military judge. Clearly, had Mr. Vokey and the other



members of the defense team been doing “everything possible” to keep LtCol Vokey on active duty, they would have advised the military judge that LtCol Vokey’s attempt to modify his retirement date was being frustrated by Colonel Redmon at USMC Headquarters. Mr. Vokey also admitted that he did not seek any relief from the convening authority, the trial counsel, or the officer in charge of the legal services support section. (Record pg. 852). LtCol Vokey also failed to seek redress from his battalion commander, Colonel Ingersoll. (Enclosure 2, Affidavit of Col Ingersoll). If LtCol Vokey was having difficulty extending his retirement date, there were myriad opportunities for any member of the defense team to seek assistance in extending his retirement date. It is incomprehensible that the defense would not seek the assistance from the military judge if there was truly a desire to remain on active duty.

**EVEN ASSUMING THAT THE DEFENSE COUNSEL’S TRANSITION FROM DETAILED COUNSEL STATUS TO CIVILIAN COUNSEL STATUS TEMPORARILY SEVERED THE ACR, THE RECORD DEMONSTRATED GOOD CAUSE AND A BASIS FOR THE EXCUSAL OF LTCOL VOKEY.**

An attorney client relationship may only be severed under a limited set of circumstances. *United States v. Weichmann*, 67 M.J. 456, 458 (C.A.A.F. 2009); R.C.M. 505(d)(2)(B); R.C.M. 505(c). Whenever there is a replacement of counsel, the military judge shall ensure that the record reflects the change, and the reason for the change. R.C.M. 813. Even where good cause exists, the military judge shall capture the good cause on the record. *See generally United States v. Acton*, 38 M.J. 330, 335-337 C.M.A., 1993). On 11 March 2009, the parties held an Article 39a U.C.M.J. session. The purpose of that 11 March 2009 session was to litigate the existence of a “newsgathering” privilege at courts-martial. The litigants were CBS Broadcasting Inc. and the United States. The accused and two members of his defense team were present at the hearing, but the

defense did not participate in the litigation of the newsgathering privilege, and consistently insisted that they "had no position" on the issue. (Record, pg. 307, 411). The defense team did not file any briefs with the trial court on the issue of the newsgathering privilege. (Record, pg. 409). During the Article 39a U.C.M.J. session, the military judge, pursuant to R.C.M. 813, discussed the status of the defense team with the detailed defense counsel, LtCol Tafoya, and the lead civilian counsel, Mr. Puckett. The military judge covered the absence of the Individual Military Counsel, Captain Nute Bonner. His presence was waived by the accused. The military judge covered the absence of assistant civilian defense counsel, Mr. Zaid. His was waived by the accused. The military judge covered the status of Mr. Faraj. His presence was waived by the accused. And, the military judge covered the status of Mr. Vokey. The following colloquy is informative:

MJ: Present today representing the defense is an new counsel, Lieutenant Colonel Tafoya. LtCol Tafoya, would you please state your legal qualifications, status as to oath, and by whom you were detailed.

DC (LtCol Tafoya): Yes Sir. I have detailed myself to this case in my capacity as the Regional Defense Counsel for the Western Region. I'm qualified and certified under Article 27(b) and sworn under Article 42(a) of the UCMJ. I have not acted in any disqualifying manner in this case.

MJ: Very well. Now, previously present in the court appearing to represent Staff Sergeant Wuterich was Captain Bonner as the individual military counsel. What is the status of Captain Bonner?

DC (LtCol Tafoya): Sir, Captain Bonner to my knowledge is still the individual military counsel for Staff Sergeant Wuterich.

MJ: Okay. He is not present in the courtroom today.

DC (LtCol Tafoya): He is not present in the courtroom today.

MJ: 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 a civilian, that that has not occurred; is that correct?

DC (LtCol Tafoya): That's correct, Your Honor.

(Record 405-406).

Here, the military judge's colloquy with the accused was informed by several previous events. And in order to properly understand the events of 11 March 2009, it is critical that one understand the exact status of the case at that time, as well as several significant events that predated the 11 March 2009 Article 39a U.C.M.J. session. Taken in concert, the factual and legal landscape surrounding the 11 March 2009 Article 39a U.C.M.J. session explain the military judge's actions in court.

On 20 June 2008, the NMCCA issued its opinion on the government's Article 62, U.C.M.J. appeal. Ten days later, on 30 June 2008, the defense filed a petition for a grant of review to the Court of Appeals for the Armed Forces (C.A.A.F.). On 1 July 2008, the C.A.A.F. ordered the defense to file a supplement to their 30 June 2008 petition, due no later than 21 July 2008. In effect, the C.A.A.F. had granted the defense motion seeking review of the 20 June 2008 NMCCA opinion. Further, the NMCCA opinion of 20 June 2008 lifted the stay of the case. Consequently, on 21 July 2008, the government sought an R.C.M. 802 conference with LtCol Meeks, the military judge. (Encl 3). After some coordination, an R.C.M. 802 conference was set for 1 August 2008. Several items were on the agenda at the R.C.M. 802 conference. The government advised the military judge that the case was again under his control. The government also sought to establish a trial schedule, discuss the status of LtCol Vokey and Maj Faraj, the status of all outstanding motions, the 20 June 2008 NMCCA opinion, and the road ahead. (Encl 3). The R.C.M.

802 conference was held on 1 August 2008. When the issue of status of counsel came up, the defense made no objection to LtCol Vokey's then impending retirement. On 1 August 2008, the defense did advise the Court and the Government that they intended to request a continuance. (AE LI, LII). After all, the Government was pushing for a trial schedule, and the stay of the proceedings was lifted. (Encl 3). In their continuance request, the defense represented that a continuance was required in order to allow newly detailed counsel time to become familiar with the case. (AE LII). It is important to note that at this point in the litigation, the defense had asked for the C.A.A.F. to review the NMCCA opinion of 20 June 2008, and the C.A.A.F. had ordered a briefing schedule. It was thus apparent to the parties that the C.A.A.F. was going to review the NMCCA ruling. There was a possibility they would reverse, or substantially modify the NMCCA's 20 June 2008 ruling. The defense, the court and CBS Broadcasting Inc. were all desirous of waiting until the appellate litigation was completed, and there was a final decision from the C.A.A.F. The defense represented that the accused's interests would not be harmed if the appellate process was to run its course. (AE LII). At no point did the defense object to the retirement of LtCol Vokey. (AE LI, LII). In fact, the defense moved the trial court for a continuance in order to allow time for newly detailed counsel to become familiar with the facts of the case. It is clear that as of 1 August 2008, before LtCol Vokey went on terminal leave, the defense team had decided to release LtCol Vokey from his detailed status because the attorney client relationship would continue in a civilian capacity. LtCol Vokey even assured the accused, before he left active duty, that LtCol Vokey "would never abandon [the accused] but the relationship would not be as detailed counsel." (AE XCIV at 5).

The R.C.M. 802 conference was held five days before LtCol Vokey went on terminal leave and after LtCol Vokey's phone conversation with Col Redmon. On 7 August 2008, true to their representations during the R.C.M. 802 of 1 August 2008, the defense filed a motion for a continuance. (AE LI). The defense argued that a continuance was necessary as it was:

axiomatic that all accused are entitled to effective assistance of detailed military defense counsel. R.C.M. 506. When, as here, the passage of time results in the loss of detailed counsel by attrition due to retirement from military service, the accused should become entitled to replacement counsel who have sufficient time to become knowledgeable about the facts, witnesses, and evidence in the case before any additional pretrial proceedings and eventual trial can resume.

(AE LI at 3). The government did not object to the continuance request. (AE LII). The government's response to the defense motion to continue stated:

[b]ased on the R.C.M. 802 conference of 1 August 2008, it is understood that SSgt Wuterich's interests will not be harmed by allowing the appellate process to run its course; and further, that SSgt Wuterich does not wish to litigate other matters while the parties wait for C.A.A.F. to render their decision.

(AE LII at 2). The defense never objected to LtCol Vokey's retirement. (AE LI). They made no motion of any retirement modification denials with the trial court, the trial counsel, the SJA or the OIC of the LSSS, and specifically represented that they did not wish to litigate any other matters during the pendency of the appellate process. (AE LII).

