

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

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

**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.

Relief Sought

Petitioner seeks declaratory and mandamus relief in the form of: (1) a declaration that Petitioner's right to the continuation of an established attorney-client relationship was improperly severed; (2) abatement of court-martial proceedings until LtCol Colby Vokey, USMC (Ret.) is restored as Petitioner's

defense counsel or, in the alternative, remand to the military judge to provide appropriate relief in light of the declaration that Petitioner's right to continuation of an established attorney-client relationship was improperly severed; and (3) a stay of proceedings pending this Court's consideration of this petition for extraordinary relief.

Request for Expedited Review

Petitioner requests expedited review of his request for a stay of proceedings in the court below as this case is currently set to begin on 2 November 2010.

Statement of the Issue

WAS AN ACCUSED'S RIGHT TO THE CONTINUATION OF AN ESTABLISHED ATTORNEY-CLIENT RELATIONSHIP VIOLATED WHERE THAT ACCUSED'S LEAD DETAILED MILITARY DEFENSE COUNSEL LEFT ACTIVE DUTY UNWILLINGLY AND WITHOUT THE ACCUSED'S CONSENT AND THEREAFTER WAS HIRED BY A CIVILIAN FIRM WHOSE REPRESENTATION OF ANOTHER CLIENT LED THE MILITARY JUDGE TO SEVER THAT COUNSEL'S ATTORNEY-CLIENT RELATIONSHIP WITH PETITIONER?

Summary of Argument

This petition for extraordinary relief involves fundamental issues concerning the attorney-client relationship.

Petitioner's attorney-client relationship was disrupted (and ultimately broken) as a result of his detailed military defense counsel's transition from military to civilian status. The military judge found that the counsel's metamorphosis in status

was accomplished without proper advice to the client. He also expressly found that both the previous military judge and counsel acted "based on a misunderstanding of the facts and the law." Finding of Fact 21, *United States v. Wuterich*, Findings of Fact and Conclusions of Law (26 October 2010) [Appendix A at 8]. In spite of this, the military judge incongruously concluded that "there is nothing to cure." *Id.* at 18.

On the contrary, Petitioner had his attorney-client relationship with his longest-serving defense counsel improperly severed after three years and nine months of representation. And this severance, which occurred just fifty-one days before trial was to begin in Petitioner's homicide case, was prejudicial to Petitioner. The severed defense counsel is integral to Petitioner's defense: he is the only defense counsel who has visited the purported crime scene, the only defense counsel who has interviewed key witnesses, and the only defense counsel who literally retraced Petitioner's steps on the day of the alleged offenses. The violation of Petitioner's right to the continuation of this existing attorney-client relationship is far more pronounced and far more prejudicial than the similar violation that led this Court to presume prejudice and grant relief in *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App.) (en banc), *certificate for review filed*, 69 M.J. 180 (C.A.A.F. 2010).

Petitioner's former detailed military defense counsel's metamorphosis into civilian status led directly to the severance of his attorney-client relationship with Petitioner. But the military judge erroneously failed to recognize that this severance - over which Petitioner had no control - violated Petitioner's fundamental right to "*the continuation of an established attorney-client relationship.*" *Hutchins*, 68 M.J. at 627 (quoting *United States v. Baca*, 27 M.J. 110, 118 (C.M.A.1988)) (emphasis supplied by *Hutchins*).

Contrary to the military judge's ruling, Petitioner's loss of his former military detailed defense counsel's representation clearly violated his right to "*the continuation of an established attorney-client relationship*" in two ways. First, the military judge erred by severing the attorney-client relationship on 13 September 2010 despite the ready availability of viable alternatives - such as abating the proceedings unless the Government recalled LtCol Vokey to active duty - that would have preserved the attorney-client relationship. Second, long before that severance, in 2008, Rule for Courts-Martial 505(d)(2)(B) was violated when Petitioner's detailed defense counsel was excused and changed without following the presidentially prescribed procedures for such excusal and change. And just as in *Hutchins*, that action was accomplished without the military judge or counsel advising Petitioner of

available means by which he could have sought to maintain his detailed defense counsel in his then-current status. Further, LtCol Vokey's departure from active service led directly to the ultimate severance of his attorney-client relationship with Petitioner: had LtCol Vokey's request to extend his service been granted he would not have taken the job which led to his imputed disqualification.

Thus Petitioner's right to continuation of his established attorney-client relationship was violated. Petitioner is therefore entitled to declaratory relief establishing as a matter of law that his rights were violated. Once that violation of his legal right is established, Petitioner is also entitled to an effective remedy. The most appropriate remedy would be an order abating Petitioner's court-martial proceedings until the Government restores his attorney-client relationship with his former detailed military defense counsel that was improperly severed. This Court may choose to order such a remedy itself. Alternatively, this Court may choose to remand the case to the military judge for him to fashion an appropriate remedy in light of the declaration that Petitioner's right to continuation of his established attorney-client relationship with LtCol Vokey was violated.

The military judge did not conclude that Petitioner's rights were violated because he focused on the wrong

individuals. The military judge's analysis concentrated almost entirely on the actions of Petitioner's two original detailed military defense counsel. This was error. The focus should not have been on Petitioner's counsel, but on Petitioner. See *Hutchins*, 68 M.J. 623. When the actions below are analyzed under the proper legal standard – based on Petitioner's role in the process and its effects on him – the legal error below comes into clear focus.

Finally, extraordinary relief is appropriate where, as here, an interlocutory appellate ruling is necessary to protect an accused's fundamental right to "*the continuation of an established attorney-client relationship.*" *Hutchins*, 68 M.J. at 627 (quoting *Baca*, 27 M.J. at 118) (emphasis supplied by *Hutchins*).

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 (UCMJ), 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).

Furthermore, as a "court of the United States," this Court is empowered to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (2006).

Previous History

Charges were preferred against Petitioner on 21 December 2006 and later, based partially on recommendations from the Article 32 Investigating Officer, modified charges were preferred and then 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, UCMJ, 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). Trial on the merits is currently scheduled to begin on 3 November 2010 at Camp Pendleton.

On 25 October 2010, Petitioner filed with this Court a petition for extraordinary relief in the nature of a stay of proceedings. On 27 October 2010, 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."

With the exception of the previous denial of Petitioner's petition for extraordinary relief seeking a stay of proceedings, the motions litigation below, and a defense continuance request currently pending before the military judge, no prior actions have been filed or are pending seeking the same relief in this or any other court.

Statement of Facts

No record of trial is currently available in this case.¹ The facts set out below are established by the evidentiary hearing that was held on 20 and 21 September 2010 and the

¹ Petitioner's 27 October 2010 motion to compel production of a transcript of the relevant proceedings below remains pending before this Court.

military judge's findings of fact and conclusions of law dated 26 October 2010.

A. LtCol Vokey's representation of Petitioner

In January 2006 – almost a year before charges against Petitioner were sworn and almost two years before the charges were referred for trial by a general court-martial – both Lieutenant Colonel (LtCol) Colby Vokey and Major (Maj) Haytham Faraj were detailed to represent Petitioner. At the time of his detailing, LtCol Vokey was serving as the Regional Defense Counsel for the Western Region. Maj Faraj was the Senior Defense Counsel at Legal Team Echo, Camp Pendleton, California. Both officers were scheduled to retire from active duty on February 1, 2008.

