IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

Frank D. Wuterich, Staff Sergeant (E-6), United States Marine Corps, Appellant,	) APPELLANT'S REPLY TO APPELLEE'S ANSWER TO WRIT APPEAL PETITION
v.	)
David M. Jones, Lieutenant Colonel, United States Marine Corps, In his official capacity as Military Judge, and	) Crim.App. Misc. Dkt. No. 200800183) USCA Misc. Dkt. No. 11-8009/MC
The United States, Appellees.	)

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

COMES NOW Appellant Staff Sergeant Frank D. Wuterich, United States Marine Corps, by and through his undersigned counsel, and pursuant to Rule 27(b) of this Court's Rules of Practice and Procedure, replies to the Government's Answer.

I.

The Government's Answer is predicated on a factual error.

The Government's Answer relies upon several factual inaccuracies, but one is particularly significant. The Government states: "LtCol Vokey, and upon retirement Mr. Vokey, represented Appellant without interruption until September 14, 2010." Government Answer at 6. This assertion appears to be

[1] The original writ appeal petition provided an erroneous middle initial for Judge Jones. Counsel apologize for the error.

based on the military judge's fourth finding of fact, which included: "Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings . . . ." Appendix to Appellant's Writ Appeal Petition at Tab E, Finding 4. But that is clearly erroneous. The record demonstrates beyond question that, contrary to the Government's assertion, the attorney-client relationship between Appellant and LtCol Colby Vokey, USMC (Ret.) was interrupted. Appendix D to Appellant's writ appeal petition was a portion of the record of trial in this case which proves that Appellant's attorney-client relationship with LtCol Vokey was severed upon his retirement from the Marine Corps. The military judge confirmed that LtCol Vokey had retired and confirmed that at the time of that Article 39(a) session - March 11, 2009 - he had not been retained to represent Appellant in a civilian capacity. So an interruption in representation of four months and ten days had already occurred at that point.

The Government's Answer is thus predicated on an erroneous factual framework. Contrary to the Government's belief, Appellant's attorney-client relationship with LtCol Vokey was severed in 2008, and remained so into 2009. Under this Court's case law, that severance was erroneous. *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978). Appellant was prejudiced by this error because it was during this first period

of erroneous severance that the cause of the second severance arose. This Court should grant Appellant's writ appeal to correct the prejudice that arose from the first erroneous severance and to avoid further prejudice that will arise if Appellant is required to go to trial without the services of his only defense counsel to have gone to the scene of the alleged offenses, interviewed key witnesses, conducted depositions of Iraqi witnesses, and formulated portions of Appellant's defense.

II.

> Because the military judge found that an "irreconcilable conflict" exists which required severance of the attorney-client relationship, no remedies are available short of a writ from a superior Court.

The Government argues that Appellant may be able to obtain relief without issuance of a writ. Government Answer at 11-12. Not so. The military judge found that an "irreconcilable conflict" required severance of Appellant's attorney-client relationship with LtCol Vokey. Because the military judge expressly found that the conflict was "irreconcilable," no further action on Appellant's part could result in the military judge allowing him to retain LtCol Vokey (Ret.) as his counsel.

As the military judge found, Appellant objected to severance of his attorney-client relationship with LtCol Vokey. Appendix to Appellant's Writ Appeal Petition at Tab E, Finding 6. Despite Appellant's express request to retain LtCol Vokey's

representation, the military judge "release[d] Mr. Vokey from further participation in this case." *Id.* The military judge concluded that there was an "*irreconcilable* conflict of interest." *Id.* (emphasis added). While Appellant disagrees that any conflict of interest is irreconcilable, the military judge's finding that an irreconcilable conflict required the severance of the attorney-client relationship demonstrates that Appellant has exhausted all avenues of relief, short of a writ from a superior Court. Because the military judge has determined that an irreconcilable conflict exists, any steps Appellant takes to remedy the matter will necessarily be futile. And "[t]he law does not require the doing of a futile act." *United States v. Ortiz*, 35 M.J. 391, 393 (C.M.A. 1992) (alteration in original) (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

