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

Frank D. Wuterich, Staff Sergeant (E-6) United States Marine Corps, Petitioner v. David M. Jones Lieutenant Colonel, United States Marine Corps, (in his official capacity as Military Judge), and The United States, Respondents.	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND BRIEF IN SUPPORT Case No. 200800183

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

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

Preamble

Petitioner seeks a writ of mandamus to vindicate his right to continued representation by Lieutenant Colonel (LtCol) Colby Vokey, USMC (Ret.). In denying Petitioner's motion to abate proceedings until his attorney-client relationship with LtCol Vokey (Ret.) is restored, Respondent Judge Jones made numerous

factual and legal errors. He repeatedly made and relied on his most significant error: concluding that there was no interruption in Petitioner's attorney-client relationship with LtCol Vokey in 2008, when LtCol Vokey retired from active duty. The record definitively proves that there was an interruption in the attorney-client relationship beginning when LtCol Vokey commenced terminal leave on 6 August 2008 and continuing at least into March 2009. Nevertheless, in ruling on Petitioner's motion to abate proceedings, Respondent Judge Jones made and repeatedly relied on the clearly erroneous finding that there was no interruption in the attorney-client relationship. By making and relying on that clearly erroneous finding, Respondent Judge Jones abused his discretion, resulting in an erroneous deprivation of Petitioner's right to be represented at his court-martial by LtCol Vokey (Ret.).

Respondent Judge Jones further erred by belittling LtCol Vokey's status as Petitioner's only counsel to visit the site of the alleged offenses, the significance of which the Court of Military Appeals' precedent has expressly recognized. Respondent Judge Jones' ruling is thus at odds with precedent which he is duty-bound to follow. Other flaws also infect his ruling, such as misconstruing one regulation and relying on another regulation that has been canceled. These and numerous other errors in his ruling demonstrate that Respondent Judge

Jones' denial of Petitioner's motion to abate proceedings constitutes a violation of his judicial duty to protect Petitioner's continued representation by LtCol Vokey (Ret.).

Petitioner has a right to be represented by LtCol Vokey (Ret.) at his court-martial. He would be harmed by the deprivation of that right. If the case were to be tried today and if Petitioner were to be convicted, he would ultimately have to be tried a second time due to Respondent Judge Jones' erroneous ruling – an outcome that is in no one's interests. This Court should, therefore, issue a writ of mandamus ordering Respondent Judge Jones to abate court-martial proceedings against Petitioner until Respondent United States restores his attorney-client relationship with LtCol Vokey (Ret.).

Relief Sought

Petitioner seeks a writ of mandamus ordering Respondent Judge Jones to abate court-martial proceedings against Petitioner until Respondent United States has restored his attorney-client relationship with LtCol Vokey (Ret.).

Statement of the Issue

SHOULD THIS COURT ORDER COURT-MARTIAL PROCEEDINGS ABATED PENDING THE RESTORATION OF PETITIONER'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL WHERE: (1) THE MILITARY JUDGE DENIED A MOTION TO RESTORE THE ACCUSED'S ATTORNEY-CLIENT RELATIONSHIP WITH HIS FORMER DETAILED DEFENSE COUNSEL; (2) THAT FORMER DETAILED DEFENSE COUNSEL WAS PETITIONER'S ONLY COUNSEL WHO HAS VISITED THE SCENE OF THE ALLEGED OFFENSES; (3) A SITE VISIT BY PETITIONER'S CURRENT COUNSEL IS IMPOSSIBLE; (4) THE MILITARY JUDGE CONCLUDED THAT ERROR OCCURRED IN THE TERMINATION OF THE FORMER DETAILED DEFENSE COUNSEL'S STATUS; (5) THE MILITARY JUDGE CONCLUDED THAT THAT ERROR WAS HARMLESS BECAUSE THE FORMER DETAILED DEFENSE COUNSEL CONTINUED TO REPRESENT PETITIONER WITHOUT INTERRUPTION; AND (6) THE MILITARY JUDGE'S FINDING OF UNINTERRUPTED REPRESENTATION IS CLEARLY ERRONEOUS?

Summary of Argument

Petitioner has always wanted LtCol Vokey's representation, but his attorney-client relationship with LtCol Vokey has been interrupted twice. The first time occurred on 6 August 2008, when LtCol Vokey began terminal leave. The military judge has ruled that error occurred in connection with the termination of LtCol Vokey's status as Petitioner's detailed defense counsel. But the military judge found that the error was harmless because, in the military judge's view, LtCol Vokey continued to provide Petitioner with uninterrupted representation until the military judge severed the attorney-client relationship on 13 September 2010 due to a conflict of interest. But that ruling was clearly erroneous; the record definitively proves that LtCol Vokey stopped representing Petitioner when he began terminal

leave on 6 August 2008 and had not rejoined the defense team by March 2009. During that crucial period when there was a break in representation, LtCol Vokey obtained civilian employment that later led the military judge to interrupt Petitioner's attorney-client relationship with LtCol Vokey a second time.

Petitioner would be uniquely prejudiced by the loss of LtCol Vokey from the defense team because LtCol Vokey is the only one of his counsel who has visited the scene of the alleged offenses – a status that Court of Military Appeals case law recognizes as significant. Moreover, given the military and political situation in Iraq, it is now impossible for any of Petitioner's current counsel to conduct such a site visit or replicate LtCol Vokey's other work for Petitioner in Al Anbar Province.

Because error occurred and Petitioner is harmed by that error, this Court should order court-martial proceedings abated until the United States restores Petitioner's attorney-client relationship with LtCol Vokey (Ret.). Several possible means exist to restore that relationship. This Court can and should leave it to the United States to determine which of those means to implement. Petitioner notes, however, that Respondent Judge Jones was wrong to reject LtCol Vokey's involuntary recall to active duty as one such means – a rejection that, among many other problems, relied in part on a canceled Secretary of the

Navy Instruction. The existence of this means proves that there is no irreconcilable bar to restoring Petitioner's attorney-client relationship with LtCol Vokey (Ret.).

Finally, the issue of Petitioner's counsel rights is peculiarly appropriate for resolution via a writ.

Jurisdictional Basis for Relief Sought

The Supreme Court has recognized that "military appellate courts" are "empowered to issue extraordinary writs . . . in aid of [their] existing statutory jurisdiction." *Clinton v. Goldsmith*, 526 U.S. 529, 534-35 (1999). Because Petitioner is being tried by a general court-martial authorized to impose a dishonorable discharge and more than a year of confinement, this case falls within this Court's potential appellate jurisdiction. *See* Article 66(b), Uniform Code of Military Justice, 10 U.S.C. § 866(b) (2006). A Court is authorized to issue relief pursuant to the All Writs Act, 28 U.S.C. § 1651(a), in cases falling within its potential appellate jurisdiction. *See, e.g., FTC v. Dean Foods Co.*, 384 U.S. 597, 603-04 (1966); *In re Tennant*, 359 F.3d 523, 528 (D.C. Cir. 2004).