Upon being detailed to the case, then-LtCol Vokey began to prepare Petitioner's case for possible trial by court-martial. He and Maj Faraj interviewed witnesses, read investigation reports, consulted with experts, and prepared to visit the scene of the alleged offenses. LtCol Vokey conducted regular and frequent meetings with Petitioner. LtCol Vokey also interviewed many witnesses. And he participated in representing Petitioner at the Article 32 investigation hearing.

On 18 February 2008, LtCol Vokey traveled along with Petitioner and a videographer to Haditha, Iraq to investigate the case. LtCol Vokey walked through the houses where the

alleged offenses occurred. He walked through the town of Haditha and took photographs. He traveled by foot and vehicle along Routes Viper and Chestnut. He studied the terrain, visibility from the roads, distances to the houses, and environmental conditions. He deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses. Throughout the site visit and the conduct of the depositions, Petitioner accompanied LtCol Vokey, providing him with key information and assisting him in his survey of the area and his witness interviews. LtCol Vokey is the only defense counsel for Petitioner who has ever conducted such a site visit.

LtCol Vokey was also responsible for a sizable portion of the case preparation. He interviewed numerous witnesses who are located in the United States. And he spent literally hundreds of hours getting to know Petitioner and his family to better understand his character and personality to enhance advocacy on his behalf.

B. The Government's denial of LtCol Vokey's request to remain on active duty to continue to represent Petitioner

Trial in this case was originally set for early March 2008. Recognizing that their planned retirement dates would render them unavailable to serve as detailed defense counsel at trial, both LtCol Vokey and Maj Faraj requested to extend their active

service until 1 May 2008, to allow sufficient time to complete the scheduled trial.

In February 2008, after the military judge 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.

On 20 June 2008, this Court reversed the military judge's order quashing the subpoena to 60 Minutes. 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 heard oral argument in the case on 17 September 2008 and issued an opinion on 17 November 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.

During the March to April 2008 timeframe, both LtCol Vokey and Maj Faraj sought and were granted further extensions of their active duty time until 1 June 2008.

Maj Faraj subsequently sought and was granted another extension on his active duty time until 1 August 2008.

LtCol Vokey sought and was granted two additional extensions, resulting in a retirement date of 1 November 2008. But Col Patrick Redmon, the Deputy Director of Headquarters Marine Corps' Manpower section, warned LtCol Vokey that further requests for extensions would be denied. Lt Col Vokey explained to Col Redmon that his extensions were necessary to allow him to continue to represent Petitioner as he was required to do based on the Uniform Code of Military Justice and his obligations to his client established by his state bar's rules of professional responsibility. Col Redmon was not persuaded and directed LtCol Vokey to conduct a turnover with his relief. LtCol Vokey shared Col Redmon's response with Maj Faraj. Both LtCol Vokey and Maj Faraj then ceased their efforts to obtain further extensions of their active duty retirement dates.

During the period when he remained uncertain as to how long he would be permitted to extend on active duty, LtCol Vokey sent his family to his home state of Texas. LtCol Vokey moved a towable trailer to the camp grounds at Lake O'Neill aboard Camp Pendleton to live in as he awaited trial. LtCol Vokey was devoted to representing Petitioner and Petitioner was wholly satisfied with that representation. With Petitioner as his sole client, LtCol Vokey devoted all his working hours to preparing the case. After Col Redmon made his final denial of LtCol Vokey's extension request, LtCol Vokey packed the remainder of

his personal effects and left the Camp Pendleton area in August of 2008. He called Petitioner to notify him that he was being forced to leave. Petitioner was left wondering what happened to his lawyers, and voiced that concern.

Maj Faraj retired with an effective date of 1 August 2008 after twenty-two years of service.

LtCol Vokey was officially retired on 1 November 2008.

Neither LtCol Vokey nor Maj Faraj appeared before any Court to be excused from their roles as Petitioner's detailed military defense counsel.

The original military judge, LtCol Meeks, conducted no inquiry of Petitioner regarding the excusal of LtCol Vokey or Maj Faraj from their roles as Petitioner's detailed military defense counsel.

The Officer in Charge of the 1st Marine Logistics Group's Legal Services Support Section, LtCol Mark Jamison, was aware of both Maj Faraj and LtCol Vokey's impending departures from active duty.

Col Joyce, who was then the Chief Defense Counsel of the Marine Corps, was informed by LtCol Vokey of his attempt to extend on active duty for the purpose of continuing to represent Petitioner. Col Joyce reported to the Staff Judge Advocate to the Commandant of the Marine Corps [hereinafter "SJA to CMC"].

Both LtCol Vokey and Maj Faraj belonged to Headquarters and Services Battalion, which is a subordinate unit of Marine Corps Base, Camp Pendleton. When LtCol Vokey and Maj Faraj requested extensions, either formally or informally, such requests were forwarded through their administrative chain of command at Headquarters and Services Battalion, Marine Corps Base, Camp Pendleton. Contrary to the Military Judge's findings, evidence presented through the testimony of LtCol Vokey at the Article 39(a) hearing on the motion clearly established that LtCol Vokey and Maj Faraj sought retirement extensions through their chain of command. They did not seek extensions through the Legal Services Support Section because they did not belong to that command, that command had no authority to grant such extensions or even participate in the administrative process. Their extensions were always supported by their chain of command. The focus on actions at the LSSS contorts and confuses the facts as they then existed and as they were testified to by Mr. Vokey and proffered by Mr. Faraj. Both officers took action through their chain of command and stopped making requests solely because LtCol Vokey was told by a senior officer that further requests would not be approved. LtCol Vokey unequivocally testified that he was instructed by Col Redmon that extensions would only be granted in 30 day increments. Both LtCol Vokey and Maj Faraj

requested such extensions until they were informed that no further extensions would be granted.

Petitioner has never released LtCol Vokey or Maj Faraj as his counsel. Petitioner has never wanted to release either of them and does not desire to do so to this day. Rather, he affirmatively desires and requests that both LtCol Vokey and Maj Faraj continue to represent him as detailed defense counsel.

Neither LtCol Meeks nor the current military judge conducted an inquiry of Petitioner regarding the excusal of his two detailed defense counsel.

C. LtCol Vokey's post-retirement representation of Petitioner

After he was told that further extension requests would be denied, LtCol Vokey received a job offer in October 2008 with the law firm of Fitzpatrick, Hagood, Smith and Uhl, LLP. This offer was the only one that LtCol Vokey received, despite sending out numerous resumes. Unfortunately, that firm represented Sgt Hector Salinas. Sgt Salinas was alleged to have shot at individuals in Haditha on 19 November 2005. Sgt Salinas was also the only Marine to witness a sniper firing from the vicinity of one of the houses in Haditha. It was at Sgt Salinas's recommendation that Petitioner's platoon leader authorized the clearing of the Iraqi houses to the south of the site of the initial attack on the Marines.