As indicated above, the attorney client relationship may only be severed under a limited set of circumstances. *United States v. Weichmann*, 67 M.J. 456, 458 (C.A.A.F. 2009); R.C.M. 505(d)(2)(B); R.C.M. 505(c). "Absent government misconduct, the routine separation of a judge advocate from active duty normally terminates any attorney-client relationship." *United States v. Spriggs*, 52 M.J. 235, 246 (C.A.A.F. 2000).

Whenever there is a replacement of counsel, the military judge shall ensure that the record reflects the change, and the reason for the change. R.C.M. 813. Even where good cause exists, the military judge shall capture the good cause on the record. *See generally United States v. Acton*, 38 M.J. 330, 335-337 (C.M.A, 1993). On 11 March 2009, during the Article 39a U.C.M.J. session, the military judge in essence found good cause to excuse LtCol Vokey's absence from the 11 March 2009 Article 39a U.C.M.J. session because his absence was explained and waived. Pursuant to R.C.M. 813, the military judge noted LtCol Vokey's absence on the record. (Record, pg. 405). Also, pursuant to R.C.M. 813, the military judge noted that there was a replacement of counsel, and he ensured that the record reflected the reason for the change. The military judge noted a replacement of counsel by stating: "present today representing the defense is a new counsel, Lieutenant Colonel Tafoya." (Record, pg. 405). And the military judge ensured that the record reflected the reason for the change:

MJ: 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?

...

MJ: Normally, you have the right to have all of your attorneys to be present prior to proceeding in this trial here today. Now, I will note that we had some discussions previously before going on the record were **I was informed that the counsel who are not present are going to be excused because you are giving them the permission to be excused.** However, I haven't talked to you about that. So I'm going to go over your rights with your right now on that.

MJ: You have the right to have all of your counsel be present with you during the presentation of your case. If your counsel isn't here, normally I would stop the proceeding until they could be here. Of course, we would also have the alternate problem of the court directing a date for the counsel to be here and the counsel not being here, we would have to deal with that separately.

MJ: Have you discussed with your counsel their presence and your desires as to their presence?

ACC: I have.

...

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. Do you understand that?

ACC: Yes, Sir I do.

MJ: Now, you have the right, of course, to retain him, but that's something completely between you and Lieutenant Colonel Vokey. Do you understand that?

ACC: Yes Sir, I do.

...

MJ: Mr. Puckett, just to make sure I'm clear, do you have any objection to us proceeding with the counsel being absent today?

CC (Mr. Puckett): No. None whatsoever, sir, and I would like to thank the court for allowing us to proceed in this fashion.

(Record pg. 405-408).

Importantly, LtCol Tafoya was the detailing authority for defense counsel to this case. (Enclosure 6). Since separation from active duty normally constitutes good cause, it is reasonable, even if erroneous, that the military judge excused LtCol Vokey's absence from the 11 March 2008 Article 39a U.C.M.J. session because his retirement appeared to constitute good cause, and, the detailing authority, LtCol Tafoya was present, representing the accused. The military judge understood LtCol Tafoya to be the detailing authority based on LtCol Tafoya's representation that he was the detailing authority as he had detailed himself to the case in his capacity as the Regional Defense Counsel, a

position that typically lacks detailing authority. All of the circumstances apparent to the military judge pointed to a knowing, intelligent waiver on the part of the defense counsel on this issue. LtCol Vokey never attempted to rescind his retirement. There was no objection by the defense. Further, LtCol Vokey had been replaced by LtCol Tafoya, the Regional Defense Counsel, West. The defense had requested and received a continuance in order to give the newly detailed counsel time to become familiar with the case. And, the military judge was informed on 4 March 2009, in writing, that the accused and Mr. Vokey were making arrangements for Mr. Vokey's continued representation as a civilian. (Enclosure 1). Mr. Vokey was courtesy copied on all of the correspondence, which certainly further assured the court that Mr. Vokey's absence from the 11 March 2009 Article 39a U.C.M.J. session was explained to the military judge's satisfaction.

**EVEN ASSUMING THAT THE DEFENSE COUNSELS' TRANSITION FROM DETAILED COUNSEL STATUS TO CIVILIAN COUNSEL STATUS TEMPORARILY SEVERED THE ACR, AND THE MILITARY JUDGE ERRED IN FAILING TO ENSURE THAT THE RECORD ACCURATELY REFLECTED THE REASONS FOR ABSENCE OF COUNSEL, ANY PREJUDICE WAS HARMLESS.**

Even assuming that the military judge erred as a matter of law by failing to ensure, pursuant to his duty under R.C.M. 813, that the record of the 11 March 2009 Article 39a U.C.M.J. session accurately reflected the reasons for LtCol Vokey's absence, the accused suffered no prejudice. The C.A.A.F. has taken a variety of approaches to the question of prejudice flowing from errors in the severance of the attorney-client relationship. See *United States v. Hutchins*, 69 M.J. 282, 291, accord *United States v. Hutchins*, 68 M.J. at 630 (citing *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978) (prejudice presumed), *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988) (prejudice presumed), *United States v. Acton*, 38 M.J. 330 (C.M.A. 1993) (prejudice evaluated in



light of facts and circumstances); *United States v. Kelly*, 16 M.J. 244 (C.M.A. 1983) (prejudice evaluated in light of facts and circumstances)). In *Hutchins*, 69 M.J. 282, the C.A.A.F. recently offered further elucidation on the issue of assessing prejudice. The *Hutchins* court held that in assessing prejudice, “we consider the context of the error in the present case.” *United States v. Hutchins*, 69 M.J. 282 at 291. Here, any assessment of prejudice inevitably leads to the conclusion that Staff Sergeant Wuterich suffered no harm as a result of LtCol Vokey’s absence from the 11 March 2009 session.

First, as indicated above, the 11 March 2009 Article 39a U.C.M.J. session was limited to the litigation of whether a “newsgathering privilege” existed at courts-martial. (Record, pg. 405). The defense consistently represented that that they take no position on the issue, nor did they file trial briefs on the issue. (Record, pg. 409, 411). The defense participation in the March 2009 litigation was *de minimis*. (Record, pg. 405-458).

Second, the accused has had the assistance of multiple counsel throughout the proceedings, to include detailed counsel (LtCol Tafoya), civilian counsel (Mr. Puckett, Mr. Zaid and Mr. Faraj), as well as Captain Bonner, the individual military counsel. All of whom, save Mr. Puckett and LtCol Tafoya, were absent on 11 March 2009. Their presence was knowingly waived by the accused. (Record pg. 406-407). The military judge granted a defense continuance request to facilitate preparation by the new member of the defense team. (AE LI); (Record pg. 409). The defense never objected to LtCol Vokey’s transition to civilian counsel, nor did LtCol Vokey advise the military judge, the trial counsel, or the convening authority of any difficulties he may have encountered in modifying his retirement date. And, the personnel action that led to LtCol Vokey’s transition from detailed defense counsel to civilian counsel was initiated by LtCol Vokey,

not by the prosecution or the command. Finally, LtCol Vokey's status was discussed at the next Article 39a, U.C.M.J. session of 22 March 2010, where the military judge referred to LtCol Vokey as "civilian counsel of record." (Record, pg. 460). Taken together, the record establishes that the accused suffered no violation of his Sixth Amendment right to counsel. See *United States v. Hutchins*, 69 M.J. 282, 292, citing *Morris v. Slappy*, 461 U.S. 1, 14 n.6 (1983) (holding that the Sixth Amendment does not create a right to a "meaningful relationship" with counsel--privately retained or provided by the public--and specifically rejecting the notion that an appointed counsel with whom an accused enjoys no "meaningful relationship" is the equivalent of deprivation of counsel). Mr. Vokey's absence on the 11-12 March 2009 Article 39a U.C.M.J sessions in no way deprived the accused of his Sixth Amendment right to counsel, and he suffered no prejudice as a result of LtCol Vokey's absence, even if the military judge erred in his duties under R.C.M. 813.