Previous History

Charges were preferred against Petitioner on 21 December 2006 and referred for trial by general court-martial on 27 December 2007. Petitioner is charged with several offenses arising from his actions during combat operations on a patrol in

Haditha, Iraq on 19 November 2005. Specifically, he is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice in violation of Articles 92, 119, 128, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 892, 919, 928, and 934 (2000). Petitioner's case has been the subject of two government appeals pursuant to Article 62, UCMJ. *See United States v. Wuterich*, 66 M.J. 685 (C.A.A.F. 2008), *vacated*, *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008), *cert. denied*, 130 S. Ct. 52 (2009); *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.), *certificate for review dismissed*, 68 M.J. 404 (C.A.A.F. 2009).

On 25 October 2010, Appellant filed a petition for extraordinary relief in the nature of a stay of proceedings with this Court. Two days later, this Court denied that petition "without prejudice to the Plaintiff's ability to petition for relief from the military judge's denial of the motion for appropriate relief." On 28 October 2010, Appellant filed a petition for a writ of mandamus before this Court seeking a declaration that his right to continuation of his established attorney-client relationship with his original detailed military defense counsel was improperly severed and seeking appropriate relief. The following day, this Court denied the petition without prejudice to the right to raise the matter during the ordinary course of appellate review.

Petitioner filed a writ appeal with the Court of Appeals for the Armed Forces on 5 November 2010. *Wuterich v. Jones*, 69 M.J. 425 (C.A.A.F. 2010). On 20 December 2010, the Court of Appeals for the Armed Forces vacated this Court's decision and remanded the case to this Court to "1) obtain the transcripts of the Article 39(a) sessions held on September 13 and 14, 2010, both sealed and unsealed; 2) determine whether the sealed portion should remain sealed; and 3) determine whether the military judge abused his discretion in determining that good cause existed to sever the attorney-client relationship." *Wuterich v. Jones*, 69 M.J. 456 (C.A.A.F. 2010). On 7 January 2011, this Court issued an opinion concluding that "the military judge did not abuse his discretion in granting Mr. V's motion to withdraw." *Wuterich v. Jones*, No. NMCCA 200800183, 2011 WL 49614 (N-M. Ct. Crim. App. Jan. 7, 2011).

Upon the case's return to the Court of Appeals for the Armed Forces, that Court ordered supplemental briefing. *Wuterich v. Jones*, 69 M.J. 474 (C.A.A.F. 2011); *see also Wuterich v. Jones*, 69 M.J. 487 (C.A.A.F. 2011). On 30 March 2011, the Court heard oral argument in the case. *Wuterich v. Jones*, 70 M.J. 36 (C.A.A.F. 2011). On 4 April 2011, the Court issued an order denying relief without prejudice. *Wuterich v. Jones*, 70 M.J. 82 (C.A.A.F. 2011) (summary disposition).

On 25 May 2011, Petitioner filed a petition for extraordinary relief in the nature of a stay of proceedings with this Court. On 27 May 2011, this Court granted a stay of proceedings until further order of this Court. On 31 May 2011, the military judge issued findings of fact and conclusions of law. On 7 June 2011, Petitioner moved for access to a transcript on an ex parte hearing in this case. The Government filed no response to that motion. In an order dated 23 June 2011 but not received by Petitioner's counsel until 29 June 2011, this Court denied that motion.[1] On 9 June 2011, Petitioner moved to propound interrogatories. The Government opposed that motion. In an order dated 23 June 2011 but not received by

[1] It does not appear to be necessary for Petitioner to note an exception to that ruling to preserve the issue for possible review by the Court of Appeals for the Armed Forces. *See, e.g., United States v. Sherrod*, 26 M.J. 30, 32 n.5 (C.M.A. 1988) (adopting waiver analysis of *United States v. Sherrod*, 22 M.J. 917, 921-22 (A.C.M.R. 1986) (adopting waiver analysis of *United States v. Schauer*, No. NCM 762574 (N.M.C.M.R. Apr. 20, 1977), *reprinted at* 21 M.J. at 220-23)). Nevertheless, in an abundance of caution, Petitioner notes his objection to this Court's denial of his motion for access to a transcript of the ex parte proceeding, which is inconsistent with the Court of Appeals for the Armed Forces' decision to grant appellate defense counsel access to Respondent Judge Jones' memorandum of record concerning an ex parte proceeding when considering the previous writ appeal in this case. *United States v. Wuterich*, 69 M.J. 487 (C.A.A.F. 2011) (order). This error hinders Petitioner's ability to challenge certain portions of Respondent Judge Jones' ruling due to his inability to compare statements concerning the ex parte hearing in the findings of fact and conclusions of law with a transcript of the ex parte hearing.

Petitioner's counsel until 29 June 2011, this Court denied that motion.

With the exception of the motion filed with the military judge and the previous petition for extraordinary relief and writ appeal noted above, no prior actions have been filed or are pending seeking the same relief in this or any other court.

Statement of Facts

A. LtCol Vokey represented Petitioner for more than 18 months before severing the attorney-client relationship upon beginning terminal leave.

LtCol Vokey believes he formed an attorney-client relationship with Petitioner on "the day he was charged," which was 21 December 2006. Transcript of 25 April 2011 Article 39(a) Session at 44. LtCol Vokey had spoken with Petitioner on one or two occasions before that. *Id*. On 17 January 2007, LtCol Vokey was formally detailed to represent Petitioner. Appellate Exhibit XCIV at 130, ¶ 2. LtCol Vokey was detailed to the case by LtCol Simmons, who was then the Marine Corps' Regional Defense Counsel Pacific. 13 Sept. 2010 Article 39(a) session transcript at 31. Six days before LtCol Vokey was detailed to this case, Maj Haytham Faraj had also been detailed to represent Petitioner. Appellate Exhibit XCIV at 130, ¶ 2.

LtCol Vokey served as Petitioner's detailed defense counsel for more than a year and a half before he began terminal leave. LtCol Vokey's work on Petitioner's behalf included a visit to

the scene of the alleged offenses accompanied by Petitioner and a videographer. Appellate Exhibit CI at 2.

> LtCol Vokey personally interviewed critical Iraqi witnesses in videotaped depositions in Iraq during a site visit in January 2008. He alone has established the rapport with these witnesses who will be crucial for cross examination during the trial. He walked over the ground and through the houses where the deaths at issue in the case occurred in Haditha, Iraq.