The Government's Answer also concocts two concessions. The Government asserts: "Appellant concedes he was never misadvised about his rights to detailed defense counsel . . . ." Government Answer at 11. The Government offers no citation for such a concession, which Appellant never made. More significantly, the Government asserts: "Appellant concedes no unlawful command influence is at work, Mr. Vokey's retirement was voluntary and his choice alone – not a denial by any authority empowered to yet again extend Mr. Vokey's retirement

date." Government Answer at 11-12. Again, the Government fails to provide any citation to such a concession, which Appellant never made. On the contrary, LtCol Vokey's ultimate retirement on November 1, 2008 (and resulting severance of his attorney-client relationship with Appellant) *was* the result of being informed by the Deputy Director of Headquarters Marine Corps' Manpower section that further requests for extensions would be denied.

The Government later repeats a portion of this concocted concession, arguing that "'unlawful command influence' is a distinct assignment of error, and one Appellant concedes has not occurred." Government Answer at 24. Appellant made no such concession. And the Government's assertion that Appellant did appears to conflict with its complaint in the previous paragraph that Appellant "imputes command influence to all the traditional 'good cause' reasons to change counsel," as well as its complaint in the same paragraph that Appellant's arguments include "innuendo and undertone of 'endemic' command influence." *Id.*

III.

This Court's precedent indicates that interference with an accused's right to counsel is an appropriate basis for extraordinary relief.

The Government argues that granting this writ appeal would be inappropriate because relief is available in the normal course of appeals. Government Answer at 12-13. But the Government fails to even address the numerous instances in which this Court has issued interlocutory writs due to interference with an accused's right to counsel. *See, e.g., United States v. Wilson*, 54 M.J. 450 (C.A.A.F. 2001) (summary disposition) (granting writ appeal to allow current defense counsel to communicate with former defense counsel); *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (summary disposition) (granting writ appeal to allow continued post-trial representation by the accused's civilian defense counsel, who had previously represented the accused as an active duty Navy JAG Corps officer); *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003) (summary disposition) (ordering further proceedings to determine whether the accused's civilian defense counsel was disqualified from further representation because of a conflict of interest); *United States v. Schmidt*, 60 M.J. 1 (C.A.A.F. 2004) (per curiam) (granting writ appeal to lift restrictions on an accused's communications with his counsel).

In all of those cases, the issue could have been addressed during the ordinary course of appeals. And yet, given the fundamental importance of the attorney-client relationship, this Court found that issuing an interlocutory writ was appropriate. The same is true here.

IV.

Appellant did not invite the error that he seeks to remedy.

The military judge expressly found that Appellant "has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case." Appendix to Appellant's Writ Appeal Petition at Tab E, Finding 6. Yet the Government argues that Appellant somehow invited the error of which he now complains. Government Answer at 13-15. That argument, however, is based on yet another concocted concession. The Government asserts, "Appellant concedes he made no objection to any military court in 2008 when the JAG-designated Detailing Authority replaced LtCol Vokey and Maj Faraj with substitute detailed defense counsel." Government Answer at 14. Again, the Government provides no citation for such a concession. And again, Appellant has made no such concession.

There were no court-martial sessions between November 1, 2008 - when Appellant's attorney-client relationship with LtCol

Vokey was severed upon the latter's retirement - and March 11, 2009 - when Judge Meeks presented the severance to Appellant as a fait accompli. But Appellant did object in court to that severance; he objected to this Court in his briefing on the Article 62 appeal. In fact, Judge Ryan noted Appellant's complaint in her dissent. *United States v. Wuterich*, 67 M.J. 63, 85 (C.A.A.F. 2008) (Ryan, J., dissenting), *cert. denied*, 139 S. Ct. 52 (2009). As Judge Ryan points out, the Government even "concede[d] that these losses may prejudice Appellant's defense." *Id.* So Appellant did not acquiesce to the loss of LtCol Vokey's representation; he complained about it in the only forum in which he could. The Government's concocted "concession" should be ignored,[2] as should the Government's invited error argument that its concocted concession supports.