LtCol Vokey never engaged in active representation of Sgt Salinas, but recognizing the conflict between his representation of Petitioner and employment with the law firm representing a witness who may be adversarial in the case, LtCol Vokey discussed with Petitioner the fact that an imputed conflict now existed.

On 22 March 2009 - after the Government's first Article 62 appeal but before its second - an Article 39(a) session was held to hear motions. LtCol Vokey and Maj Faraj were both present as civilian counsel, though neither filed a notice of appearance. Petitioner was also represented by civilian defense counsel Neal Puckett, Esq., and Mark Zaid, Esq., along with LtCol Patricio Tafoya and Captain Nute Bonner as military defense counsel.

During Article 39(a) sessions on 13 and 14 May 2010 - after the litigation concerning the second Article 62 appeals was complete - LtCol Vokey made an appearance as a civilian counsel though he did not actively participate. After that appearance, the defense team recognized the imputed conflict that now existed between LtCol Vokey and Petitioner.

D. The defense's litigation of the severance of attorney-client relationship issue

On 26 August 2010, the defense filed a Motion for Appropriate Relief to Dismiss All Charges and Specifications for Violation of Right to Detailed Counsel. The Government filed

its opposition on 13 September 2010.

Respondent Judge Jones held an Article 39(a) session to receive evidence and hear argument on the motion on 20 and 21 September 2010.

Thirty-one days after the motion hearing, in an e-mail to counsel with the subject "Ruling on Motion" dated 22 October 2010, 5:28:16 AM EDT, Respondent Judge Jones wrote: "The Defense motion seeking relief based on the violation of right to detailed counsel is DENIED. I will put the Ruling on the record when we meet for court on the morning of 2 November." On the following duty day (Monday, 25 October 2010), Petitioner filed a petition for extraordinary relief in the nature of a stay with this Court. The next day, Respondent Judge Jones sent an e-mail to counsel for the parties with findings of fact and conclusions of law subject to further revision. [Attached as Appendix A.] The military judge made 21 findings of fact, including the following²:

1. Both Lieutenant Colonel Vokey and Major Faraj were "double-detailed" as counsel in this case; neither counsel represented the accused as individual military counsel (IMC). LtCol Vokey was detailed on 11 January 2007 and Major Faraj was co-detailed on 17 January 2007, both within 27 days of preferral of charges.

² The quotation below omits findings of fact concerning the trial counsel; those findings are not relevant to the present petition for extraordinary relief, which focuses on the violation of Petitioner's right to continuation of an established attorney-client relationship.

2. Within 21 days of being detailed to the case, LtCol Vokey submitted a request for voluntary retirement pursuant to 10 U.S.C. Section 6323. His initial request was approved and his retirement date was scheduled for 1 April 2008. Subsequently, LtCol Vokey requested that his retirement date be modified four times. All four of the requests were granted and he never requested further modification after the approvals. The changed retirement dates went from 1 April to 1 May 2008, 1 May to 1 June 2008, 1 June to 1 August 2008 and, finally, 1 August to 1 November 2008. LtCol Vokey retired on 1 November 2008 after 20 years, 7 months of active duty service.

3. LtCol Vokey never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. LtCol Vokey did meet resistance from manpower regarding the continual change of his retirement date a month at a time, but he never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case.

4. In October 2008, while still on active duty (albeit it [sic] terminal leave), LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP (hereinafter Fitzpatrick). Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings, to include in March 2010 and September 2010 in front of the present judge. Mr. Vokey continued to represent the accused while a member of the Fitzpatrick law firm, despite the firm already having established representation of former Sgt Hector Salinas, an alleged co-conspirator in the accused's case. Mr. Vokey was told, orally, upon his hiring, that Sgt Salinas did not have a conflict with the firm hiring Mr. Vokey, despite the fact that the accused's interests may be contradictory to the firm's interests of Salinas.

5. There is no evidence that the firm has a written waiver of Sgt Salinas, regarding this potential conflict of interest. Nor did Mr. Vokey, while on active duty or since retirement, ever secure a waiver from the accused concerning this conflict.

6. The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case. However, at the Article 39(a) sessions of 13 and 14 September, the defense team asked for an ex parte hearing with the judge regarding the continued representation of Mr. Vokey on the case, given the potential conflict involved. When the Military Judge had tried to sever this relationship with the accused's approval on the record, the judge was stymied by the defense. So, after hearing the defense's request, including the desires of Mr. Vokey, the Court was constrained to release Mr. Vokey from further participation in this case, pursuant to R.C.M. 505(d)(2)(B)(3), based on an irreconcilable conflict of interest. (A record of this ex parte hearing will be sealed and attached to the record of trial.) Until being released at the September Article 39(a) session, Mr. Vokey had continued to represent the accused.

7. Within 31 days of being detailed to the accused's case, on 18 February 2008, Maj Faraj submitted his request to voluntary retire on 1 May 2008. He subsequently requested two modifications to the retirement dates, from 1 May to 1 June 2008 and from 1 June to 1 August 2008. Both requests were granted and Maj Faraj subsequently retired on 1 August 2008, after being on active duty some 22 years. Maj Faraj never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. Maj Faraj never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case (except for the extensions already discussed).

8. Immediately upon retiring in August 2008, Mr. Faraj entered private practice. He formed a partnership with Mr. Neal Puckett, one of the civilian attorneys who had already been representing the accused and with whom Mr. Faraj had worked with on the case. Mr. Faraj has never been released by either the Court, or his client, from his attorney-client relationship (hereinafter, ACR), and that ACR continues to exist.

9. Mr. Faraj indicated that he is not getting paid for his representation of the accused, but still

represents him as his legal ethics and personal morals dictate that he must. But his law firm is getting paid, as the law firm continues to represent the accused. See, <http://www.puckettfaraj.com>. Mr. Puckett and Mr. Faraj continue to zealously represent the accused, along with another civilian counsel (Mr. Mark Zaid) and a detailed defense counsel (Major Meredith Marshall, USMC). The defense had not asked for a detailed defense counsel to be assigned to the case, but the Court insisted in March that a detailed defense counsel be assigned. At the beginning of July 2010, Major Marshall was appointed detailed defense counsel. She has been assisting the defense for almost four months.

10. Also representing the accused in the past, and having been properly relieved, have been LtCol Patricio Tafoya and Captain Nute Bonner. Therefore, until Mr. Vokey was released by the Court in September 2010, both detailed defense counsel became, in effect, civilian counsel of record and continued to represent the accused. Neither party, however, ever filed notices of appearance as civilian attorneys in the case. The accused never released either one of them from participation and neither had the Court until Mr. Vokey was released on 13 September 2010.

. . . .

15. It is clear that both LtCol Vokey and Maj Faraj wanted to continue to represent the accused. LtCol Vokey even moved his family to Texas and lived in a trailer to continue working on the case pending his retirement. But they also understood that there was no way to know when the case was going to be litigated for sure based on the extensive appellate litigation and appeals that were ongoing throughout 2008 and 2009. Eventually, both officers elected to retire and continue representing the accused as civilian attorneys. No one from the government stepped in to assist the two officers in securing extra time on active duty as the two officers did not petition the Court, the trial counsel, their Commanding Officer (with the exception of the extensions as noted) or the Convening Authority for relief to stay on active duty. The Court sincerely doubts that either officer would

have been happy to remain on active duty for the two years it has taken this case to get to trial.