Appellate Exhibit XCIV at 131, ¶ 9. Before becoming a judge advocate, LtCol Vokey had served as a Marine Corps artillery officer. *Id*. at 1. In that capacity, he served as a battery executive officer in combat during Operation Desert Storm, receiving the Combat Action Ribbon. *Id*. Lt Col Vokey provides this synopsis of his role on the defense team:

> I believe I was a key member of the defense team and invaluable to the preparation of the defense in this case. I was the only attorney of SSgt Wuterich's current defense team that traveled to Iraq to conduct a site visit. I walked through the houses where the alleged crimes occurred. I walked through the town of Haditha and took photos. I traveled by foot and vehicle along routes Viper and Chestnut. I studied the terrain, visibility from the roads, distances to the houses and environmental conditions. I deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses that were present but unknown. Throughout the period of the site visit and the conduct of depositions, I was accompanied by SSgt Wuterich who provided . . . key information and assisted me in my survey of the area and my interview of the witnesses.
>
> I also took on a sizable portion of the case preparation. I interviewed numerous witnesses who are located in the U.S. I spent hundreds of hours getting to know SSgt Wuterich and his family to better

> understand his character and personality so that I may genuinely advocate for my client.

Appellate Exhibit CI at 3-4.

B. LtCol Vokey's terminated representation of Petitioner on 6 August 2008, upon commencing terminal leave.

Trial in this case was originally set for early March 2008. Approximately 14 months before trial was to begin, both LtCol Vokey and Maj Faraj submitted retirement requests. 13 Sept. 2010 Article 39(a) session transcript at 32. LtCol Vokey was originally assigned a retirement date of 1 May 2008, which he understood would allow him sufficient time to complete Petitioner's court-martial, which was scheduled to be tried in March 2008. *Id*. at 32-34. In February 2008, however, after the previous military judge in this case quashed a subpoena seeking outtakes from an interview that the CBS television show "60 Minutes" taped with Petitioner, the Government filed an Article 62 appeal, resulting in an automatic stay of court-martial proceedings. *See generally United States v. Wuterich*, 66 M.J. 685 (N-M. Ct. Crim. App. 2008). That automatic stay was not lifted until 20 June 2008, when this Court reversed the military judge's order quashing the subpoena. *Id*. Ten days later, Petitioner submitted a petition to the Court of Appeals for the Armed Forces seeking review of this Court's decision. *United States v. Wuterich*, 66 M.J. 498 (C.A.A.F. 2008). The Court of Appeals for the Armed Forces issued an opinion on 17 November

2008. *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008). That decision vacated this Court's decision while also reversing the military judge's quashal of the subpoena. While not formally stayed during the proceedings before the Court of Appeals for the Armed Forces, the trial did not resume during that appeal.

Because the prosecution appeal threatened to push Petitioner's trial date past his retirement date, LtCol Vokey took steps seeking to ensure that he would be able to continue representing Petitioner as his military defense counsel. During the March to April 2008 timeframe, he sought and received an extension of his retirement date until 1 June 2008. 13 Sept. 2010 Article 39(a) session transcript at 34. This extension disrupted LtCol Vokey's previous plans for transitioning to a civilian career. His wife and children left Camp Pendleton in May 2008 to live with her parents in Texas. *Id*. at 33. LtCol Vokey moved into a travel trailer at Lake O'Neill and continued to work on Petitioner's case. *Id*. at 35. From May to 6 August 2008, LtCol Vokey lived in the trailer, which he was required to move from camp site to camp site every five to seven days, as he continued to work on Petitioner's case and seek extensions of his retirement date. *Id*. at 35-36.

LtCol Vokey sought and received another extension of his retirement date until 1 July 2008. *Id*. at 34-35. Colonel

Patrick Redmon of the Manpower Management Officer Assignment (MMOA) office at Headquarters Marine Corps refused a subsequent telephonic request from LtCol Vokey for a further extension, instructing LtCol Vokey to submit an Administrative Action form with an endorsement by a general officer or the military judge in the *Wuterich* case if LtCol Vokey wanted to remain in his billet longer. Finding of Fact 2 from 25 April Motion.[2] LtCol Vokey did not submit such an Administrative Action form or seek the assistance of the military judge, the officer-in-charge of the Legal Service Support Section, or any senior judge advocate. *Id.*, Finding of Fact 4. He instead asked MMOA for an extension of his retirement date until 1 November 2008 not for the purpose of representing Petitioner, but rather to out-process, for travel, and for terminal leave. 13 Sept. 2010 Article 39(a) session transcript at 37, 57-58. That request was approved. *Id*.

LtCol Vokey left the Camp Pendleton area and ceased representing Petitioner on 6 August 2008. *Id*. at 37. LtCol Vokey was officially retired on 1 November 2008. Supplemented Finding of Fact 2. LtCol Vokey "assumed that leaving active

[2] LtCol Vokey (Ret.) disputes Col Redmon's testimony on this point. But because the military judge credited Col Redmon's testimony on this point, and because that finding of fact does not appear to be clearly erroneous, Petitioner adopts it for purposes of this petition for extraordinary relief only.

duty severed the attorney-client relationship." Transcript of 25 April 2011 Article 39(a) Session at 101.

On the same day that LtCol Vokey began terminal leave, the Convening Authority delegated defense counsel detailing authority to the Regional Defense Counsel West, who is stationed at Camp Pendleton, California. Appellate Exhibit CXVI; Transcript of 25 April 2011 Article 39(a) Session at 115. The Regional Defense Counsel West when LtCol Vokey began terminal leave was LtCol Patricio Tafoya. *Id*. LtCol Tafoya never released LtCol Vokey from the *Wuterich* case. Transcript of 25 April 2011 Article 39(a) Session at 103, 116. Nor did any other detailing authority ever release LtCol Vokey from the *Wuterich* case. *Id*. at 102. Nor did LtCol Vokey ever appear before any Court to be excused from his role as Petitioner's detailed military defense counsel before or upon beginning his terminal leave. 13 Sept. 2010 Article 39(a) session transcript at 70. Nor did Petitioner ever release him. 13 Sept. 2010 Article 39(a) session transcript at 70.

C. During the break in LtCol Vokey's representation of Petitioner, LtCol Vokey accepted employment that led to Respondent Judge Jones' 13 September 2010 ruling that LtCol Vokey was irreconcilably conflicted from further representation of Petitioner.