**INVOLUNTARY RECALL OF MR. VOKEY TO ACTIVE DUTY IN ORDER TO SERVE AS DETAILED DEFENSE COUNSEL IS NOT AN APPROPRIATE REMEDY IN LIGHT OF THE DEFENSE TEAM'S REVERSAL ON THE NATURE OF MR. VOKEY'S CONFLICT OF INTEREST.**

Involuntary recall of Mr. Vokey to active duty to serve as Staff Sergeant Wuterich's detailed counsel is unnecessary in light of the defense team's recent reversal on their position that Mr. Vokey's conflict of interest is irreconcilable. The defense team now states that Mr. Vokey's conflict of interest due to his representation of Staff Sergeant Wuterich and subsequent employment with Fitzpatrick, Haygood, Smith & Uhl, LLP, is an imputed, rather than actual conflict of interest.

Instead of involuntarily recalling Mr. Vokey to active duty, the appropriate course of action is for the military judge to revisit his finding of facts and decision to sever the

ACR between Mr. Vokey and Staff Sergeant Wuterich at the 13 September 2010 Article 39(a) U.C.M.J. session in light of the defense team's reversal. If the military judge decides that the conflict of interest can and has been waived, the appropriate course of action is to re-evaluate the military judge's decision to sever the ACR between Mr. Vokey and the accused instead of ordering the United States to recall Mr. Vokey to active duty. In short, if new evidence arose during the *ex parte* hearing of 25 April 2011 that tends to make the existing conflict of interest imputed, rather than actual, recall of Mr. Vokey is unnecessary. Mr. Vokey could, as he has done up until 13 September 2010, represent the accused as civilian counsel. However to be clear, it is the government's position that no evidence was presented on 25 April 2011 that would necessitate disturbing any of the military judge's existing finding of fact and conclusions of law.

**EVEN IF INVOLUNTARY RECALL OF MR. VOKEY IS ORDERED, THE GOVERNMENT WILL NOT BE ABLE TO RECALL MR. VOKEY BECAUSE THE DEPARTMENT OF THE NAVY ONLY HAS THE AUTHORITY TO INVOLUNTARILY RECALL RETIRED MARINES IF SUCH RECALL IS "NECESSARY IN THE INTERESTS OF NATIONAL DEFENSE." RECALL OF MR. VOKEY WOULD NOT MEET THAT REQUIREMENT.**

Involuntary recall of a retired Marine Corps officer is governed by several regulations to include: 1) Sections 688 and 12301(a) of Title 10 of the United States Code, 2) Department of Defense Directive 1352.1 dated 16 July 2005, and 3) Secretary of the Navy Instruction 1300.14B. Taken together, these regulations mandate that involuntary recall of a service member must be "*necessary in the interest of national defense,*" an interest which is not evident in any proposed recall of Mr. Vokey.

10 U.S.C. § 688(a) says that:

*"Under regulations prescribed by the Secretary of Defense, a member described in subsection (b) [which includes retirees of Regular military*

services] *may be ordered to active duty by the Secretary of the military department concerned at any time* (emphasis added).

A careful reading of Section 688 reveals that the “*at any time*” language above is not a free license to the Secretary of the Navy to recall Mr. Vokey or any other retired Marine officer for any reason. Rather, the recall “*at any time*” should be read in conjunction with the beginning of that sentence, “*Under regulations prescribed by the Secretary of Defense...*”

In this case, the Secretary of Defense has indeed promulgated regulations governing the recall of retired military members that act to limit the “*at any time*” language in 10 U.S.C. § 688 above. DOD Directive 1352.1 provides guidance to the military services on the question of recalling retired military members and states the following at paragraph 4.1:

*“It is DOD policy that military retirees be ordered to active duty as needed to perform such duties as the Secretary concerned considers necessary in the interests of national defense as described in sections 12301(a) and 688 of reference b [Title 10, United States Code].”*

Accordingly, for Mr. Vokey to be recalled from retirement to active duty, the Secretary of the Navy would have to determine that Mr. Vokey’s recall would be “*necessary to serve the interests of national defense.*” DOD Directive 1352.1 at paragraph 4.1 provides further direction in determining exactly what constitutes the “*interests of national defense*” by referring to Sections 12301(a) and 688 of Title 10 of the United States Code.

The “*interests of national defense*”, as described in 10 U.S.C. § 12301(a) is as follows:

*“In time of war, national emergency declared by Congress or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order...a*

*member... under the jurisdiction of that Secretary....to active duty for the duration of the war or emergency. “*

The “*interests of national defense*” are not as specifically set forth in 10 U.S.C. § 688, rather, that section leaves the definition of the “*interests of national defense*” to “*regulations promulgated by the Secretary of Defense*” as discussed above. 10 U.S.C § 688 (a).

Further, paragraph 4.c of SECNAV Instruction 1300.14b reiterates the requirements of DOD Directive 1352.1, allowing involuntary recalls of retired personnel only if:

*“...requirements in the interest of national defense cannot be met by voluntary means....”*

Therefore, military retirees, including Mr. Vokey, may only be involuntarily recalled to active duty for reasons necessary in the interest of national defense, which consists of, pursuant to 10 U.S.C. § 12031(a) and other regulations discussed above: 1) war, 2) a congressionally declared national emergency, or 3) as otherwise authorized by law.

At this time, there has been no declaration of national emergency by Congress and the government is not aware of any laws other than those stated herein that would authorize the involuntary recall of Mr. Vokey from his retired status to active duty. The government acknowledges that the U.S. is currently engaged in the Global War on Terror (GWOT), and that this state of war could authorize the involuntary recall to active duty of a retired service member whose service is necessary for the interests of national defense under 10 U.S.C. §12031(a). However, despite the U.S.’s conduct of two overseas wars in

the last decade, there has been only one involuntary recall of any retired U.S. Marine in that time frame. (Enclosure 3). That fact points to the rarity with which the Secretary of the Navy determines the involuntary recall of a retiree is "necessary in the interests of national defense."

Here it appears there is little chance that the Secretary of the Navy would approve any involuntary recall of Mr. Vokey because his return is likely not for the interests of national defense in light of the GWOT. Further, the position for which he would be recalled, as detailed counsel to Staff Sergeant Wuterich, would not fill any of the permissible uses for an activated retiree.

Mr. Vokey's involuntary return to active duty to serve as detailed counsel to a single accused would serve the interest of a single individual rather than for the national defense of the U.S. as it conducts the GWOT. There is nothing to link Mr. Vokey's status as detailed counsel to a single accused with the defense of this nation in a time of war. The position of detailed defense counsel in *U.S. v. Wuterich* has no direct relationship to the conduct of military efforts or the furtherance of U.S. foreign policy abroad. Even if some tenuous link could be asserted, representation of an accused who already has two civilian counsel and a detailed defense counsel, would cast serious doubts on the necessity of such an involuntary recall.

Further, DOD Directive 1352.1 at paragraph 4.2 plainly says that component members of the DOD (which includes the USMC) should only use retirees to meet national security needs. The directive lays out at paragraph 4.3 the specific areas where a retiree ordered to active duty in the interests of national defense may be used:

*" To fill shortages or to augment deployed or deploying units....to release other military members for deployment....to fill federal civilian workforce*

*shortages....to meet national security needs outside the DOD ...to perform other duties that the Secretary concerned considers necessary in the interests of national defense."*

10 U.S.C. § 688(c) also limits the assignment of a member recalled to active duty to:

*"....such duties as the Secretary considers necessary in the interests of national defense."*

Mr. Vokey's involuntary return to active duty would not serve to fill any manpower shortages, release other service members for deployment, fill civilian workplace shortages or meet needs outside the Department of Defense. As above, there is nothing about Mr. Vokey's recall to active duty as detailed counsel that could be said to be necessary to serve the interest of national defense during the GWOT.

**THE STATE BAR OF TEXAS DOES PROVIDE RESOURCES TO TEXAS LICENSED ATTORNEYS IN REACHING INFORMED DECISIONS ON ETHICAL OBLIGATIONS AND ISSUES.**

During his testimony on 25 April 2011 at Mr. Vokey stated that the State Bar of Texas did not issue ethics advisory opinions. The implication being, that he was unable to avail himself of any assistance from the State Bar of Texas in determining whether his employment with Fitzpatrick, Haygood, Smith & Uhl, LLP, would result in a conflict of interest due to that firm's representation of Sergeant Salinas, a witness in *U.S. v. Wuterich*. While it is true that the State Bar of Texas does not issue ethics advisory opinions, other avenues of assistance were available to Mr. Vokey from the State Bar of Texas. The State Bar of Texas had resources available to Mr. Vokey to assist in the determination of whether his employment with Fitzpatrick, Haygood, Smith & Uhl, LLP

would result in a conflict of interest. Further, these resources were readily available and could have easily been discovered by Mr. Vokey.