16. LtCol Vokey took an active role in the accused's case (even appearing on 22 March 2010 at an Article 39(a)) until he was released in September 2010 by the Court, upon a motion from the defense, from further participation based on a finding of an irreconcilable conflict of interest. Prior to that time, he had done a site visit to Iraq with the accused and a videographer from the Puckett law firm (among other support staff); had interviewed numerous witnesses; participated in the Article 32 hearing and bonded with the client. Mr. Faraj took the same active role, except that he did not physically go to Iraq for the site visit. Mr. Faraj is fluent in Arabic, which has and will assist the defense to no small measure. Both detailed defense counsel were sent to continuing legal education courses. The original trial date this case was scheduled for trial was early March 2008. However, the trial was continued once the appellate litigation started, which was during February 2008.

17. The previous judge in the case, LtCol Meeks, made no inquiry on the record regarding the excusal of the accused's two detailed counsel from active duty. SSgt Wuterich has never excused either counsel from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey 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.

18. Mr. Faraj has taken, and continues to take the most active role of the defense counsel in representing the accused at pretrial hearings. Mr. Faraj acts as the lead attorney.

19. During the years this case has taken to get to trial, there has been equal access to witnesses, evidence and discovery. As illustrated by General Mattis' testimony during the unlawful command influence motion in March 2010, the Convening Authorities have sought to ensure a fair process for both the trial and defense teams in this case.

20. The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the fact that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience; 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) the defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; and 7) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

21. The Court is convinced that the previous "military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law." *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010).

Appendix A at 2-8.

Reasons this Court Should Issue the Requested Relief

Petitioner's fundamental right to "the *continuation of an established attorney-client relationship*" has been violated. See *Hutchins*, 68 M.J. at 627 (quoting *Baca*, 27 M.J. at 118) (emphasis supplied by *Hutchins*). Judge Jones' ruling below erroneously failed to find such a violation of Petitioner's rights. That failure is inconsistent not only with this Court's

case law, but also his own finding that the military judge and counsel acted based on a "misunderstanding of the facts and the law." Finding of Fact 21, *supra* (quoting *Hutchins*, 68 M.J. at 631). It is appropriate to issue extraordinary relief where the military judge finds that the military judge and counsel were acting on the basis of factual and legal misunderstandings concerning an accused's fundamental right, but nevertheless fails to conclude that any legal error occurred.

This Court should issue declaratory relief making clear that a legal violation has occurred. Doing so will avoid the ultimate derailing of this court-martial, which is about to pull out of the station on a broken track. Once this Court has declared that Petitioner's rights have been violated, it should also order an appropriate remedy or remand the case to the military judge to fashion an appropriate remedy.

A. Petitioner's Right the continuation of an established attorney-client relationship has been violated

Petitioner was represented for years by LtCol Colby Vokey, USMC (Ret.). Petitioner wants to continue to be represented by LtCol Vokey. Yet almost four years after charges were preferred and just fifty-one days before trial is to commence in this homicide case, the military judge severed Petitioner's attorney-client relationship with LtCol Vokey (Ret.). That severance violates this Court's case law recognizing a fundamental right

to the continuation of an established attorney-client relationship. *Hutchins*, 68 M.J. at 627.

The military judge below failed to find a violation of that right. This failure was a consequence of his erroneous focus on the actions of Petitioner's previous defense counsel and their interactions with various Marine Corps officials. But the right to the continuation of the established attorney-client relationship belongs to Petitioner, not to his former counsel. To Petitioner, it matters not whether his established attorney-client relationship with LtCol Vokey (Ret.) was violated because LtCol Vokey did or did not request to withdraw his retirement, make a fifth request for extension on active duty, or ask the convening authority to intervene with Headquarters Marine Corps on his behalf. To Petitioner, what matters is that he is now being required to go to trial without the counsel with whom he enjoyed his longest attorney-client relationship.

Two distinct legal bases exist to find that Petitioner's right to the continuation of his established attorney-client relationship was violated. The first looks at the military judge's 13 September 2010 ruling severing Petitioner's attorney-client relationship with LtCol Vokey (Ret.). The second looks at the termination of LtCol Vokey's status as detailed military defense counsel in 2008.

1. Good cause did not exist to sever Petitioner's attorney-client relationship with LtCol Vokey on 13 September 2010

The military judge erroneously severed Petitioner's attorney-client relationship with LtCol Vokey, USMC (Ret.) on 13 September 2010. This Court's case law required that rather than ordering the severance of Petitioner's attorney-client relationship, the military judge should have ordered effective relief to preserve that relationship. And such effective relief was available - including, but not limited to, ordering the abatement of proceedings unless the Government recalled LtCol Vokey to active duty, thereby allowing him to continue as Petitioner's detailed military defense counsel.

This Court has ruled that good cause to sever an attorney-client relationship "must be based on a 'truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship.'" *Hutchins*, 68 M.J. at 628 (quoting *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978)). Furthermore, during oral argument before the CAAF, the government itself conceded that when counsel and the accused both want counsel to remain on a serious case counsel, should be allowed to do so, stating that: "if the counsel wants to stay on, and the manpower rules allow him to stay on, [the government] should do everything they can to ensure that [the counsel] stays on." *United States v. Hutchins*, USCA Dkt. No.

10-5003/MC (13 Oct 2010)(Oral Argument at 1:00:36.) This is just such a case. LtCol Vokey and SSgt Wuterich both wanted to continue their attorney-client relationship and it was not "virtually impossible" for the government to effect this. In fact, not only did means exist to avoid Petitioner's loss of LtCol Vokey as his detailed military defense counsel but means exist to restore LtCol Vokey to that status today, including by placing LtCol Vokey in a retired recalled status. The military judge's ruling below failed to even mention that possibility. And that possibility is particularly significant. To the extent that the military judge concluded that LtCol Vokey must withdraw from this case because of an imputed disqualification arising from his law firm's representation of Sgt Salinas, that justification for disqualification would evaporate if LtCol Vokey were recalled to active duty. He would no longer remain in the status which created the imputed disqualification, thereby allowing his continued representation of Petitioner. See generally Navy Rule of Professional Conduct 1.10, JAGINST 5803.1C (9 Nov 2004).

2. Petitioner's right to continuation of an existing attorney-client relationship was violated in 2008 when LtCol Vokey ceased serving as Petitioner's detailed military defense counsel

Regardless of the propriety of the military judge's 13 September 2010 ruling, Petitioner's rights had already been

violated when LtCol Vokey ceased serving as Petitioner's detailed military defense counsel in 2008.