LtCol Vokey sent out approximately 300 resumes, but received only two or three job offers. 13 Sept. 2010 Article 39(a) session transcript at 38, 62-63. The most attractive of these offers was from the law firm of Fitzpatrick, Hagood, Smith and Uhl, LLP, which he accepted. *Id*. at 40. That firm represented Sgt Hector Salinas, who was also involved in the events in Haditha on 19 November 2005. *Id*. at 10.

LtCol Vokey has never engaged in active representation of Sgt Salinas. *Id*. at 14. Rather, the firm screened LtCol Vokey from the case to ensure that there would be no actual conflict. *Id*. LtCol Vokey believes that the firm no longer represents Sgt Salinas. Finding of Fact 6 from 25 April Motion; *see also* 13 Sept. 2010 Article 39(a) session transcript at 14 (indicating that the firm no longer represents Sgt Salinas).

LtCol Vokey (Ret.) made no appearances on Petitioner's behalf and was not retained to represent Petitioner between the time he left active duty and March of 2009. Transcript of 25 April 2011 Article 39(a) Session at 103. An email sent on 4 March 2009 by Neal Puckett, Esquire, to Judge Meeks stated, in relevant part, "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." Government Argument on Defense Motion for Appropriate Relief (Abate Proceedings Until Attorney Client Relationship with Detailed Defense Counsel (LtCol Vokey) Is Restored at Encl. 1 (filed 28 April 2011).

On 11 March 2009 – after the Government's first Article 62 appeal but before its second – an Article 39(a) session was held to hear motions. During that session, Judge Meeks briefly discussed LtCol Vokey's status:

> MJ: All right. 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 civilian counsel, but that has not occurred, is that correct?
>
> DC (LtCol Tafoya): That's correct, Your Honor.

11 March 2009 Article 39(a) session transcript at 2-3 (from the record in *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (en banc), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009)). Judge Meeks then gave Petitioner this advice regarding his right to continued representation by LtCol Vokey:

> 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 . . . Now, you have the right, of course, to retain him, but that's something completely between you and Lieutenant Colonel Vokey.

11 March 2009 Article 39(a) session transcript at 3.

During an Article 39(a) session on 22 May 2010 – after the litigation concerning the second Article 62 appeal was complete – LtCol Vokey first made an appearance as civilian counsel. Transcript of 22 May 2010 Article 39(a) session at 64. After that appearance, the defense team realized that an imputed conflict existed between LtCol Vokey and Petitioner. 13 Sept. 2010 Article 39(a) session transcript at 11.

D. Respondent Judge Jones denied a defense motion for abatement of proceedings until Petitioner's attorney-client relationship is restored.

Following the Court of Appeals for the Armed Forces' ruling on his writ appeal, on 15 April 2011, Petitioner filed a motion to abate proceedings until his attorney-client relationship with LtCol Vokey (Ret.) is restored. The Government filed a written opposition on 22 April 2011.

Respondent Judge Jones held an Article 39(a) session to receive evidence and hear argument on the motion on 25-26 April 2011. Following the hearing, on 29 April 2011, the Government submitted additional evidence and argument.

Twenty-four days after the motion hearing, in an e-mail to counsel dated 20 May 2011, Respondent Judge Jones denied the

motion while indicating that he had not yet completed his findings of fact and conclusions of law.

On 25 May 2011, Petitioner sought a stay of proceedings from this Court. On 27 May 2011, this Court ordered a stay of proceedings pending further order of this Court. This Court ordered Respondent Judge Jones to produce his findings of fact and conclusions of law no later than 13 June 2011.

On 31 May 2011, Respondent Judge Jones issued findings of fact and conclusions of law in support of his denial of Petitioner's motion to abate proceedings.

Reasons this Court Should Grant the Requested Writ

A military accused has a right to continued representation by a detailed military defense counsel unless and until that relationship is properly severed. *See United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). In this case, two severances of Appellant's attorney-client relationship with Appellant occurred. Neither was legally permissible.

The first severance occurred in connection with LtCol Vokey's retirement from active duty. On 6 August 2008, LtCol Vokey stopped representing Appellant upon commencing terminal leave. Sept. 13, 2010 Article 39(a) session transcript at 10-11. When an Article 39(a) session was held seven months later, in March 2009, LtCol Vokey was not in an attorney-client relationship with Appellant. 11 March 2009 Article 39(a)

session transcript at 2-3. The severance of the attorney-client relationship that occurred upon LtCol Vokey's commencement of terminal leave on 6 August 2008 was improper.

A second erroneous severance of Appellant's attorney-client relationship with LtCol Vokey (Ret.) occurred on 13 September 2010 when Respondent Judge Jones ordered the attorney-client relationship severed. At some unspecified point after 11 March 2009, Appellant and LtCol Vokey (Ret.) reformed an attorney-client relationship. The military judge ordered that relationship severed because he concluded that LtCol Vokey (Ret.) had an irreconcilable conflict that prevented his further representation of Appellant. 13 Sept. 2010 Article 39(a) session transcript at 21; Supplemented Finding of Fact 6. That conclusion, however, was erroneous. LtCol Vokey's conflict was not irreconcilable. Rather, the potential limitation on LtCol Vokey's representation of Appellant arose solely from an imputed disqualification, not an actual conflict. *See* 13 Sept. 2010 Article 39(a) session transcript at 14. One simple solution to the imputed disqualification – a solution that is entirely within Appellee United States' control – is to recall LtCol Vokey (Ret.) to active duty. Once recalled, the imputed disqualification would vanish and LtCol Vokey could resume his representation of Appellant without limitation. Respondent Judge Jones' determination that there was an irreconcilable

conflict that required LtCol Vokey's withdrawal from the case was thus influenced by an erroneous view of the law and was, therefore, an abuse of discretion. *United States v. Miller*, 66 M.J. 306, 307 (C.A.A.F. 2008).

A. The military judge correctly concluded that the severance of Petitioner's attorney-client relationship with LtCol Vokey upon LtCol Vokey's commencement of terminal leave was erroneous.

Appellant's attorney-client relationship with LtCol Vokey was not properly severed upon LtCol Vokey's commencement of terminal leave on 6 August 2008. The military judge in the case at that time was Judge Meeks, the same military judge who presided over the trial in *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). And Judge Meeks made the same mistakes in this case that led the Court of Appeals for the Armed Forces to conclude in *Hutchins* that "the record of trial does not establish a valid basis for" the relevant defense counsel's termination of participation in the case. *Id*. at 284. As Respondent Judge Jones concluded in his 31 May 2011 findings of fact: "The previous judge in the case did not make a proper inquiry, on the record, regarding the excusal of the accused's two detailed counsel from active duty . . . ." Supplemental Finding of Fact 18. Respondent Judge Jones continued:

> [Petitioner] has never excused either [LtCol Vokey or Maj Faraj] from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey (before 13 September 2010) ever

> made an application to the Court for excusal or withdrawal, nor did they ask that the proceedings be abated if they were not retained on active duty.