The State Bar of Texas provides assistance to Texas licensed attorneys in the event they are unsure of their ethical obligations in a particular situation in the form of a toll-free ethics hotline.<sup>1</sup> An attorney may call in to speak with an ethics specialist employed by the State Bar of Texas regarding his or her ethics question. *Id.* An attorney calling in for help on an ethical issue would receive assistance in navigating the Texas ethics rules and case law relevant to his or her ethical question. *Id.* The hotline specialist does not give a written opinion on the matter, or advice as to what the attorney should do, but they do guide that attorney through relevant Texas rules and case law, such that the attorney is better situated to make an educated determination for him or herself on their particular ethical dilemma. *Id.*

The existence of this ethics hotline was discoverable to Mr. Vokey via simple Internet search. “Googling” the phrase “Texas Bar Ethics” returns a variety of results, the first of which is the State Bar Ethics Resources for Texas Attorneys.<sup>2</sup> Even assuming Mr. Vokey was not capable of conducting an Internet search, a simple phone call inquiry to the main line at the State Bar of Texas would have informed him that the Bar does indeed have ethical assistance resources available to Texas attorneys.

---

<sup>1</sup> <http://www.texasbar.com/Content/NavigationMenu/ForLawyers/GrievanceInfoandEthicsHelpline/default.htm>.

<sup>2</sup> <http://www.google.com/search?hl=en&source=hp&biw=1419&bih=695&q=Texas+Bar+Ethics&aq=f&aqi=g7g-j1g-b2&aql=&oq=>




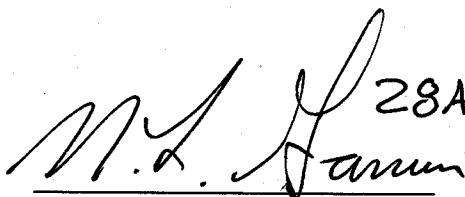
**ATTACHMENTS**

Pursuant to this Honorable Court's decision on 25 April 2011 authorizing the parties to submit additional evidence and written argument, the following additional evidence:

1. Email traffic from 2008 and 2009.
2. Affidavit of Colonel Alvah Ingersoll, USMC of 27 April 2011.
3. Affidavit of Mr. Tate, 28 April 2011.
4. Appellate Exhibit VI (51).
5. Appellate Exhibit VII (52).
6. Appellate Exhibit CXVI (116) Delegation of Detailing Authority to Regional Defense Counsel, West dated 6 August 2008.

I certify that the following argument was served on the Court and opposing counsel on 28  
April 2011.



 28 APR 11  
N. L. Gannon

N. L. Gannon,  
Major, U.S. Marine Corps  
Trial Counsel

## Gannon Maj Nicholas L

---

**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Tuesday, March 10, 2009 3:52 PM  
**To:** Meeks LtCol Jeffrey G  
**Cc:** Benedetti, Carl; Gannon Capt Nicholas L; Plowman Maj Donald J; Mark Zaid; Colby Vokey; Haytham Faraj; Tafoya LtCol Patricio A; Bonner Capt Nute A; Jamison LtCol Mark K; Sullivan LtCol Sean; Erickson LtCol Daren J; Lee Levine  
**Subject:** Re: U.S. v. Wuterich

Thank you, Your Honor. I'll be there.

Neal A. Puckett  
LtCol, USMC (Ret)  
Puckett & Faraj, PC

Sent from my iPhone

On Mar 10, 2009, at 17:43, "Meeks LtCol Jeffrey G" <[jeffrey.meeks@usmc.mil](mailto:jeffrey.meeks@usmc.mil)> wrote:

> Mr. Puckett:  
>  
> I am granting you leave to appear telephonically.  
>  
> All:  
>  
> I am moving the start time to 0900 vice 0800.  
>  
> v/r  
>  
> LtCol Meeks  
>  
> -----Original Message-----  
> From: Neal Puckett [<mailto:neal@puckettfaraj.com>]  
> Sent: Wednesday, March 04, 2009 17:55  
> To: Benedetti, Carl  
> Cc: Meeks LtCol Jeffrey G; Gannon Capt Nicholas L; Plowman Maj Donald  
> J; Mark Zaid; Colby Vokey; Haytham Faraj; Tafoya LtCol Patricio A;  
> Bonner Capt Nute A; Jamison LtCol Mark K; Sullivan LtCol Sean;  
> Erickson LtCol Daren J; Lee Levine  
> Subject: Re: U.S. v. Wuterich  
>  
> Judge Meeks,  
> SSgt Wuterich will be present for the hearing accompanied by his newly  
> detailed defense counsel, LtCol Tafoya. Absent will be his IMC, Capt  
> Bonner, Mr. Zaid and Mr. Faraj. SSgt Wuterich will waive his right to  
> have them present. 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. I would like to  
> ask leave of the court to appear by speaker phone in order to answer  
> any questions the court may have and to monitor the hearing. I am in  
> court at the Navy Yard on 10 March for the litigation of several  
> motions, which could last all day. Thus I will be unable to be  
> physically present for the hearing.  
> V/r,  
>

**Enclosure (1)**

> Neal A. Puckett, Esq  
> LtCol, USMC (Ret)  
> Puckett & Faraj, PC  
> Washington DC | San Diego  
> 888.970.0005

>  
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> 888-970-0005 or via a return the e-mail to sender.  
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> making any copy or distribution.

> On Mar 4, 2009, at 6:44 PM, Benedetti, Carl wrote:

>  
>  
> Dear Judge Meeks,  
> Please find attached: (1) Court-Martial Notice of Appearance of  
> Carl R. Benedetti; (2) Answer Brief of Non-Party News Organization CBS  
> Broadcasting Inc. on Remand and in Further Support of its Motion to  
> Quash Subpoena Duces Tecum, including Attachments 1-3; and (3) a cover  
> letter enclosing courtesy copies of the documents sent via overnight  
> mail.

> Respectfully submitted,

> Carl R. Benedetti

> Assistant General Counsel  
> CBS Law Department  
> 4024 Radford Avenue  
> Studio City, California 91604  
> tel: 818-655-1646  
> fax: 818-760-9548

>  
>  
> \_\_\_\_\_  
> <Letter to Judge Meeks.pdf><Notice of Appearance.pdf><Answer Brief  
> of CBS.PDF>

## **Gannon Maj Nicholas L**

---

**From:** Neal Puckett [napuckett@comcast.net]  
**Sent:** Monday, July 28, 2008 1:56 PM  
**To:** Erickson Maj Daren J  
**Cc:** mark@markzaid.com; Vokey LtCol Colby C; sberlin@lskslaw.com; Plowman Maj Donald J; Gannon Capt Nicholas L  
**Subject:** Re: U.S. v. SSgt Wuterich

Wuterich defense team will be available for telephonic 802 conference at 1200 PST on Friday, 1 August.

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego | Chicago  
888.970.0005

On Jul 28, 2008, at 1:06 PM, Erickson Maj Daren J wrote:

Gentlemen,

Based on the below response from the MJ, please advise as to availability on Friday, 1 August. Propose doing the 802 at 1200 PST.

Also need to arrange for a conference call prior to Friday, 1 August, to discuss the agenda and specifically new trial dates and milestones. Please advise to your availability.

v/r  
Major Erickson

-----Original Message-----

**From:** Meeks LtCol Jeffrey G  
**Sent:** Monday, July 28, 2008 9:53  
**To:** Erickson Maj Daren J  
**Cc:** 'mark@markzaid.com'; 'napuckett@comcast.net'; Vokey LtCol Colby C; 'neal@puckettfaraj.com'; Plowman Maj Donald J; Gannon Capt Nicholas L  
**Subject:** Re: U.S. v. SSgt Wuterich

I am on leave until Friday, per my out of office reply.

I am available on Friday.