After LtCol Vokey was detailed on 11 January 2007, he and Petitioner formed an attorney-client relationship. Rule for Courts-Martial 505(d)(2)(B) provides:

After an attorney-client relationship has been formed between the accused and detailed defense counsel . . . , an authority competent to detail such counsel may excuse or change such counsel only:

- (i) Under R.C.M. 506(b)(3);
- (ii) Upon request of the accused or application for withdrawal by such counsel under R.C.M. 506(c); or
- (iii) For other good cause shown on the record.

Rule for Courts-Martial 505(d)(2)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). LtCol Vokey was excused and changed as detailed defense counsel in 2008. Yet this was done without satisfying any of the regulatory requirements established by the President of the United States. Thus, Petitioner's right to LtCol Vokey's continued service as detailed defense counsel was violated just as Sgt Hutchins' right to Capt Bass's continued service as an assistant defense counsel was violated in *Hutchins*. And when the focus is placed where it should be - on the Petitioner's right to be free from the erroneous excusal and changing of his detailed defense counsel without satisfying the governing regulatory requirements - then the missed opportunities laid out in Respondent Judge Jones' ruling below are seen for what they are: proof of the violation of

Petitioner's rights rather than justification for the detailed defense counsel's changed status.

For example, the military judge concluded that during the summer of 2008,

when it appeared that [the Article 62 appeal] litigation was dragging on and there was no end in sight for when the case might be tried, all parties should have made known to the Court of the impending retirements of the two detailed defense counsel. Then, the pervious [sic] military judge should have held a hearing to determine whether good cause existed or not to release the two attorneys as detailed defense counsel for cause or by getting the accused's permission. Absent good cause, the officers, perhaps, would have remained on active duty.

Finding of Fact and Conclusions of Law at 13.

The failure to take such actions before LtCol Vokey terminated his status as Petitioner's detailed defense counsel makes this case just like *Hutchins*, where neither counsel nor the military judge took adequate steps to ensure that Sgt Hutchins was advised of his rights and given an opportunity to exercise them before Capt Bass left active duty. So this reasoning does not justify reaching a conclusion different from *Hutchins*; rather, it reinforces that *Hutchins* should control here. And, as this Court noted in *Hutchins*, "the fact that no one person or entity was entirely responsible for the inappropriate severance of the attorney-client relationship ... does not alter the fact that a wrongful severance has occurred." *Hutchins*, 68 M.J. at 631.

The military judge's ruling below subsequently emphasizes still more that the two original detailed defense counsel could have done to maintain their status:

Although the two detailed defense counsel wanted to continue to represent the accused, they did not seek redress from the Court, the Convening Authority (LtGen Mattis, who was very amenable to assist the defense, as shown in the UCI motion), their Commanding Officers or the Officer in Charge of the Legal Services Support Section. Neither defense attorney availed himself of the provisions of paragraph 2004.8(c), of MCO P1900.16F. Clearly, their ACR with the accused would fall under the regulation's criteria for granting modifications and cancellations of retirement.

Findings of Fact and Conclusions of Law at 17. But the military judge did not appear to appreciate that these failings created prejudice to Petitioner rather than cured it. Where all of these means existed to maintain Petitioner's relationship with his two detailed military defense counsel *as detailed defense counsel*, he was prejudiced all the more where he was not informed that he could object to their change in status and prevent it.

The military judge below also reasoned that "[w]hen an ACR persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel." Findings of Fact and Conclusions of Law at 14. But this oversimplifies the facts, and ignores that the change in LtCol Vokey's status led directly to the basis for the military judge to sever the attorney-client

relationship on 13 September 2010. And LtCol Vokey would not have accepted the employment that led to his imputed disqualification but for the termination of his status as detailed defense counsel. Had Petitioner been properly advised that he could object to LtCol Vokey terminating that status, the basis for severance would not have occurred. Again, Petitioner's position is just like that of Sgt Hutchins - both of them suffered a loss of counsel near the start of trial because they were not properly advised that they could prevent their detailed defense counsel from ceasing representation in that capacity.

- B. The military judge erroneously concluded that Petitioner would not be prejudiced by his loss of LtCol Vokey's representation

In *Hutchins*, this Court presumed prejudice where the accused lost the services of a counsel who had "participated in nearly a year of defense consultation and planning efforts" during which he "participated in the ongoing development of trial strategy, contributed to the decision-making process which defined the anticipated contribution of each counsel, and earned the appellant's trust." *Id.* at 629. Here, the severed counsel's importance was actually far greater to the defense team. Rather than having represented the accused for "nearly a year," LtCol Vokey (Ret.) had represented Petitioner for three years and nine months at the time of severance. As the military

judge's factual findings indicate, LtCol Vokey was the first counsel to form an attorney-client relationship with Petitioner.

And his representation of Petitioner was not merely temporally long, it was also crucial. LtCol Vokey was the only defense counsel to travel to the site of the alleged offenses, view the alleged crime scene, and interview key witnesses. There is no substitute for the kind of detailed knowledge that such a "crime scene" visit provides. Issues could pop up at any time during the trial that could render first-hand knowledge of the location of the alleged offenses outcome determinative. Without LtCol Vokey at counsel table, the defense would be unable to effectively handle such moments and may be unaware that they are even occurring. None of the nine reasons that the military judge marshals for concluding that LtCol Vokey is expendable constitutes an adequate substitute for a defense counsel at trial who has conducted an in-depth analysis of the purported crime scene. See Findings of Fact and Conclusions of Law at 14-15.

The military judge's conclusions of law seek to reduce Petitioner's argument to absurdity. *Id.* at 16-17. The military judge writes:

Taking the defense position to the extreme, a senior defense counsel should never detail a young officer to a general court-martial if that officer wanted to leave active duty after one tour, because, potentially, the court-martial could be appealed for

years and that officer could never be released while the litigation was ongoing.

Id. at 16. Of course, that is not the law and Petitioner never suggested anything so preposterous. Military case law provides that a trial defense counsel's representational duties terminate upon the designation and commencement of representation by appellate defense counsel. *See, e.g., United States v. Palenius*, 2 M.J. 86, 93 (C.M.A. 1977). Petitioner's argument is neither based upon nor leads to the fanciful scenarios that the military judge suggests. Rather, his argument is based on a plain, direct application of *Hutchins* and the authorities that it applies. The military judge was quite mistaken when he ruled: "Abating the proceeding does nothing to assist the accused or the government because there is nothing to cure, and nothing to wait for." Findings of Fact and Conclusions of Law at 18. There is the severance of Petitioner's attorney-client relationship to cure. And there is the implementation of an effective remedy to await.

Hutchins establishes that Petitioner's right to the continuation of his established attorney-client relationship with LtCol Vokey was violated. This Court should declare that such a violation occurred. *See* 28 U.S.C. § 2201(a).

Once this Court has declared that such a violation has occurred, it should then order an effective remedy. And such an

effective remedy is readily available. This Court should order that proceedings be abated until the Government has provided Petitioner with that to which he is entitled: continuation of his attorney-client relationship with LtCol Vokey (Ret.). Recalling LtCol Vokey to active duty is one way that the Government could restore Petitioner's rights. Other means no doubt also exist. But this Court need not dictate how the Government must restore Petitioner's attorney-client relationship with LtCol Vokey. Rather, it is sufficient that it simply rule that proceedings be abated until the Government does so. The Government can then choose the optimal method to restore Petitioner's attorney-client relationship with LtCol Vokey.