Id.

Respondent Judge Jones subsequently explained the error that occurred in greater detail:

> Clearly, there was error back in March 2009 when there was not an official severance of the attorney-client relationship pursuant to R.C.M. 505(d)(2)(B) and 506(c). There was no excusal by: 1) the detailing authority; 2) excusal by express consent of the accused; 3) application for withdrawal by the defense counsel; or 4) by appointment of individual military counsel. "The military judge has a critical role in this process." *United States v. Hutchins*, 69 M.J. 282, 289 (C.A.A.F. 2011). Although the previous military judge did have a colloquy with counsel, he did not do a correct analysis of the loss of a detailed defense counsel with the parties. (Record of Trial 405.-6 [sic]).

Findings of Fact and Conclusions of Law at p. 25.

Respondent Judge Jones subsequently added that Judge Meeks "stated, 'Now, there's no way the government can compel [LtCol Vokey] to be present' to the accused. Post-*Hutchins*, this can now be viewed, in hindsight, as an error by the military judge." *Id*. at p. 28 n.5.

These legal conclusions by Respondent Judge Jones are certainly correct under *United States v. Hutchins*, 69 M.J. 282 (C.A.A.F. 2011). Particularly in light of his long service on the case and his status as the only defense counsel to have visited the scene of the alleged offenses, LtCol Vokey's

participation is crucial to the defense. Thus this is a situation that falls with the *Hutchins* caveat that while "separation from active duty normally terminates representation, highly contextual circumstances may warrant an exception from this general guidance in a particular case." *Hutchins*, 69 M.J. at 291. Indeed, Respondent Judge Jones himself previously recognized that LtCol Vokey is an "indispensible part of the team, especially in light of his site visit to Haditha with Petitioner. 13 Sept. 2010 Article 39(a) Session Transcript at 12. During that site visit, LtCol Vokey personally interviewed numerous witnesses, making him irreplaceable on the defense team when they testify at trial. *See* Appellate Exhibit XCIV at 131, ¶ 9. But his site visit is not all that makes LtCol Vokey indispensible. LtCol Vokey devoted approximately 18 months of full-time work to preparing to litigate Appellant's case. *See generally* Appellate Exhibit CI at 3-4. That preparation cannot be replicated by another counsel. Other relevant factors in this case include the seriousness of the offenses with which Appellant is charged, the trial venue's remoteness from the scene of the alleged offenses, the continuity of representation by the Government, and the extraordinary lengths to which the Government went to continue its own counsel in this case on active duty and on station, including allowing the lead trial

counsel in the case – LtCol Sean Sullivan – to reach sanctuary status.

Additionally, the Court of Appeals for the Armed Forces' recent *Hohman* decision confirms that error occurred. *See United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011) (per curiam). There, the Court of Appeals for the Armed Forces observed that the detaching defense counsel "did not seek the permission of the military judge to withdraw from representation in the ongoing trial *as required by the applicable rules*, see Dep't of the Navy, Judge Advocate General Instr. 5803.1C, para. 16e(2) (Nov. 4, 2004)." *Hohman*, No. 11-6004/MC, slip op. at 3 (emphasis added). In this case, the detaching defense counsel failed to comply with that same requirement. Error thus occurred in this case. If that error harmed Petitioner, then relief is necessary. The military judge concluded that there was no such harm, but his basis for making that ruling is clearly erroneous.

B. Petitioner was harmed by a break in representation upon LtCol Vokey's commencement of terminal leave.

Having correctly found error, Respondent Judge Jones proceeded to conclude that the error was harmless. But he based his conclusion on a clearly erroneous factual finding. He wrote: "[T]he denying of the detailed status of Mr. Vokey is harmless error where the underlying attorney-client relationship

remains intact. *United States v. Wiechmann*, 67 M.J. 456 (C.A.A.F. 2009). Such was the case in the accused's case." Findings of Fact and Conclusions of Law at p. 25. On the contrary, the record definitively establishes that there was a break in LtCol Vokey's representation of Petitioner.[3] The following portions of the record document that break:

(1) An email sent on 4 March 2009 by Neal Puckett, Esquire, to Judge Meeks stated, in relevant part, "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

[3] Beyond this factual error, Respondent Judge Jones' finding also misconstrues *Wiechmann*. Specifically, the error in *Weichmann* was found to be harmless solely because the severed counsel continued to fully participate in all critical stages of trial, and, further, that any resulting defects in his representation were explicitly waived through the pretrial agreement and guilty plea. *Wiechmann*, 67 M.J. at 463. In this case, unlike in *Wiechmann*, Petitioner has *not* waived the error related to LtCol Vokey's improper severance, and, moreover, LtCol Vokey was fully severed and can no longer assist during the critical stages of trial. Finally, Respondent Judge Jones' reliance on *Wiechmann* overlooks that even if LtCol Vokey were to have continued as a *pro bono* civilian counsel, rather than as an active-duty counsel, the improper change to the nature of his attorney client relationship with Petitioner would have still been legal error. Military courts have consistently held that "[o]nce entered into, the relationship between the accused and his appointed military counsel may not be severed or *materially altered* for administrative convenience." *United States v. Catt*, 1 M.J. 41, 48 (C.M.A. 1975)(emphasis added) (quoting *United States v.* Murray, 20 C.M.A. 61, 62, 45 C.M.R 253, 254). *See also United States v. Iverson*, 5 M.J. 440 (1978); *United States v. Tellier*, 13 C.M.A. 323, 32 C.M.R 323 (1962). An attorney-client relationship is "materially altered" when it is improperly changed from detailed defense counsel status to status as a *pro bono* civilian.

relationship has been formalized." Government Argument on Defense Motion for Appropriate Relief (Abate Proceedings Until Attorney Client Relationship with Detailed Defense Counsel (LtCol Vokey) Is Restored at Encl. 1 (filed 28 April 2011) (emphasis added). That email demonstrates that LtCol Vokey had left the defense team. If he had not, there would be no need for him to rejoin the defense team. This is a contemporaneous document – written long before this Court's *Hutchins* decision – that compellingly demonstrates the state of the defense team in March 2009. LtCol Vokey (Ret.) was not on the defense team at that point.

(2) One week later, on 11 March 2009, Judge Meeks discussed LtCol Vokey's status with LtCol Tafoya:

> MJ: All right. 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 civilian counsel, but that has not occurred, is that correct?
>
> DC (LtCol Tafoya): That's correct, Your Honor.