V/r

LtCol Meeks

----- Original Message -----

**From:** Erickson Maj Daren J  
**To:** Erickson Maj Daren J; Meeks LtCol Jeffrey G  
**Cc:** (mark@markzaid.com) <mark@markzaid.com>; 'napuckett@comcast.net' <napuckett@comcast.net>; Vokey LtCol Colby C; neal@puckettfaraj.com

**Enclosure (1)**

<neal@puckettfaraj.com>; Plowman Maj Donald J; Gannon Capt Nicholas L  
Sent: Mon Jul 28 09:47:54 2008  
Subject: RE: U.S. v. SSgt Wuterich

Your Honor,

With regards to the requested RCM 802 conference, we have received no response. Respectfully request confirmation on whether the RCM 802 conference was approved for this afternoon. Government and defense counsel are available for 1500 today. The conference line to call into for all parties has changed to: (760)725-8101. If an 802 conference is not possible today, the Government respectfully requests an Article 39a for Monday 4 August 2008.

Your Honor may have learned that CAAF recently directed the Government to file a consolidated brief by 22 August 2008. That directive did not stay this case. Therefore, we believe we are still moving forward to trial and wish to establish trial dates and milestones as your Honor directs.

Very respectfully,  
Major Erickson

-----Original Message-----

From: Erickson Maj Daren J  
Sent: Monday, July 21, 2008 10:21  
To: Meeks LtCol Jeffrey G  
Cc: (mark@markzaid.com); 'napuckett@comcast.net'; Vokey LtCol Colby C;  
'neal@puckettfaraj.com'; Plowman Maj Donald J; Gannon Capt Nicholas L  
Subject: U.S. v. SSgt Wuterich

Your Honor,

I was recently advised that the record of trial ICO U.S. v. Wuterich has been returned to the court reporters here at Camp Pendleton. As the case is now back in the hands of the Military Judge, the government respectfully requests that we conduct a telephonic 802 conference to discuss the way ahead.

The government respectfully requests that we conduct an 802 on 28 July at 1500 PST. We can use our teleconference line, which is (760) 725-9963. As you may recall Sir, the parties just need to call in to that line at the prearranged time and they will automatically be "conferenced in" to the call.

During the call, the government respectfully proposes the following agenda:

1. The establishment of a new trial schedule.
2. The status of the defense counsel, more specifically, LtCol Vokey's and Maj Faraj's respective status.
3. The status of all of the outstanding motions,
4. The NMCCA opinion ICO U.S. v. Wuterich and the road ahead.

With respect to topic number 4 above, the government anticipates that CBS will want to participate in the conference call. The government is available to conduct this requested proposed telephonic 802 at the Court's convenience, and at the convenience of the other parties.

Very respectfully submitted,

Daren J. Erickson  
Major USMC  
OIC, LSST-E  
Legal Services Support Section  
1st Marine Logistics Group  
Box 555067, Camp Pendleton, CA 92055-5607  
Comm: (760) 725-4820  
DSN: 365-4820 Fax: (760) 725-4500  
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**Gannon Maj Nicholas L**

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**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Thursday, August 07, 2008 5:31 AM  
**To:** Meeks LtCol Jeffrey G  
**Cc:** Erickson Maj Daren J; Plowman Maj Donald J; Gannon Capt Nicholas L; Haytham Faraj; Mark Zaid; Vokey LtCol Colby C; Bonner Capt Nute A  
**Subject:** U.S. v. Wuterich Continuance Motion  
**Attachments:** Aug 2008 motion for continuance.pdf; ATT2999410.htm

Your Honor,  
Please find attached a defense motion for a continuance.  
R/s,

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego | Chicago  
888.970.0005

**Enclosure (1)**

## **Gannon Maj Nicholas L**

---

**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Thursday, February 12, 2009 6:44 PM  
**To:** Erickson LtCol Daren J  
**Cc:** Gannon Capt Nicholas L; Plowman Maj Donald J; Mark Zaid; Colby Vokey; Haytham Faraj; Seth Berlin; Tafoya LtCol Patricio A; Bonner Capt Nute A; Jamison LtCol Mark K; Sullivan LtCol Sean  
**Subject:** Re: Government Motion ICO U.S. v. Wuterich

All 3 days work for me.

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego  
888.970.0005

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On Feb 12, 2009, at 9:36 PM, Erickson LtCol Daren J wrote:

Gentlemen,

I have received availability from the Government and Mr. Berlin. Would like to arrange for an 802 teleconference with the MJ on one of the following dates:

Anytime on Feb. 23, 24, 25.

Please advise if you can work the above into your schedules.

v/r  
LtCol Erickson

-----Original Message-----

**From:** Erickson LtCol Daren J  
**Sent:** Thursday, February 12, 2009 17:02  
**To:** Meeks LtCol Jeffrey G  
**Cc:** Gannon Capt Nicholas L; Plowman Maj Donald J; Mark Zaid; Colby Vokey; 'Neal Puckett'; Haytham Faraj; Seth Berlin; Tafoya LtCol Patricio A; Bonner Capt Nute A; Jamison LtCol Mark K; Sullivan LtCol Sean  
**Subject:** Government Motion ICO U.S. v. Wuterich

Your Honor,

Please find attached the Government's Motion for Appropriate Relief. Also attached is a proposed Judicial Order concerning the CAAF decision returned to the Court on 24 Dec 2008.



The Defense, Government and Mr. Berlin are in communication and will request an 802 Conference to discuss proposed court dates for motions and trial once everyone's schedules are reconciled.

<<...>> <<...>>

v/r

Daren J. Erickson

LtCol USMC

OIC, LSST-E

Legal Services Support Section

1st Marine Logistics Group

Box 555607, Camp Pendleton, CA 92055-5607

Comm: (760) 725-4820

DSN: 365-4820 Fax: (760) 725-4500

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## Gannon Maj Nicholas L

---

**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Wednesday, February 11, 2009 1:23 PM  
**To:** Seth Berlin  
**Cc:** Erickson LtCol Daren J; Mark Zaid; Bonner Capt Nute A; Colby Vokey; Gannon Capt Nicholas L; Plowman Maj Donald J; Haytham Faraj; Tafoya LtCol Patricio A  
**Subject:** Re: U.S. v. Wuterich

All,  
Please include LtCol Tafoya and Mr. Faraj on all email correspondence.

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego  
888.970.0005

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On Feb 11, 2009, at 4:11 PM, Seth Berlin wrote:

Lt. Col. Erickson --

I have been travelling and just returned this afternoon. I will do my best to circle back to you tomorrow. One preliminary comment -- the first paragraph of the proposed order appears to require full compliance with the subpoena, which would include production of the outtakes to the Government. I suspect was not what you intended and, in any event, was not what was contemplated by the reviewing courts. While obviously it up to you since it is the Government's motion, it might be cleaner to remove that paragraph.

Seth D. Berlin  
Levine Sullivan Koch & Schulz, L.L.P.  
tel 202/508-1122  
fax 202/861-9888  
[sberlin@lskslaw.com](mailto:sberlin@lskslaw.com) <<mailto:sberlin@lskslaw.com>>  
[www.lskslaw.com](http://www.lskslaw.com) <<http://www.lskslaw.com/>>

---

**From:** Erickson LtCol Daren J [<mailto:daren.erickson@usmc.mil>]  
**Sent:** Monday, February 09, 2009 6:20 PM  
**To:** [neal@puckettfaraj.com](mailto:neal@puckettfaraj.com); Seth Berlin  
**Cc:** Zaid Mark; Bonner Capt Nute A; Colby Vokey; Gannon Capt Nicholas L; Plowman Maj Donald J  
**Subject:** U.S. v. Wuterich

Gentlemen,

Please find attached a draft copy of a motion and proposed order regarding the CBS News outtakes and CAAF decision. Wanted to give everyone a heads up that the Government will be filing this with the MJ on Thursday, 12 Feb 2009.

When we file the attached we will also ask for a telephonic 802 Conference based on all the above addressees availability to discuss the way ahead with the MJ. If I can get a quick email on when everyone would be available for a telephonic 802 with the MJ I will include proposed date and time in the submission on Thursday. Looking at something in the next 10 days if possible. This is nothing that requires documents to be filed with the court. Figured we need to get some dialogue started with the MJ as there are several issues outstanding that need addressing.

--Break--

Mr. Berlin,

As always we welcome your involvement in the 802 Conference and respectfully request availability for a telephonic conference with the Military Judge to discuss the CAAF decision.

