

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

Before Panel No. 2

Frank D. WUTERICH)	GOVERNMENT ORDER RESPONSE
Staff Sergeant (E-6))	
U.S. Marine Corps,)	Case No. 200800183
Petitioner)	
)	
v.)	
)	
David M. JONES)	
Lieutenant Colonel)	
U.S. Marine Corps)	
Military Judge)	
Respondent)	

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

COMES NOW the United States pursuant to this Court's Order
of December 29, 2010, and hereby produces for inclusion in the
Record of Trial:

1. The original signed page 19 of the Military Judge's Findings of Fact and Conclusions of Law;
2. The original, corrected and initialed pages 10, 12, and 74 of the Record of Trial;
3. The original, signed Authentication page 48 of the Record of Trial, dated December 22, 2010;
4. The original, signed Authentication page 76 of the Record of Trial, dated December 22, 2010; and,
5. The un-numbered Appellate Exhibit, sealed and signed by the Military Judge on December 23, 2010.



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Certificate of Filing and Service

I certify that the original and required number of copies of the foregoing, including only a copy of the cover page of the sealed exhibit, were delivered to the Court on January 6, 2011. I also certify that a copy of the foregoing was delivered on January 6, 2011, to counsel for Petitioner and to Respondent.



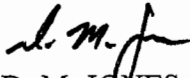
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conspirators) in front of this judge. The Court knows Mr. Puckett to be a very able attorney, as he has also practiced in front of this judge.

Dismissal of the charges in this case is a windfall for the accused and is not warranted based on the actions and inactions of both the prosecution and defense teams. In focusing on the affect on the accused of this entire ordeal, the Court is convinced that the accused has not been "irreparably prejudiced" as the defense claims in their motion. This Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and continue to be zealously represented by Mr. Faraj, Mr. Puckett, Mr. Zaid, and Major Marshall, USMC. The Court will fashion whatever remedy it deems appropriate during trial to ensure both the accused and the government receive a fair trial.

RULING

The defense MOTION is DENIED.


D. M. JONES
LtCol, USMC
Military Judge

we talked about at the previous session that when you got hired by the law firm that you presently work for -- Fitzpatrick, Haygood, Smith, and Uhl -- that they were already representing Mr. Salinas and that, if I remember correctly, the partner told you when you were hired that Mr. Salinas did not object to you being hired by the firm orally, but you did not see anything in writing nor did you receive anything in writing from your client, Staff Sergeant Wuterich.

almf

Is that correct?

CC (Mr. Vokey): Yes, sir. It really wasn't discussed when I first joined the firm. It was actually not discussed for months later. When -- at the time I got out, I left here in -- on -- like, 6 August I drove out of town and I was anticipating -- I hadn't looked for a job because I didn't know when the case was going to go. So when I got back to Dallas, I was kind of frantically looking for a job and putting out resumes and that sort of thing.

So when I took the job with Fitzpatrick, Haygood, Smith, and Uhl, I had known a few of the people there because that's where I'm from and I'd known Dan Haygood for a number of years. It had nothing to do with him representing Salinas. It's just a very reputable law firm in Dallas. So I started working there. At the time, I was not doing anything with Staff Sergeant Wuterich's case at all. I really didn't discuss that with Mr. Haygood or anybody else in the firm. That really didn't come up for a number of months later.

almf

MJ: But was the firm already representing Mr. Salinas --

CC (Mr. Vokey): Yes. Yes.

MJ: -- when you were hired?

CC (Mr. Vokey): Yes, that's correct.

MJ: Okay. And did you get a waiver from your client or have you received a waiver from your client up until today, 13 September?

CC (Mr. Vokey): I have not. And at the time, I didn't -- I didn't think it was necessary. When I first joined the firm, it really -- I didn't even know if I was going to

the questions you might ask regarding the specific nature would get into areas of privilege.

MJ: Okay. Here's my concern -- go ahead and have a seat, Mr. Vokey.

Here's my concern, Mr. Puckett: My concern is that in order to -- in order to keep the ~~em~~otion alive despite my ruling, if I ruled against you, you would be kicking off a member of your team prior to going to court to save the issue on appeal that you didn't have your entire defense team here. So I'm not going to allow that to happen if I feel like Mr. Vokey can continue to represent Staff Sergeant Wuterich. And the reason for that is because he's the one that did the site visit according to his proffer.

remf

It seems to me -- I've heard different things, but I don't think it's been incongruent. I heard last session that he -- that Mr. Vokey hasn't worked on the case recently too much at all, but I certainly know that he worked on the case earlier. He did the site visit with your videographer --

CC (Mr. Puckett): Yes, sir.

MJ: -- and your client --

CC (Mr. Puckett): Right. On active duty.

MJ: -- to Iraq --

CC (Mr. Puckett): Yes, sir.

MJ: -- and those kind of things.