11 March 2009 Article 39(a) session transcript at 2-3 (from the record in *United States v. Wuterich*, 68 M.J. 511 (N-M. Ct. Crim. App.) (en banc), *certificate of review dismissed*, 68 M.J. 404 (C.A.A.F. 2009)). Once again, this is a compelling

contemporaneous account of LtCol Vokey's status. This colloquy also occurred long before this Court's *Hutchins* decision. At the time, there would not have appeared to be any tactical significance to the question of whether there was a break in Petitioner's attorney-client relationship with LtCol Vokey. These contemporaneous accounts, free from any subconscious desire by either party to promote a particular answer to the question of LtCol Vokey's status, are highly credible. The record thus definitively indicates that such a break did occur.

(3) At the 13 September 2010 motions session, LtCol Vokey stated that upon commencing terminal leave, he ceased representing Petitioner. *See* 13 Sept. 2010 Article 39(a) session transcript at 10-11; *see also id*. at 37.

(4) At the 25 April 2011 Article 39(a) session, LtCol Vokey testified that he "assumed that leaving active duty severed the attorney-client relationship." Transcript of 25 April 2011 Article 39(a) Session at 101. Such an assumption is consistent with the break in representation that Mr. Puckett's 4 March 2009 email and LtCol Tafoya's 11 March 2009 colloquy with Judge Meeks document.

(5) At the 25 April 2011 Article 39(a) session, LtCol Vokey testified that he was not retained by and made no appearances of behalf of Petitioner between when he left active duty and March 2009. Transcript of 25 April 2011 Article 39(a)

Session at 101. Again, that testimony is consistent with contemporaneous documentation from March 2009.

The break in representation is further corroborated by the fact that LtCol Vokey did not participate in any of the telephonic R.C.M. 802 conferences with Respondent Judge Jones between LtCol Vokey's retirement and March 2010. *See* 22 March 2010 Article 39(a) session transcript at 9.

Despite this evidence conclusively proving that there was a break in LtCol Vokey's representation of Petitioner, Respondent Judge Jones found that there was not. Respondent Judge Jones found that "[u]pon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused . . . ." Supplemented Finding of Fact 4. That finding of fact is clearly erroneous. And that clearly erroneous finding of fact substantially influenced Respondent Judge Jones' denial of the motion to abate proceedings. Throughout his ruling, Respondent Judge Jones repeated and relied on his clearly erroneous finding that LtCol Vokey provided continuous representation to Petitioner after LtCol Vokey left active duty.[4] Thus, the entire basis for Respondent Judge Jones' ruling is wrong.

[4] *See, e.g.*,: (1) Supplemented Finding of Fact 6 ("Until being released at the 13 September 2010 Article 39(a) session, Mr. Vokey had continued to represent the accused, albeit in a much reduced role."; (2) Supplemented Finding of Fact 10 ("Therefore, until Mr. Vokey was released by the Court in September 2010, both original defense counsel became, in effect, civilian

Petitioner was severely prejudiced by the error in terminating LtCol Vokey's status as his detailed defense counsel. It was only as a result of that erroneous severance that LtCol Vokey accepted employment that led to Respondent Judge Jones' 13 September 2010 ruling that LtCol Vokey was under an irreconcilable conflict leading to his second removal from Petitioner's defense team.

And Petitioner will be severely harmed if LtCol Vokey is not sitting at his counsel table during the trial. Respondent Judge Jones denigrated the importance of LtCol Vokey's representation of Petitioner. He concluded, "There is little prejudice to the defense in losing the services of Mr. Vokey."

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counsel of record and continued to represent the accused."); (3) Supplemented Finding of Fact 16 ("LtCol Vokey continued to represent the accused, albeit in a much more limited fashion until he was released in September 2010 by the Court . . . ."); (4) 31 May 2011 Findings of Fact and Conclusions of Law at p. 25 ("The attorney-client relationship existed until 15 September 2010 . . . ."); (5) 31 May 2011 Findings of Fact and Conclusions of Law at p. 27 ("Eventually, both officers elected to retire and continue representing the accused as civilian attorneys."); (6) *id*. at p. 28 n.5 ("Certainly it can be argued that the defense team had decided to release LtCol Vokey from his detailed defense counsel status but that his attorney-client relationship would continue in a civilian capacity, just as it did for Mr. Faraj."); (7) *id*. at p. 29 (Mr. Vokey continued to represent the accused for almost two years from his hiring at the law firm, albeit in a more limited fashion."); (8) *id*. ("When an attorney-client relationship persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel."); (9) *id*. at 46 ("With no end in sight for the appellate litigation, the defense counsel both assumed they had to retire, but would continue to represent the accused as civilian attorneys."

Supplemented Finding of Fact 21. He reasoned that "[t]he defense team has a videographer, who went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any relevant videos or maps of the area involved in the incident." *Id*. He later added, "Just because Mr. Vokey did a site visit to Iraq and worked on the case does not mean the accused' can't get a fair trial unless Mr. Vokey is sitting at counsel table." 31 May 2011 Findings of Fact and Conclusions of Law at 47. Respondent Judge Jones overlooks that the key question is not whether Petitioner can receive a fair trial without LtCol Vokey, but whether he is harmed by the errors that resulted in his loss of representation by LtCol Vokey. And the answer to that question is yes.

While Respondent Judge Jones diminished the significance of LtCol Vokey's status as the only counsel on the defense team who visited the scene of the alleged offenses, controlling case law establishes that status's significance. In *Eason*, the Court of Military Appeals found that the detailed defense counsel was indispensible to the defense team, notwithstanding the accused's representation by civilian counsel, in part because the detailed defense counsel had "unique knowledge of the case which no one else on the defense team possessed," in part because he was in Vietnam where the offenses allegedly occurred but the civilian defense counsel "never journeyed to Vietnam." *United States v.*

Eason, 21 C.M.A. 335, 339, 45 C.M.R. 109, 113 (1971). Indeed, Respondent Judge Jones himself previously noted the significance of LtCol Vokey's visit with Petitioner to the scene of the alleged offenses and characterized LtCol Vokey (Ret.) as an "indispensible part of the team." 13 Sept. 2010 Article 39(a) session transcript at 12. Thus, Respondent Judge Jones' 31 May 2011 conclusion that "[t]here is little prejudice to the defense in losing the services of Mr. Vokey," Supplemented Finding of Fact 21, conflicts with his own previous assessment of LtCol Vokey's significance to Petitioner's representation. LtCol Vokey's crucial role on the defense team also distinguishes this case from both *Hutchins* and *United States v. Hohman*, 70 M.J. 98 (C.A.A.F. 2011) (per curiam), where the severed defense counsel had played far more peripheral roles on the defense team. Critically, in *Hutchins* an essential element of the Court of Appeals for the Armed Forces' holding that there was no prejudice was its conclusion that "[n]one of the issues under the initial responsibility of Captain Bass involved matters of fact or law in which he had unique knowledge or expertise beyond that which could be gained through routine preparation by the attorneys who remained on the defense team." *Hutchins*, 69 M.J. at 292. LtCol Vokey's site visit and extensive specialized preparation for this case is this precise type of unique expertise.