<<...>> <<...>>

v/r

Daren J. Erickson  
LtCol USMC  
OIC, LSST-E  
Legal Services Support Section  
1st Marine Logistics Group  
Box 555607, Camp Pendleton, CA 92055-5607  
Comm: (760) 725-4820  
DSN: 365-4820 Fax: (760) 725-4500  
Classification: UNCLASSIFIED//LIMDIS

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**Gannon Maj Nicholas L**

---

**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Wednesday, February 11, 2009 1:22 PM  
**To:** Erickson LtCol Daren J  
**Cc:** Seth Berlin; Mark Zaid; Bonner Capt Nute A; Colby Vokey; Gannon Capt Nicholas L; Plowman Maj Donald J; Haytham Faraj  
**Subject:** Re: U.S. v. Wuterich

Daren,  
Available when others are. Very flexible usually.  
Neal

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego  
888.970.0005

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On Feb 9, 2009, at 6:20 PM, Erickson LtCol Daren J wrote:

Gentlemen,

Please find attached a draft copy of a motion and proposed order regarding the CBS News outtakes and CAAF decision. Wanted to give everyone a heads up that the Government will be filing this with the MJ on Thursday, 12 Feb 2009.

When we file the attached we will also ask for a telephonic 802 Conference based on all the above addressees availability to discuss the way ahead with the MJ. If I can get a quick email on when everyone would be available for a telephonic 802 with the MJ I will include proposed date and time in the submission on Thursday. Looking at something in the next 10 days if possible. This is nothing that requires documents to be filed with the court. Figured we need to get some dialogue started with the MJ as there are several issues outstanding that need addressing.

--Break--

Mr. Berlin,

As always we welcome your involvement in the 802 Conference and respectfully request availability for a telephonic conference with the Military Judge to discuss the CAAF decision.

<<...>> <<...>>

v/r  
Daren J. Erickson

LtCol USMC  
OIC, LSST-E  
Legal Services Support Section  
1st Marine Logistics Group  
Box 555607, Camp Pendleton, CA 92055-5607  
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<Judicial Order CBS Draft.doc><Motion to Order Production of Outtakes Wuterich.doc>

## Gannon Maj Nicholas L

---

**From:** Neal Puckett [neal@puckettfaraj.com]  
**Sent:** Sunday, January 25, 2009 2:09 PM  
**To:** Erickson LtCol Daren J  
**Cc:** Plowman Maj Donald J; Gannon Capt Nicholas L; Faraj Haytham; Colby Vokey; Zaid Mark; Bonner Capt Nute A  
**Subject:** Re: Wuterich trial schedule

Daren,  
Let's talk Monday afternoon (my time). I'll give you a call on my way driving down to Camp Lejeune.  
S/f,  
Neal

Neal A. Puckett, Esq  
LtCol, USMC (Ret)  
Puckett & Faraj, PC  
Washington DC | San Diego  
888.970.0005

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On Jan 23, 2009, at 12:02 PM, Erickson LtCol Daren J wrote:

Mr. Puckett,

Welcome to the New Year, hopefully it will be a blessed one for you and yours. I think everyone is back in the saddle at this point and the materials have been delivered to the MJ. Would like to figure out a trial schedule at this point based on you and your team's availability.

Please advise as to when you can discuss.

v/r  
LtCol Erickson

-----Original Message-----

**From:** Neal Puckett [mailto:neal@puckettfaraj.com]  
**Sent:** Monday, December 29, 2008 13:53  
**To:** Erickson LtCol Daren J  
**Cc:** Plowman Maj Donald J; Gannon Capt Nicholas L; Faraj Haytham; Colby Vokey; Zaid Mark; Bonner Capt Nute A  
**Subject:** Re: Wuterich trial schedule

Daren,  
Still trying to figure out who's on first. Let's talk when you get back.

Nothing will change before that. You can quote this email in reply to any frivolous speedy trial motions.

Happy New Year to you and your family!

Neal

N. A. Puckett  
LtCol, USMC (Ret)  
Puckett & Faraj, PC

On Dec 29, 2008, at 16:45, "Erickson LtCol Daren J"  
<[daren.erickson@usmc.mil](mailto:daren.erickson@usmc.mil)> wrote:

Neil,

I am going on leave from 1 January - 15 January. Point of Contact for all things SSgt Wuterich will be Maj Plowman and Capt Gannon. If we can hash out dates prior to the 1st that would be great. If not, then please contact Maj P and Capt G for proposed dates. If you wish to wait until I return on the 15th please advise as well.

v/r  
Daren

Daren J. Erickson  
LtCol USMC  
OIC, LSST-E  
Legal Services Support Section  
1st Marine Logistics Group  
Box 555607, Camp Pendleton, CA 92055-5607  
Comm: (760) 725-4820  
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## **Gannon Maj Nicholas L**

---

**From:** Erickson Maj Daren J  
**Sent:** Monday, July 28, 2008 9:48 AM  
**To:** Erickson Maj Daren J; Meeks LtCol Jeffrey G  
**Cc:** (mark@markzaid.com); 'napuckett@comcast.net'; Vokey LtCol Colby C; neal@puckettfaraj.com; Plowman Maj Donald J; Gannon Capt Nicholas L  
**Subject:** RE: U.S. v. SSgt Wuterich

Your Honor,

With regards to the requested RCM 802 conference, we have received no response. Respectfully request confirmation on whether the RCM 802 conference was approved for this afternoon. Government and defense counsel are available for 1500 today. The conference line to call into for all parties has changed to: (760)725-8101. If an 802 conference is not possible today, the Government respectfully requests an Article 39a for Monday 4 August 2008.

Your Honor may have learned that CAAF recently directed the Government to file a consolidated brief by 22 August 2008. That directive did not stay this case. Therefore, we believe we are still moving forward to trial and wish to establish trial dates and milestones as your Honor directs.

Very respectfully,  
Major Erickson

-----Original Message-----

**From:** Erickson Maj Daren J  
**Sent:** Monday, July 21, 2008 10:21  
**To:** Meeks LtCol Jeffrey G  
**Cc:** (mark@markzaid.com); 'napuckett@comcast.net'; Vokey LtCol Colby C; 'neal@puckettfaraj.com'; Plowman Maj Donald J; Gannon Capt Nicholas L  
**Subject:** U.S. v. SSgt Wuterich

Your Honor,

I was recently advised that the record of trial ICO U.S. v. Wuterich has been returned to the court reporters here at Camp Pendleton. As the case is now back in the hands of the Military Judge, the government respectfully requests that we conduct a telephonic 802 conference to discuss the way ahead.

The government respectfully requests that we conduct an 802 on 28 July at 1500 PST. We can use our teleconference line, which is (760) 725-9963. As you may recall Sir, the parties just need to call in to that line at the prearranged time and they will automatically be "conferenced in" to the call.

During the call, the government respectfully proposes the following agenda:

1. The establishment of a new trial schedule.
2. The status of the defense counsel, more specifically, LtCol Vokey's and Maj Faraj's respective status.
3. The status of all of the outstanding motions, 4. The NMCCA opinion ICO



U.S. v. Wuterich and the road ahead.

With respect to topic number 4 above, the government anticipates that CBS will want to participate in the conference call. The government is available to conduct this requested proposed telephonic 802 at the Court's convenience, and at the convenience of the other parties.

Very respectfully submitted,

Daren J. Erickson  
Major USMC  
OIC, LSST-E  
Legal Services Support Section  
1st Marine Logistics Group  
Box 555067, Camp Pendleton, CA 92055-5607  
Comm: (760) 725-4820  
DSN: 365-4820 Fax: (760) 725-4500

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

---

UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	AFFIDAVIT
	)	OF
Frank D. Wuterich Staff Sergeant U. S. Marine Corps Accused	)	ALVAH E. INGERSOLL III COLONEL, USMC 27 APRIL 2011
	)	
	)	

---

I, Colonel Alvah E. Ingersoll, III, U.S. Marine Corps, hereby declare, under penalty of perjury, that the following facts are true:

1. I am a Colonel on active duty in the United States Marine Corps. From July 2006 until 18 July 2008, I was the Commanding Officer, Headquarters and Support Battalion, Marine Corps Base, Camp Pendleton, California. In July of 2008, Lieutenant Colonel Colby Vokey, USMC, was the Regional Defense Counsel-West, located aboard Camp Pendleton, California. Lieutenant Colonel Vokey was a member of my command.