V.

The Government's argument that Appellant's right to counsel was not violated is based on erroneous assertions of fact.

The Government once again seeks to rely on a concocted concession when it argues that Appellant's right to counsel was

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[2] The same is true of the Government's other concocted concessions, including: (1) "Appellant concedes he made no demand of any party that then-LtCol Vokey delay his retirement a fifth time, or that he requested that Mr. Vokey be recalled to active duty immediately"; and (2) "Appellant concedes he was advised correctly about his statutory rights to counsel." Government Answer at 12. The Government offers no citation for such concessions and Appellant has made no such concessions.

not violated. According to the Government, "Appellant concedes that in November 2008, he had no objection to Mr. Vokey's retirement, departure as detailed defense counsel, and subsequent service as civilian defense counsel." Government Answer at 16. As discussed above, Appellant never made any such concession and it is untrue that Appellant had no objection to LtCol Vokey's departure as detailed defense counsel.

In support of its argument that Appellant's counsel rights were not violated, the Government also attempts to rely on its factually erroneous assertion that there was no severance of Appellant's attorney-client relationship with LtCol Vokey upon LtCol Vokey's retirement. Government Answer at 17-18. As discussed above, the record proves that such a severance did occur. And because that severance was not based on a "truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship," it violated Appellant's rights. *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978).

In discussing Appellant's right to counsel, the Government cites this Court's decision in *United States v. Curtis*, 44 M.J. 106, 126 (C.A.A.F. 1996). Government Answer at 19. The Government fails to note two important facts. First, the continuity of counsel issue in *Curtis* involved appellate representation, not representation by trial defense counsel.

Appellate representation and trial-level representation are governed by distinct statutes and regulations. Second, this Court subsequently reversed a portion of that *Curtis* decision. *United States v. Curtis*, 46 M.J. 129 (C.A.A.F. 1997) (per curiam).

VI.

The Government's attempt to relitigate the *Hutchins* case reinforces the appropriateness of reaching the merits of Appellant's writ appeal.

The Government offers an extended recap of its arguments in the pending case of *United States v. Hutchins*. *See United States v. Hutchins*, 69 M.J. 180 (C.A.A.F. 2010) (certificate for review filed). Government Answer at 19-27. This argument reinforces that the law governing this case is currently in flux. This Court should reach the merits of this writ appeal to ensure that the law as this Court will announce it in *Hutchins* is applied here. For that law will certainly govern this case if it reaches appellate review. *See Griffith v. Kentucky*, 479 U.S. 314 (1987); *see generally United States v. Harcrow*, 66 M.J. 154, 160-61 (C.A.A.F. 2008) (Ryan, J., concurring). Both parties would benefit from having that law applied now rather than trying the case under one understanding of the law only to have that understanding reversed after trial. Given the

enormous delay that has already occurred in this case, the prospect of having to try it twice should be avoided.

VII.

Article 59(a) does not, and cannot, apply to this Court's resolution of an interlocutory petition for extraordinary relief.

Finally, the Government argues that any error in this case should be tested for prejudice under Article 59(a). Government Answer at 26-27. Article 59(a) does not and cannot apply to the resolution of an interlocutory petition for extraordinary relief. Article 59(a) prohibits an appellate court from holding a "finding or sentence . . . incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." 10 U.S.C. § 859(a) (2006). Appellant is not asking this Court to overturn a finding or sentence. Nor could he, since no findings or sentence yet exist in his case. So Article 59(a) does not limit this Court's ability to grant the requested relief. On the contrary, it would be preferable to grant the requested relief now rather than overturning any convictions and sentence later because Appellant was prejudiced by the improper severance of his attorney-client relationship with LtCol Vokey (Ret.).

Conclusion

For the foregoing reasons, as well as those set out in Appellant's original writ appeal petition, this Court should grant Appellant's writ appeal.

Respectfully submitted,

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