LtCol Vokey's status as the Petitioner's only counsel to have visited the scene of the alleged offenses takes on added significance in light of military and geopolitical considerations, which make it impossible for one of Petitioner's current counsel to visit the site of the alleged offenses in Al Anbar Province, Iraq. Being deprived of LtCol Vokey's knowledge of the purported crime scene – with the added advantage of LtCol Vokey's knowledge as a veteran combat arms officer – is an irreparable loss to the defense team.

C. Respondent Judge Jones erred when he severed Petitioner's attorney-client relationship a second time based on his erroneous determination that an irreconcilable conflict prevents LtCol Vokey from ever representing Petitioner.

A second erroneous severance of Petitioner's attorney-client relationship with LtCol Vokey (Ret.) occurred on 13 September 2010. On that date, the military judge granted LtCol Vokey's request to withdraw, thereby effectively severing the Appellant's attorney-client relationship with him for a second time. The military judge granted the withdrawal due to what he perceived to be an irreconcilable conflict that prevented LtCol Vokey from continuing to represent Appellant. The military judge's characterization of the conflict as irreconcilable, however, was legally erroneous. And that error led the military judge to improperly order Appellant's attorney-client relationship with Appellant severed rather than taking

appropriate action to preserve the attorney-client relationship, as dictated by controlling precedent. See, e.g., *United States v. Iverson,* 5 M.J. 440, 442-43 (C.M.A. 1978) ("Absent a truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship, only the accused may terminate the existing affiliation with his trial defense counsel prior to the case reaching the appellate level.").

The record establishes that the conflict that currently affects LtCol Vokey's representation of Appellant is solely an imputed disqualification arising from his law firm's former representation of Sgt Salinas. *See* 13 Sept. 2010 Article 39(a) session transcript at 14. While Respondent Judge Jones concluded that there was an actual conflict, he reached that conclusion on the basis that LtCol Vokey has an adverse interest with Sgt Salinas and he works for a firm that represents Sgt Salinas. *See* 31 May 2011 Findings of Fact and Conclusions of Law at 31.[5] That is the very definition of an imputed disqualification. See ABA Model Rule of Professional Conduct 1.10. LtCol Vokey has no personal conflict as he never has, and does not now, represent Sgt Salinas. But for the fact that other members of his firm represented Sgt Salinas, he would be

[5] Respondent Judge Jones made no findings of fact suggesting that LtCol Vokey had acquired any privileged information concerning Sgt Salinas, nor would any such finding have been supported by the record.

free to represent Petitioner without limitation. The military judge thus clearly erred by concluding that an actual conflict exists. There is no actual conflict that limits LtCol Vokey's representation of Appellant. On the contrary, the firm screened off LtCol Vokey from the *Salinas* case, thereby ensuring that no actual conflict could develop. 13 Sept. 2010 Article 39(a) session transcript at 14. To the extent that a conflict exists, it is an imputed conflict. And that imputed disqualification could be resolved in a number of ways, thereby vindicating Petitioner's right to continued representation by LtCol Vokey. See *Iverson,* 5 M.J. at 442-43.

If proceedings were to be abated, it would be up to Respondent United States to choose the optimal method of restoring the attorney-client relationship between Petitioner and LtCol Vokey. Respondent United States routinely procures trial defense counsel services through numerous means, any one of which could allow Petitioner's attorney-client relationship with LtCol Vokey to be reestablished. But the existence of merely one such means is sufficient to refute Respondent Judge Jones' characterization of any conflict purportedly barring LtCol Vokey from representing Petitioner as "irreconcilable." One such obvious means is recalling LtCol Vokey to active duty. And although Respondent Judge Jones rejected this possibility,

see 31 May 2011 Findings of Fact and Conclusions of Law at pp. 43-44, his analysis was infused with error.

First, recalling LtCol Vokey to active duty would eliminate any ethical issue concerning his representation of Petitioner. If LtCol Vokey were recalled to active duty, he would be governed by the Navy Rules of Professional Conduct, JAGINST 5803.1C (9 Nov 04), not by the Texas Disciplinary Rules of Professional Conduct. *See* Navy Rule of Professional Conduct 8.5, comment (2) ("When covered USG attorneys are engaged in the conduct of Navy or Marine Corps legal functions, whether serving the Navy or Marine Corps as a client or serving an individual client as authorized by the Navy or Marine Corps, these Rules supersede any conflicting rules applicable in jurisdictions in which the covered attorney may be licensed."). Thus, Respondent Judge Jones' extended analysis of the Texas Disciplinary Rules of Professional Conduct would become irrelevant. LtCol Vokey would be a United States Government Attorney if he were to be recalled to active duty. *See* JAGINST 5803.1C, ¶4.b (defining "covered USG attorneys" to include all active duty Marine Corps judge advocates). And there is no automatic imputed disqualification for United States Government attorneys under the Navy Rules. *See* R. 1.10. In fact, rejection of a per se imputed disqualification rule is a long-standing aspect of the military justice system that has been endorsed by the American

Bar Association. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 343 (1977); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1235 (1972).

Respondent Judge Jones' ruling also raised concerns about LtCol Vokey's ability to retain his employment with his current firm if he were to represent Petitioner. *See* 31 May 2011 Findings of Fact and Conclusions of Law at p. 41. For example, Respondent Judge Jones wrote: "Mr. Vokey is in a difficult position; he wants to help his client, but he doesn't seem to want to be recalled to active duty and leave (forfeit?) his job at the Fitzpatrick law firm." *Id*. Respondent Judge Jones overlooked that if LtCol Vokey were to be recalled to active duty to represent Petitioner, he would have a statutory right to reemployment at the Fitzpatrick law firm with no resulting adverse effects. *See* 38 U.S.C. § 4311 (2006) ("A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."). Thus, representing Petitioner in a retired recalled status would eliminate any conflict that

might otherwise exist between LtCol Vokey's employment interests and representing Petitioner.

Respondent Judge Jones also questioned the United States' ability to recall LtCol Vokey to active duty. But his analysis of this question was marred by misquotations and misconstructions of governing authorities as well as reliance on a canceled regulation.