2. I have no recollection of Lieutenant Colonel Vokey requesting my assistance in coordinating with any personnel at Headquarters, United States Marine Corps, in order to extend his retirement date or rescind his retirement request. I have no recollection of Lieutenant Colonel Vokey advising me, officially or unofficially, of any problems or issues he was having in arranging the modification of his retirement date.

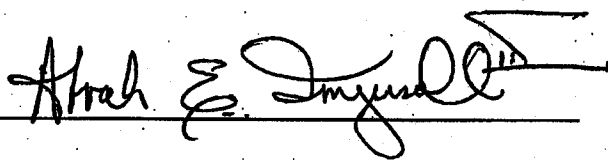
3. Lieutenant Colonel Vokey never approached me and advised me of any conversations he had had with Colonel Patrick Redmon, or any other USMC Headquarters personnel regarding the modification of his retirement date. I have no recollection of Lieutenant Colonel Vokey ever

**Enclosure (2)**

advising me that Colonel Patrick Redmon, or any other USMC Headquarters personnel refused to modify Lieutenant Colonel Vokey's 1 August 2008 retirement date. As part of my check-out/retirement interview with each Marine I discussed three things: First, I would thank them for their service and inquire about their transition plans and family, second I would ensure that their retirement ceremony was appropriate and see if they had any questions, finally, I would inquire if there were any administrative issues or concerns associated with their retirement that they would like me to personally address with the Installation Personnel Administration Center (IPAC) that was also under my command. As I recall based on my conversation with Lieutenant Colonel Vokey, he had no administrative concerns nor did he seek my assistance or support in any administrative action to modify his retirement date. To the contrary, my impression was he looked forward to his retirement and was ready to leave active duty.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 27 April 2011.

A handwritten signature in black ink, appearing to read "Alvah E. Ingersoll, III", written over a horizontal line.

Alvah E. Ingersoll, III  
Colonel, USMC  
Camp Pendleton, California

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

UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	AFFIDAVIT OF VINCENT TATE.
	)	
Frank D. Wuterich	)	Vincent Tate
XXX XX 4541	)	Separation and Retirement Branch,
Staff Sergeant	)	Manpower Management Division,
U. S. Marine Corps	)	Manpower & Reserve Affairs, USMC.
	)	28 April 2011

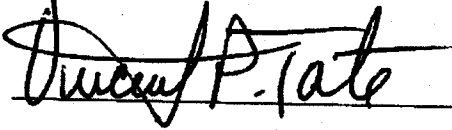
I, Vincent Tate, hereby declare, under penalty of perjury, that the following facts are true:

1. I am Vincent Tate, the Head of Retired List Maintenance & Support Section, Manpower Management Separations and Retirement (MMSR), United States Marine Corps. I have been employed as the Section Head of MMSR-7 for approximately ten years. In my capacity as the Section Head of MMSR-7, I am responsible for the processing of voluntary and involuntary recalls of retired service members to active duty.
2. Any involuntary recall of a retired Marine requires the approval of the Secretary of the Navy.
3. In my ten years with MMSR, I can recall only one instance where a Marine was involuntarily recalled to active duty. The Marine in that instance was the accused in a court-martial. I can recall no other instances where a Marine not subject to a court-martial was recalled involuntarily to active duty.

**ENCLOSURE (3)**

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4/28/2011.

  
\_\_\_\_\_

Vincent Tate  
Section Head, Retired List Maintenance and  
Support Section (MMSR-7), Separation and Retirement Branch,  
Manpower Management Division (M&RA),  
Quantico, VA

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

**UNITED STATES**

**v.**

**FRANK D. WUTERICH  
STAFF SERGEANT  
XXX XX 3221  
U.S. Marine Corps**

**GENERAL COURT-MARTIAL**

**DEFENSE MOTION FOR  
APPROPRIATE RELIEF**

**(CONTINUANCE)**

**(07 AUG 2008)**

**1. NATURE OF THE MOTION**

The defense moves the court, pursuant to Rules for Court-Martial 906(b)(1), 502(d), 503(c), 505(d)(2)(B) and 506, Manual for Courts-Martial, 2008, for a ninety-day continuance in the trial to permit enough time for new military counsel to be detailed to represent SSgt Wuterich and for those counsel to have sufficient time to become acquainted with the evidence in the case so that they may be prepared effectively to represent their client at trial.

**2. SUMMARY OF THE FACTS**

Maj Haytham Faraj, USMC, and LtCol Colby Vokey, USMC, were detailed to represent SSgt Wuterich on 11 January 2007 and 17 January 2007, respectively. They both have thoroughly reviewed many thousands of pages of discovery, interviewed dozens of witnesses, and actively participated in a hotly contested Art 32 investigation in the Fall of 2007. They also participated in

**Enclosure (4)**

**APPELLATE EXHIBIT LI (51)  
PAGE 1 OF 4**

pretrial Art 39a session of this case in March 2008. In addition, LtCol Vokey conducted a site visit in Haditha, Iraq, in January 2008. Maj Faraj retired from the Marine Corps on 1 August 2008. LtCol Vokey, currently on terminal leave and permissive TAD pending retirement, retires on 1 October 2008. The retirement of these two officers effectively severs their attorney/client relationships with SSgt Wuterich and ends their participation in the case as detailed defense counsel of record.

Capt Nute Bonner, USMC, was approved as individual military counsel (IMC) in the late summer/early fall of 2007. Capt Bonner has since executed permanent change of station orders to Marine Barracks, 8<sup>th</sup> and I, and currently serves as the Barracks Adjutant, a full-time, active duty position requiring his full attention, and not insignificantly, located on the opposite side of the country from Camp Pendleton. Thus SSgt Wuterich now has no local counsel and will probably choose to release Capt Bonner as essentially incapacitated from effective representation due only to his new assignment.

To complicate matters further, a new Regional Defense Counsel recently reported to Camp Pendleton to replace LtCol Vokey. He is still getting acquainted with the Haditha landscape, in addition to all of his other counsel and their cases on the West Coast. We consider the Senior Defense Counsel at the LSSS to be conflicted out from assigning counsel as he

represented a former co-accused, LCpl Tatum. So additional time will be required to sort out the replacement of detailed defense counsel for SSgt Wuterich in accordance with R.C.M.s 503(c), 505 (d) (2) (B) and 506.

**3. DISCUSSION**

It is axiomatic that all accused are entitled to effective assistance of detailed military defense counsel. R.C.M. 506. When, as here, the passage of time results in the loss of detailed counsel by attrition due to retirement from military service, and IMC due to PCS orders, the accused should become entitled to replacement counsel who have sufficient time to become knowledgeable about the facts, witnesses and evidence in the case before any additional pretrial proceedings and eventual trial can resume.

**4. EVIDENCE**

The defense will present no evidence.

**5. BURDEN OF PROOF**

Pursuant to R.C.M 905(c) the burden of proof is on the defense as the moving party. The standard for the burden of proof on this motion shall be a preponderance of the evidence.

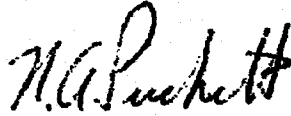
**6. RELIEF REQUESTED**

The defense respectfully requests that the Court grant a continuance of ninety days from the date of the court's ruling on this motion.



7. ARGUMENT

Oral argument is not requested.



N. A. PUCKETT  
LtCol, USMC (Ret)  
Civilian Defense Counsel

---

I hereby certify that a copy of the foregoing motion was served on the government on 7 August 2008 by email.



N. A. PUCKETT

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

**UNITED STATES**

v.