Alternatively, this Court could declare that Petitioner's right to the continuation of his established attorney-client relationship with LtCol Vokey (Ret.) was violated and remand the case to the military judge to fashion an appropriate remedy.

C. Granting extraordinary relief is appropriate due to the fundamental importance of the attorney-client relationship

Interference with the right to counsel is one of the few areas of the law where military appellate courts have granted extraordinary relief since *Clinton v. Goldsmith*, 526 U.S. 529 (1999). 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 severance of an established attorney-client relationship over the accused's objection – is demonstrably the type of rare case in which extraordinary relief is appropriate.

- D. A stay is appropriate due to the extreme consequences of erroneously being tried following an improper severance of an attorney-client relationship

Finally, this Court should issue a stay of proceedings as it considers whether to grant Petitioner's request for declaratory and extraordinary relief. Such a stay is particularly appropriate because the consequences of an erroneous ruling concerning counsel rights are so severe. This Court has observed that "[i]n cases involving severance of an existing attorney/client relationship by someone other than the appellant or the defense team," the Court of Appeals for the

Armed Forces "has consistently opined that, due to the unique nature of defense counsel, appellate courts will not engage in 'nice calculations as to the existence of prejudice'... but will instead presume prejudice." *Hutchins*, 68 M.J. at 630 (quoting *Baca*, 27 M.J. at 119). This Court has, therefore, "held that it will not undertake a prejudice analysis when an existing attorney-client relationship was improperly severed, and will instead find that improper severance requires reversal." *Id.* (citing *United States v. Dickinson*, 65 M.J. 562, 566 (N-M. Ct. Crim. App. 2006); *Iverson*, 5 M.J. at 444). Thus, if Petitioner's case were to proceed to trial, if he were to be convicted, and then it was held during the normal course of appeal that his attorney-client relationship with LtCol Vokey was improperly severed, the remedy would be to reverse the findings and sentence, thereby subjecting Petitioner to another trial. It is in no one's interest - not the Petitioner's, not the prosecution's, and not the military justice system's - to devote the considerable resources necessary to try Petitioner's case only to have that case reversed on a basis that could have been addressed via a petition for extraordinary relief before trial.

Given the years of delay that have already occurred in bringing this case to trial, such a stay would be inconsequential. Almost four years have passed since charges

were preferred against Petitioner. The defense is responsible for almost none of the delay that has occurred in this case. From approximately February 2008 until December 2009, trial was delayed as the Government pursued two prosecution appeals seeking outtakes of a television interview with Petitioner when the key portions of that interview were already available to the Government. While the Government ultimately prevailed in that litigation, the importance of obtaining those outtakes pales in comparison to the protection of Petitioner's fundamental right to the "*continuation of an established attorney-client relationship.*" *Hutchins*, 68 M.J. at 627.

Accordingly, a stay of proceedings will further important interests without causing any undue prejudice. A stay of proceedings is, therefore, appropriate to ensure that the law governing severance of an accused's attorney-client relationship with detailed military defense counsel is respected.

Conclusion

For the foregoing reasons, Petitioner respectfully requests that this Honorable Court: (1) declare that Petitioner's right to the continuation of an established attorney-client relationship was improperly severed; (2) abate court-martial proceedings until LtCol Colby Vokey, USMC (Ret.) is restored as Petitioner's defense counsel or, in the alternative, remand the case to the military judge to fashion an appropriate remedy; and

(3) stay court-martial proceedings pending this Court's consideration of this petition for extraordinary relief.

Respectfully submitted,

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Appendix

A. Military Judge's Findings of Fact and Conclusions of Law issued 26 Oct 2010.

Certificate of Service

I certify that this document was delivered to the Court, the Appellate Government Division, and to the Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity on 28 October 2010. I also certify that this document was served electronically on the named respondent, LtCol David M. Jones, at david.m.jones5@usmc.mil on the same day.

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

UNITED STATES)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
)	
v.)	MOTION TO DISMISS FOR VIOLATION OF RIGHT OF DETAILED COUNSEL
)	
FRANK D. WUTERICH STAFF SERGEANT, USMC)	26 OCTOBER 2010

The defense moves that all charges and specifications against the accused be dismissed, with prejudice, for violation of the accused’s right to detailed counsel under the Sixth Amendment to the Constitution and Article 27 of the UCMJ. In the alternative, the defense argues for an abatement of the proceedings to “allow the Government to fashion a remedy.” The Court has considered the documentary evidence presented, the testimonial evidence, the argument of counsel and has made all judgments of credibility of witnesses.

STATEMENT OF THE CASE

Charges were preferred against the accused on 21 December 2006 and referred on 27 December 2007 for actions relating to his conduct on 19 November 2005 in Haditha, Iraq. The charges allege violations of the UCMJ: Article 92 (dereliction of duty), 119 (voluntary manslaughter), 128 (aggravated assault) and Article 134 (reckless endangerment and obstruction of justice). 10 U.S.C. Sections 892, 919, 928, and 934.

As a result of rulings by a previous military judge regarding the release of CBS outtakes, the case has been appealed twice by the government pursuant to Article 62, U.C.M.J. 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); and *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). The particular appellate court rulings do not bear on the issues before the Court in the present motion. However, the delay in the proceedings due to the appellate litigation is relevant. Due to the time involved in litigating and appealing issues relating to this case, both original detailed defense counsel, LtCol Colby Vokey, USMC, and Major Haytham Faraj, USMC, retired from active duty.

ISSUE PRESENTED

Whether a change in defense counsels' status from a detailed defense counsel to a civilian defense counsel is a violation of the accused's Sixth Amendment right to counsel, or a violation of the accused's Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels' transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

FINDINGS OF FACT

1. Both Lieutenant Colonel Vokey and Major Faraj were "double-detailed" as counsel in this case; neither counsel represented the accused as individual military counsel (IMC). LtCol Vokey was detailed on 11 January 2007 and Major Faraj was co-detailed on 17 January 2007, both within 27 days of preferral of charges.
2. Within 21 days of being detailed to the case, LtCol Vokey submitted a request for voluntary retirement pursuant to 10 U.S.C. Section 6323. His initial request was approved and his retirement date was scheduled for 1 April 2008. Subsequently, LtCol Vokey requested that his retirement date be modified four times. All four of the requests were granted and he never requested further modification after the approvals. The changed retirement dates went from 1 April to 1 May 2008, 1 May to 1 June

2008, 1 June to 1 August 2008 and, finally, 1 August to 1 November 2008. LtCol Vokey retired on 1 November 2008 after 20 years, 7 months of active duty service.

3. LtCol Vokey never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. LtCol Vokey did meet resistance from manpower regarding the continual change of his retirement date a month at a time, but he never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case.

