

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

UNITED STATES v. FRANK D. WUTERICH XXX XX 3221 Staff Sergeant U.S. Marine Corps))))))))))))	GENERAL COURT MARTIAL Defense Motion for Leave of Court to Submit Additional Matters in Support of Its Motion for Appropriate Relief for Loss of Counsel 22 September 2010
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1. Nature of Motion. The defense requests leave of court to submit additional matters and brief written argument in support of the Defense’ motion for Appropriate Relief for Loss of Counsel.

2. Facts. On September 15, 2010, the trial judge in the case of *United States v. Hohman*, issued his essential findings and conclusions of law and order in that case on the issue of loss of counsel due to release from active duty. The defense submits that decision and brief argument for this court’s review because the issues considered in *Hohman* and the facts related to representation in that case are closely related to this case.

Discussion. During the Article 39a session held on 13 and 14 September, 2010, the Government vigorously argued the issue of detailed defense counsels’ –Mr. Colby Vokey and Mr. Haytham Faraj- conduct with respect to the effort exerted in order to extend on active duty and remain on this case. We presented some evidence and extensive testimony about the efforts Mr. Faraj and Mr. Vokey made to remain on active duty. The testimony was that manpower refused to continue to grant extensions. That was backed-up by an enlightening negative endorsement by Col. Redmon of manpower to LtCol Sullivan’s sanctuary package and buttressed by the email and testimony provided by Mr. Colby Vokey. Upon review of the

Judge's findings and order in *U.S. v. Hohman*, it appears that the Government's focus on defense counsels' actions to extend on active duty are without merit and perhaps even disingenuous because even when the LSSS OIC recommended approval, Manpower refused to grant extensions to the detailed counsel in *U.S. v. Hohman*. *U.S. v. Hohman*, Military Judge's Essential Findings of Fact and Conclusions of Law at 7. [Hereinafter "*Hohman* Order"]. That decision is consistent with the evidence provided by Mr. Colby Vokey and Mr. Yetter, proffer by Mr. Faraj, and the Redmon and Walker endorsements contained within the sanctuary packages of LtCol Sean Sullivan, USMCR and LtCol Paul Atterbury, USMCR.

Like the instant case, one of the reasons why an extension was denied to Capt Muth – DDC in *Hohman* – was force management concerns. *Id.* Col Redmon's correspondence makes clear that force management was a concern and a basis why an extension of an officer on active duty should be denied. And in fact it was denied to both, then, LtCol Colby Vokey and Maj Haytham Faraj. But even if Defense Counsel exert no effort to remain on active duty, the case law on the matter of right to detailed counsel is substantial and clear. It is the Government's or Convening Authority's obligation to ensure that detailed counsel remain on the case absent *excusal by the Court*. And, "it is error for a military judge to allow proceedings to continue after a *detailed defense counsel* ceases representation of the accused without either the accused's knowing release or a finding of good cause by the military judge." *Hohman* Order at 15; (citing *U.S. v. Hutchins*, 68 M.J. 623, 628-629 (N-M.C.C.A 2010) (emphasis added)). Neither counsel in this case was excused by the military judge prior to severance of ACR as detailed defense counsel.

In *Hohman*, The trial judge heard testimony from Manpower that the reason for the denial of the request was essentially a policy reason and not statutory. He found that the stated

policy reasons do not amount to a good cause as defined by *Hutchins*. These are the same reasons that the two detailed defense counsel in this case faced in attempting to extend to remain on the case. Yet, it is clear from the extensions granted to reserve officer prosecutors, who were statutorily barred from further service, that both policy and statutes can and were waived to keep government counsel on this case.

The physical presence of former detailed counsel in the courtroom is of no relevance on the issue of severance of ACR as detailed defense counsel. In *Hutchins* and *Hohman* formerly detailed defense counsel did not show up for court proceedings thus resulting in a reversal in *Hutchins* and abatement in *Hohman*. Formerly detailed defense counsel did show up in this case because of professional responsibility rules mandating that they appear. But that does not undo the severance of the detailed counsel ACR. Neither Mr. Vokey nor Mr. Faraj have filed notices of appearance as civilian counsel. They have both appeared because they were under a duty to do so created by State Bar rules. (See Concurring opinion in *Hutchins* criticizing counsel for failure to appear in court and recommending disciplinary action). Severance occurred when they both left active duty creating the same problem as in *Hutchins* and *Hohman*. That severance created a time bomb that began to tick when both detailed counsel in this case were released from active duty. The clock ran out with the permanent loss of Mr. Colby Vokey due to a conflict as a result of his improper release from active duty and severing of the ACR. In the case of Mr. Faraj, he could choose to stay away from these proceedings, hire an attorney and communicate with the court as Mr. Muth did. The fact that he is in court to argue this issue does not solve the severance problem, no differently than if Mr. Muth had appeared to do the same. The Government in both cases would still be required to repair the improper severance.

3. Evidence. Military Judge's Finding of Fact, Conclusions of Law and order in *United States v. Hohman*.
4. Relief Requested. Abatement of the proceeding to allow the Government to fashion a remedy or dismissal of the charges.
5. Argument. None requested

By: /S/

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22 September 2010

Date

CERTIFICATE OF SERVICE

I certify that an electronic copy of this document was served upon government counsel on
22 September 2010.

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