**FRANK D. WUTERICH  
STAFF SERGEANT  
UNITED STATES MARINE CORPS**

**GENERAL COURT-MARTIAL**

**GOVERNMENT RESPONSE TO MOTION  
FOR APPROPRIATE RELIEF  
(CONTINUANCE)**

**26 August 2008**

1. Nature of Response. This is the Government's response to the defense continuance request of 7 August 2008.

2. Summary of Facts.

- a. On 1 August 2008, the Accused, his counsel, and the Military Judge, the Government and CBS Broadcasting Inc. counsel participated in a telephone conference call conducted pursuant to RCM 802. During the call, the defense counsel indicated that they intended to request a continuance in the subject case. To date, the RCM 802 conference of 1 August 2008 has not been summarized on the record.
- b. The reasons for the continuance request were several. First, the defense indicated that due to the retirement of two of the Accused's military defense counsel, there was a need for the defense to take time to obtain newly detailed counsel, and then allow the newly detailed counsel to become familiar with the facts of the case. Second, the defense indicated that the Accused's interests would not be harmed if the appellate process was to run its course (referring to the 23 July 2008 U.S. Court of Appeals for the Armed Forces (C.A.A.F.) order directing the Government to file a consolidated answer to CBS and the

Enclosure (5)

1

APPELLATE EXHIBIT 411 (52)  
PAGE 1 OF 6

Defense's requests for CAAF review of the 20 June 2008 NMCCA opinion) and, finally, the defense does not wish to litigate any other matters while the parties wait for the C.A.A.F. to issue an opinion.

- c. Currently, there is an appellate hearing scheduled for 17 September 2008 where the C.A.A.F. will hear oral argument.

### 3. Discussion

- a. The Government does not oppose the defense continuance request of 7 August 2008.

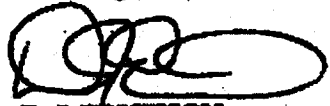
Based on the RCM 802 conference of 1 August 2008, it is understood that SSgt Wuterich's interests will not be harmed by allowing the appellate process to run its course; and further, that SSgt Wuterich does not wish to litigate other matters while the parties wait for C.A.A.F. to render their decision.

- b. On the issue of the Military Judge ordering CBS to deliver all "outtakes" to the military judge to conduct an in camera review as contemplated by the NMCCA opinion of 20 June 2008, the Government is not opposed to allowing the C.A.A.F. to render its decision on this matter before the Military Judge so orders, so long as any delay that results from postponing the Military Judge's order to CBS is not attributed to the Government. In essence, if the defense does not object to waiting for the C.A.A.F. to decide this issue, and does not object to the military judge postponing an order to CBS, then the Government does not object to waiting for the C.A.A.F. to issue an opinion prior to the Military Judge ordering CBS to produce the "outtakes."

4. **Evidence.** The Government requests that the Court consider the following documentary evidence attached to its response:

1. Cmdr, MARCENT ltr 5800 SJA of 18 Aug 08
2. U.S. Court of Appeals for the Armed Forces order of 23 July 2008 in the case of U.S. v. SSgt Wuterich

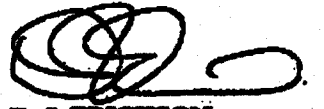
5. **Argument.** The Government does not request oral argument.

  
D. J. ERICKSON  
Lieutenant Colonel, USMC  
Trial Counsel

\*\*\*\*\*  
\*\*\*\*\*

**Certificate of Service**

I hereby attest that a copy of the foregoing motion was served on the Court and opposing counsel on 26 AUGUST 2008.

  
D. J. ERICKSON  
Lieutenant Colonel, USMC



**UNITED STATES MARINE CORPS**  
U.S. MARINE CORPS FORCES CENTRAL COMMAND  
715 SOUTH BOUNDARY BOULEVARD  
MACDILL AIR FORCE BASE, FLORIDA 32203-5001

TO BE SENT TO:  
5800  
SJA  
18 Aug 88

**From:** Commander, U.S. Marine Corps Forces, Central Command  
**To:** Trial Counsel, United States v. Staff Sergeant Frank D. Waterich

**Subj:** RECORD OF TRIAL IN THE CASE OF UNITED STATES V. SSGT FRANK D. WATERICH, USMC

**Ref:** (a) MCM 988, MCM (2008 Ed.)

1. On 20 June 2008, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) vacated the Military Judge's order granting a Government subpoena issued to CBS Broadcasting Inc.
2. For reference (a), you are directed to return the record of trial to the Military Judge for proceedings not inconsistent with the NMCCA opinion of 20 June 2008.

I. D. BRASORE  
By direction

Copy to:  
CO, HQMC  
SJA, MARCENT  
MJ  
DC (all) for SSGt Waterich  
TC  
File

**United States Court of Appeals  
for the Armed Forces  
Washington, D.C.**

UNITED STATES, )  
Appellee )

USCA Dkt. No. 08-6006/MC  
Crim.App. Dkt. No. 200800183

v. )

ORDER

Frank D. )  
WUTERICH, )  
Appellant )

CBS BROADCASTING INC., )  
Petitioner )

USCA Dkt. No. 08-8020/MC  
Crim.App. Dkt. No. 200800183

v. )

United States Navy-Marine )  
Corps Court of Criminal )  
Appeals, United States, and )  
Frank D. Wuterich, Staff )  
Sergeant, E-6, U.S. Marine )  
Corps, )  
Respondents )

In re )  
Frank D. )  
WUTERICH )

USCA Dkt. No. 08-8021/MC  
Crim.App. Dkt. No. 200800183

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals on appeal by the United States under Article 62, UCMJ, 10 U.S.C. § 862 (2000), the supplement to said petition, filed on July 21, 2008, the petition for extraordinary relief in the nature of a writ of prohibition and/or mandamus, filed by CBS Broadcasting, Inc., on July 10, 2008, and the

**Enclosure (2)**

U.S. v. WUTERICH,

petition for extraordinary relief in the nature of a writ of mandamus (In Re Frank D. Wuterich), filed on July 10, 2008, it is, by the Court, this 23rd day of July, 2008,

**ORDERED:**

That the United States will file a consolidated answer to all three of the above-referenced petitions no later than August 22, 2008;

That Appellant and Petitioners may file replies within ten days of the filing of the answer of the United States; and

That the three above-captioned actions be called for a consolidated hearing on the 17th day of September, 2008, at 9:00 a.m. Appellant/Petitioner Wuterich, Petitioner CBS Broadcasting, Inc., and the United States will each be allotted 20 minutes to present oral argument. The hearing will be held in the courtroom of the United States Court of Appeals for the Armed Forces, 450 E Street, NW, Washington, D.C. Counsel presenting argument will report to Room 104 prior to the hearing and sign in.

For the Court,

/s/ William A. DeCicco  
Clerk of the Court

cc: The Judge Advocate General of the Navy  
Counsel for Appellant/Petitioners (LEVINE, Esq., BROADSTON)  
Counsel for Appellee/Respondent



**UNITED STATES MARINE CORPS**  
U.S. MARINE CORPS FORCES CENTRAL COMMAND  
7115 SOUTH BOUNDARY BOULEVARD  
MACDILL AIR FORCE BASE, FLORIDA 33621-5101

IN REPLY REFER TO  
5800  
SJA  
AUG 06 2008

**From:** Commander, U.S. Marine Corps Forces, Central Command  
**To:** Regional Defense Counsel West

**Subj:** DELEGATION OF DETAILING AUTHORITY TO REGIONAL DEFENSE  
COUNSEL WEST

**Ref:** (a) R.C.M. 503, MCM (2008 ed.)  
(b) JAGINST 5800.7c, Para. 0130 (JAGMAN)  
(c) CMC ltr 5800, JAM1 dtd 6 Jun 06

1. Pursuant to the references, you are hereby delegated detailing authority for those cases arising from alleged misconduct in Haditha, Iraq during November 2005.
2. Reference (a) requires that a detailed defense counsel represent service members at Special and General Courts-Martial. Reference (b) provides that Navy and Marine Corps Judge Advocates may be detailed as Defense Counsel by their Commanders or their designee.
3. As Commander, U.S. Marine Corps Forces, Central Command, I authorize you to detail defense counsel under my cognizance or qualified counsel from other commands, if made available for detailing by the appropriate command authority. Reference (c) allows me to request the temporary assignment of any Marine Corps personnel to my command as may be necessary for completion of any administrative or disciplinary proceedings that I initiate. If necessary, I further delegate that authority to you for assignment of detailed defense counsel.
4. This detailing authority authorizes you to detail up to two detailed defense counsel per accused if in your discretion you believe one detailed defense counsel may be insufficient. Requests for individual military counsel (IMC) shall be forwarded via trial counsel to my Staff Judge Advocate, Lieutenant Colonel I. D. Brasure (or his successor), who will forward those requests to the appropriate commander for a determination of reasonable availability.

  
S. T. HELLAND

Enclosure (6)