4. In October 2008, while still on active duty (albeit it terminal leave), LtCol Vokey was offered a position at Fitzpatrick, Hagood, Smith and Uhl, LLP (hereinafter Fitzpatrick). Upon retirement, Mr. Vokey continued to maintain an attorney-client relationship with the accused and represented him in subsequent hearings, to include in March 2010 and September 2010 in front of the present judge. Mr. Vokey continued to represent the accused while a member of the Fitzpatrick law firm, despite the firm already having established representation of former Sgt Hector Salinas, an alleged co-conspirator in the accused's case. Mr. Vokey was told, orally, upon his hiring, that Sgt Salinas did not have a conflict with the firm hiring Mr. Vokey, despite the fact that the accused's interests may be contradictory to the firm's interests of Salinas.

5. There is no evidence that the firm has a written waiver of Sgt Salinas, regarding this potential conflict of interest. Nor did Mr. Vokey, while on active duty or since retirement, ever secure a waiver from the accused concerning this conflict.

6. The accused has always desired that Mr. Vokey and Mr. Faraj represent him and has not excused either one from participation in the case. However, at the Article 39(a) sessions of 13 and 14 September, the defense team asked for an ex parte hearing with the judge regarding the continued representation of Mr. Vokey on the case, given the potential conflict involved. When the Military Judge had tried to sever this relationship with the accused's approval on the record, the judge was stymied by the

defense. So, after hearing the defense's request, including the desires of Mr. Vokey, the Court was constrained to release Mr. Vokey from further participation in this case, pursuant to R.C.M. 505(d)(2)(B)(3), based on an irreconcilable conflict of interest. (A record of this ex parte hearing will be sealed and attached to the record of trial.) Until being released at the September Article 39(a) session, Mr. Vokey had continued to represent the accused.

7. Within 31 days of being detailed to the accused's case, on 18 February 2008, Maj Faraj submitted his request to voluntary retire on 1 May 2008. He subsequently requested two modifications to the retirement dates, from 1 May to 1 June 2008 and from 1 June to 1 August 2008. Both requests were granted and Maj Faraj subsequently retired on 1 August 2008, after being on active duty some 22 years. Maj Faraj never attempted to cancel his retirement pursuant to paragraph 2004.8 of MCO P1900.16F. Maj Faraj never sought relief from his command, the convening authority, the military judge, or any other entity regarding staying on active duty to finish out the case (except for the extensions already discussed).

8. Immediately upon retiring in August 2008, Mr. Faraj entered private practice. He formed a partnership with Mr. Neal Puckett, one of the civilian attorneys who had already been representing the accused and with whom Mr. Faraj had worked with on the case. Mr. Faraj has never been released by either the Court, or his client, from his attorney-client relationship (hereinafter, ACR), and that ACR continues to exist.

9. Mr. Faraj indicated that he is not getting paid for his representation of the accused, but still represents him as his legal ethics and personal morals dictate that he must. But his law firm is getting paid, as the law firm continues to represent the accused. See, <http://www.puckettfaraj.com>. Mr. Puckett and Mr. Faraj continue to zealously represent the accused, along with another civilian counsel (Mr. Mark Zaid) and a detailed defense counsel (Major Meredith Marshall, USMC). The defense had not asked for a detailed defense counsel to be assigned to the case, but the Court insisted in March that a detailed defense counsel be assigned. At the beginning of July 2010,

Major Marshall was appointed detailed defense counsel. She has been assisting the defense for almost four months.

10. Also representing the accused in the past, and having been properly relieved, have been LtCol Patricio Tafoya and Captain Nute Bonner. Therefore, until Mr. Vokey was released by the Court in September 2010, both detailed defense counsel became, in effect, civilian counsel of record and continued to represent the accused. Neither party, however, ever filed notices of appearance as civilian attorneys in the case. The accused never released either one of them from participation and neither had the Court until Mr. Vokey was released on 13 September 2010.

11. The prosecution team has consisted of, primarily, LtCol Sean Sullivan, Major Don Plowman and Major Nick Gannon. Major Plowman retired in May 2010 and has been released from all further participation in the case. LtCol Sullivan, a reservist, applied for sanctuary, meaning that he submitted a request for 3-year orders so that he could retire with a full pension. He did this on 4 March 2009, some five to seven months after Mr. Faraj and Mr. Vokey had retired.

12. Undoubtedly, the primary reason for LtCol Sullivan's sanctuary request was personal, as the granting of sanctuary would allow him to immediately secure the vesting of his pension. But the reason for the approval was, to some extent, tied to the letters written to Manpower by General Officers (and others), requesting that LtCol Sullivan be granted sanctuary so that he could assist in the Haditha cases, including the accused's case. There was nothing improper about LtCol Sullivan's request for sanctuary or the government's approval of it. Retaining LtCol Sullivan on active duty did not occur at the expense of the active duty slots available for LtCol Vokey or Maj Faraj to continue on active duty because they applied at different times and under different statutes and administrative procedures.

13. LtCol Paul Atterbury, mentioned in the defense motion as a prosecutor, never made an appearance in court, so evidence of his role in the case is of very minimal

relevance, if it is relevant at all. Major Gannon was allowed to continue on as a prosecutor in the Haditha cases despite his staying at the legal team in excess of what would normally be expected. There was no disparate treatment of the prosecution team and the defense team. The circumstances between the individuals was completely different; LtCol Sullivan was trying to achieve sanctuary, Maj Faraj and LtCol Vokey were retiring and Maj Gannon was simply left in place at this duty station to work on Hamdaniyah and Haditha cases. There was no intent by the government to undermine the integrity of the defense team while simultaneously making a herculean effort to keep the trial team intact. All of these actions occurred in the normal course of governmental business. Retaining LtCol Sullivan on active duty did not occur at the expense of active duty slots available for LtCol Vokey or Maj Faraj; the officers were not in competition for slots because they applied for retention at different times, under different statutes and administrative procedures. The situations between LtCol Sullivan and the accused were divergent in status, conduct and time.

14. The government was not seeking to improperly influence the accused's right to counsel by the voluntary retirements of his two detailed defense counsel. Although it is true that Manpower did not perhaps fully understand the impact of the two attorneys retiring (as evidenced by Col Redmon, Deputy Director of Manpower), no one at Manpower, or for that matter the government as a whole, improperly influenced the right of the accused to his counsel. Col Redmon was frustrated of dealing with LtCol Vokey's constant change in retirement plans, to be sure, but his actions cannot be imputed as bad faith on behalf of the government. In fact, despite the letters submitted on behalf of LtCol Sullivan's package in March 2010, Col Redmon recommended against granting LtCol Sullivan sanctuary.

15. It is clear that both LtCol Vokey and Maj Faraj wanted to continue to represent the accused. LtCol Vokey even moved his family to Texas and lived in a trailer to continue working on the case pending his retirement. But they also understood that there was no way to know when the case was going to be litigated for sure based on

the extensive appellate litigation and appeals that were ongoing throughout 2008 and 2009. Eventually, both officers elected to retire and continue representing the accused as civilian attorneys. No one from the government stepped in to assist the two officers in securing extra time on active duty as the two officers did not petition the Court, the trial counsel, their Commanding Officer (with the exception of the extensions as noted) or the Convening Authority for relief to stay on active duty. The Court sincerely doubts that either officer would have been happy to remain on active duty for the two years it has taken this case to get to trial.