So if he is an indispensable part of the team, I certainly don't want him off the case and I understand why Staff Sergeant Wuterich would ~~nt~~. But if the defense team is telling me there's an ethical conflict, Mr. Vokey cannot represent him from this point forward; and you're representing that to me but I can't ask any more questions, then I would have to release him because my hands are tied. I don't want to get into any attorney/client privileged information.

remf

CC (Mr. Puckett): Right, sir. Right.

present on the motion?

TC (Maj Gannon): Nothing further other than the evidence attached to our motion. We respectfully request that you consider that, sir. And then just, again, very briefly since the court has severed the attorney/client relationship between Mr. Vokey and the accused, the government's position is that none of the materials in that in-camera packet are relevant in any way, shape, or form because the issue before the court is whether or not the government improperly severed. The disparate treatment argument doesn't flow unless there was an improper severance. Since this court just severed the ACR on good cause, we don't even get to that, sir. That's our position, sir. Thank you.

MJ: What about the issue as it relates to Mr. Faraj?

TC (Maj Gannon): In terms of relevance to Mr. Faraj?

MJ: Right.

~~CC (Mr. Faraj):~~ The ACR is alive and well and Mr. Faraj continues apparently to represent Staff Sergeant Wuterich, frankly rather capably.

my

CC (Mr. Faraj): Till I think of another argument tonight, Your Honor, and come up with it tomorrow.

MJ: Okay. Thank you.

It is true that -- I'm sorry. Go ahead.

CC (Mr. Faraj): They asked for some evidence to be considered by the court. I am going to object based on the same grounds that the government offered to -- evidence that I offered in my motion; and that is this timeline of key events was produced by counsel for the government. And I ask that the court not consider it based on the same grounds that the government argued against my evidence. And these are simply proffers by government counsel. And any facts that aren't supported by evidence that's on the record within their motion, I would also object to your consideration, again, based on the same grounds that were used for our motion.

MJ: Government.

AUTHENTICATION OF THE RECORD OF TRIAL

in the case of

Staff Sergeant Frank D. Wuterich, XXX XX 3221, U.S. Marine Corps, Headquarters Battalion, 1st Marine Division, Marine Forces Pacific, Camp Pendleton, California 92055.

TRIAL COUNSEL CERTIFICATION

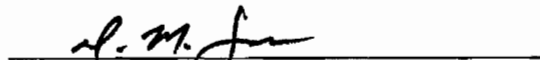
In accordance with R.C.M. 1103(i)(1)(A), I have examined the record of trial in these proceedings and caused those changes to be made which are necessary to report the proceedings accurately.



M. R. BROWER
Captain
U.S. Marine Corps
Trial Counsel

2010 12 21
Date

MILITARY JUDGE AUTHENTICATION



D. M. JONES
Lieutenant Colonel
U.S. Marine Corps
Military Judge

22 DEC 2010
Date

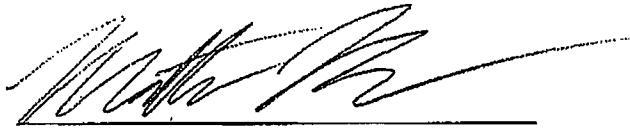
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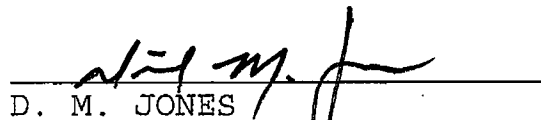
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M. R. BROWER
Captain
U.S. Marine Corps
Trial Counsel

20/01221
Date

MILITARY JUDGE AUTHENTICATION



D. M. JONES
Lieutenant Colonel
U.S. Marine Corps
Military Judge

22 DEC 2010
Date

**UNITED STATES MARINE CORPS
Western Pacific Judicial Circuit
Navy-Marine Corps Trial Judiciary
General Court-Martial**

UNITED STATES

v.

FRANK W. WUTERICH
STAFF SERGEANT, USMC

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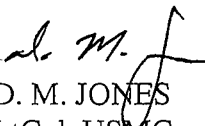
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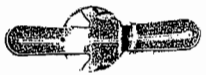
23 DEC 2010

1. This un-numbered Appellate Exhibit is a Memorandum for the Record of an ex parte hearing conducted between the Military Judge and the Defense Counsel. The Exhibit will be numbered at the next session of court. It is sealed by Court Order. This action is necessary to protect and safeguard the attorney-client privilege and work product of the defense counsel in the above-mentioned case. This exhibit may be opened *only* by Appellate Courts in the proper exercise of their appellate responsibility.

2. Specifically, this exhibit may NOT be opened by:
- a. Any party seeking to make copies of this record of trial;
 - b. Any government agent seeking to assess this case for legal or procedural error;
 - c. Any government agent assessing this case for clemency or aggravation purposes.

Ordered this 23rd day of December 2010.


D. M. JONES
LtCol, USMC
Military Judge



[Handwritten signature]
LTCOL, USMC

D. M. JONES
~~LTCOL, USMC~~ *[Handwritten signature]*
LTCOL, USMC

EX PARTE HEARING OF 13 SEPT 2010

SEALED

23 DEC 2010

[Handwritten signature]

D. M. JONES
LTCOL, USMC