Respondent United States has the legal authority to return LtCol Vokey to active duty. 10 U.S.C. § 688 permits the Secretary of the Navy, under regulations prescribed by the Secretary of Defense, to order a retired member to active duty. The Secretary of Defense, in turn, has provided the Service Secretaries with broad authority to recall retired members to active duty. *See* Dep't of Def Directive 1352.1 (16 July 2005). It is, therefore, completely within the power of Respondent United States to restore Petitioner's attorney-client relationship with LtCol Vokey (Ret.) by recalling the latter to active duty.

The administrative burden of recalling one retired lieutenant colonel to active duty would be slight. But even if it were not, administrative inconvenience would not justify interference with the continuation of a properly formed attorney-client relationship. "Although there may be a 'financial, logistical, [or] ... administrative burden'

associated with providing representation by the military counsel with whom an accused has formed an attorney-client relationship, 'it is the duty and obligation of the Government to shoulder that burden where possible.'" *United States v. Spriggs*, 52 M.J. 235, 240 (C.A.A.F. 2000) (alterations in original) (quoting *Eason,* 21 C.M.A. at 340, 45 C.M.R. at 114).

Respondent Judge Jones' erroneous conclusion that LtCol Vokey could not be recalled to active duty[6] was based in part on a misconstruction of a Department of Defense Directive. He wrote: "Paragraph 4.2 of DOD Directive 1352.1 states that members of the Department of Defense should only use retirees to meet national security needs." 31 May 2011 Findings of Fact and Conclusions of Law at p. 43. Actually, it does not. It states: "The DoD Components and the Commandant of the U.S. Coast Guard shall plan to use as many retirees as necessary to meet national security needs." Dep't Defense Inst. 1352.1, ¶ 4.2 (16 July 2005). So rather than *limiting* the purposes for which retirees may be recalled, Paragraph 4.2 is actually a policy statement *encouraging* the recall of retirees. It does not prohibit the involuntary recall of retirees for purposes other than meeting national security needs. But even if it did, recalling LtCol Vokey to represent Petitioner would qualify. The President of

[6] *See* 31 May 2011 Findings of Fact and Conclusions of Law at p. 44.

the United States has concluded that military justice is a national security function. The President has stated: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. I, ¶ 3 (2008 ed.) [hereinafter MCM]. Thus, recalling LtCol Vokey to active duty to play a key role in a court-martial would be a means of strengthening the United States' national security.

Respondent Judge Jones also sought to rely on SECNAVINST 1300.14B. 31 May 2011 Findings of Fact and Conclusions of Law at 24, 44. But that regulation was canceled pursuant to ALVAV 093/04, which listed SECNAVINST 1300.14B as an Instruction to be delegated to the Navy and Marine Corps and canceled upon publication of an appropriate replacement. The subject matter of SECNAVINST 1300.14B now appears to be governed by MCO 3000.19A (25 August 2010), which does not include the language upon which Respondent Judge Jones sought to rely from the canceled SECNAVINST.

Moreover, Respondent Judge Jones adopted the Government's argument that recalling LtCol Vokey to active duty to represent a single accused would not be in the national defense interest.

31 May 2011 Findings of Fact and Conclusions of Law at 44 n.15. That view, however, is inconsistent with the view of the President of the United States. *See* MCM, Pt. 1, ¶ 3. Moreover, Respondent Judge Jones overlooked that if proceedings were abated until Petitioner's attorney-client relationship with LtCol Vokey is restored, then recalling LtCol Vokey would not serve merely the interests of Petitioner, but also the interests of the United States, since it would allow the United States to continue with its prosecution of Petitioner. And the record establishes that a precedent exists for involuntarily recalling a retired Marine to active duty for the purpose of prosecuting him. *See* 31 May 2011 Findings of Fact and Conclusions of Law at 44 ("As indicated by the affidavit of Mr. Tate, Head of Retired List Maintenance and Support Section, Manpower Management Separations and Retirement (MMSR), there has only been one instance where a Marine was [involuntarily] recalled to active duty and that was to face court-martial himself."). If facilitating that one court-martial was in the interests of national defense, there is no reason why facilitating Petitioner's court-martial would not also be. In fact, General Mattis has characterized the Wuterich case as "one of the most significant Marine Corps cases since Vietnam." LtCol Sean Sullivan sanctuary package, Gen Mattis endrsmnt dtd 17 Mar 2009). Facilitating the trial of such a significant case would

certainly be an authorized purpose for the Secretary of the Navy to involuntarily recall a retiree to active duty.

There can be no serious question that the Secretary of the Navy would be authorized to involuntarily recall LtCol Vokey to active duty for the purpose of representing Petitioner at his court-martial. It may not even be necessary to involuntarily recall LtCol Vokey (Ret.) to active duty since he previously indicated his willingness to be recalled to active duty to once again represent Appellant. *See* Appellate Exhibit CXVII at 33. Recalling LtCol Vokey to active duty either voluntarily or involuntarily would eliminate any ethical limitations that might currently prevent his ability to represent Petitioner. Accordingly, there is no irreconcilable conflict preventing the restoration of Petitioner's attorney-client relationship with LtCol Vokey. Respondent Judge Jones therefore erred by concluding that such an irreconcilable conflict existed.

D. Issues concerning interference with the attorney-client relationship are uniquely appropriate for resolution via a writ.

The Court of Appeals for the Armed Forces' case law establishes the appropriateness of resolving right-to-counsel issues through the mechanism of a petition for extraordinary relief. For example, in *United States v. Nguyen*, 56 M.J. 252 (C.A.A.F. 2001) (summary disposition), the Court of Appeals for the Armed Forces reversed this Court and granted a writ appeal

to allow continued post-trial representation by the accused's civilian defense counsel, who had previously represented the accused as an active duty Navy JAG Corps officer. And in *United States v. Shadwell*, 58 M.J. 142 (C.A.A.F. 2003) (summary disposition), the Court of Appeals for the Armed Forces reversed this Court and ordered further proceedings to determine whether the accused's civilian defense counsel was disqualified from further representation because of a conflict of interest. A case such as this, which, like *Nguyen* and *Shadwell*, involves questions concerning the appropriateness of an attempt to sever an attorney-client relationship over the accused's objection, is demonstrably the type of rare case in which extraordinary relief is appropriate.

Conclusion

For the foregoing reasons, this Court should issue a writ of mandamus directing Respondent Judge Jones to abate proceedings until Respondent United States restores Petitioner's attorney-client relationship with LtCol Vokey (Ret.).

Respectfully submitted,

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Certificate of Service

I certify that the foregoing document was delivered to the Court, the Appellate Government Division, the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, and LtCol David M. Jones on 6 July 2011.

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