16. LtCol Vokey took an active role in the accused's case (even appearing on 22 March 2010 at an Article 39(a)) until he was released in September 2010 by the Court, upon a motion from the defense, from further participation based on a finding of an irreconcilable conflict of interest. Prior to that time, he had done a site visit to Iraq with the accused and a videographer from the Puckett law firm (among other support staff); had interviewed numerous witnesses; participated in the Article 32 hearing and bonded with the client. Mr. Faraj took the same active role, except that he did not physically go to Iraq for the site visit. Mr. Faraj is fluent in Arabic, which has and will assist the defense to no small measure. Both detailed defense counsel were sent to continuing legal education courses. The original trial date this case was scheduled for trial was early March 2008. However, the trial was continued once the appellate litigation started, which was during February 2008.

17. The previous judge in the case, LtCol Meeks, made no inquiry on the record regarding the excusal of the accused's two detailed counsel from active duty. SSgt Wuterich has never excused either counsel from representing him and desired that both Mr. Faraj and Mr. Vokey represent him. Neither Mr. Faraj nor Mr. Vokey 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.

18. Mr. Faraj has taken, and continues to take the most active role of the defense counsel in representing the accused at pretrial hearings. Mr. Faraj acts as the lead attorney.

19. During the years this case has taken to get to trial, there has been equal access to witnesses, evidence and discovery. As illustrated by General Mattis' testimony during the unlawful command influence motion in March 2010, the Convening Authorities have sought to ensure a fair process for both the trial and defense teams in this case.

20. The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the fact that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience; 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) the defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; and 7) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

21. The Court is convinced that the previous "military judge and counsel were at all times acting with the best of intentions based on a misunderstanding of the facts and the law." *United States v. Hutchins*, 68 M.J. 623, at 631 (N.M. Ct. Crim. App. 2010).

SUMMARY OF THE LAW

Rule for Court-Martial 506(c) states:

(c) *Excusal or withdrawal.* Except as otherwise provided in R.C.M. 505(d)(2) and subsection of (b)(3) of this rule, defense counsel may be excused only with the express consent of the accused, or by the military judge upon application for withdrawal by the defense counsel for good cause shown.

Regarding changes of detailed defense counsel, Rule for Court-Martial 505(d)(2)(B) states:

(B) *After formation of attorney-client relationship.* After an attorney-client relationship has been formed between the accused and detailed defense counsel or associate or assistant defense counsel, an authority competent to detail such counsel may excuse or change such counsel only:

- (i) Under R.C.M. 506(b)(3);
- (ii) Upon request of the accused of application for withdrawal by such counsel under R.C.M. 506(c); or
- (iii) For other good cause shown on the record.

R.C.M. 505(f) states:

(f) *Good cause.* For purposes of this rule, “good cause” includes physical disability, military exigency, and other extraordinary circumstances which render the...counsel...unable to proceed with the court-martial within a reasonable time. “Good cause” does not include temporary inconveniences which are incident to normal conditions of military life.

The case of *United States v. Hutchins*, the Navy-Marine Corps Court of Criminal Appeals stated the following: “The Uniform Code of Military Justice provides an accused with rights to counsel that exceed Constitutional standards...” and that “release of a defense counsel in situation such as this occur only with the approval of the military judge for good cause, or with the ‘express consent’ of the accused.” 68 M.J. 623, 628 (N-M. Ct. Crim. App. 2010).

Further, “[g]ood cause must be based on a ‘truly extraordinary circumstance rendering virtually impossible the continuation of the established relationship.’” *Id.*, quoting *United States v. Iverson*, 5 M.J. 440, 442-43 (C.M.A. 1978).

Without the accused’s consent of release of counsel, or approval of an application of withdrawal by the defense counsel, severance of the relationship can only be proper when good cause is shown on the record. *United States v. Allred*, 50 M.J. 795, 799-800.

Convenience of the government is not a sufficient basis to establish good cause. *Id.*, at 800, (citing *United States v. Murray*, 42 C.M.R. 253, 254).

Although an accused is not absolutely entitled to the defense counsel of his choice, he is entitled to retain an established relationship with the counsel in the absence of demonstrated good cause. *United States v. Baca*, 27 M.J. 110, 119 (C.M.A. 1988).

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009).

A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463.

The core of the Sixth Amendment right to counsel “has historically been, and remains today, the “opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial.” *Id.*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, ___ U.S. ___, 129 S.Ct. 1841 1844-45 (2009).

“Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians...But these broader rights are the creations of statute and regulation, not of the Constitution.” *Id.*, at 465.

Paragraph 2004.8 of MCO P1900.16F, Modification or Cancellation of Requests states in pertinent part:

a...Approval will be based on the following criteria:

- (1) Bona fide humanitarian or hardship circumstances.
- (2) A critical need exists for the officer’s grade and MOS.
- (3) Needs of the service.
- (4) Selection for promotion.

c. Modification of any duration may be requested; however, as a general rule, the effective date of the requested modification should not exceed 14 months from the date of the submission of the original request...

ANALYSIS / CONCLUSIONS OF LAW

The issue is whether a change in defense counsels’ status from a detailed defense counsel to a civilian defense counsel is a violation of the accused’s Sixth Amendment right to counsel, or a violation of the accused’s Article 38, U.C.M.J. right to detailed defense counsel when: 1) the attorney-client relationship is not severed by the counsels’ transition from detailed military defense counsel to civilian defense counsel; and 2) where the defense counsel continue to represent the accused in their civilian capacity?

The defense relies heavily on the case of *United States v. Hutchins*, 68 M.J. 623 (N-M. Ct. Crim. App. 2010). This recent Navy-Marine Corps Court of Criminal Appeals case ruled that in the absence of the accused's consent or an approved application for withdrawal by defense counsel, severance of the attorney-client relationship can only be proper when good cause is shown on the record. *Id.*, at 628. Further, the Court found that the detailed defense counsel's departure from active duty did not constitute good cause for severing the attorney-client relationship when the counsel was replaced a mere five to six weeks before the murder trial and he had participated extensively in the trial preparation. *Id.* Lastly, the Court attached the presumption of prejudice to the wrongful severance.

The case at bar, however, is markedly different than the *Hutchins* case. First, the attorney-client relationship (hereinafter ACR) in *Hutchins* was severed by the defense attorney leaving active duty. In this case, that ACR survived the retiring of both LtCol Vokey and Major Faraj as they both continued to represent the accused at court sessions after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey continued to represent the accused from his retirement until he petitioned relief for good cause from the Court in September 2010. After their retirements, they continued to maintain the ACR for around two years since their retirement. Unlike the counsel in *Hutchins*, Mr. Vokey and Mr. Faraj have not abdicated their professional responsibility in this case despite failing to seek redress from the Court at an earlier time. They are to be commended for their professionalism.

Second, the issue of the attorney's status as civilian vs. military counsel is entirely distinct from the counsel in *Hutchins*, who was altogether removed from the case by his terminating his active service. The attorney in the *Hutchins* case did not continue to do anything on the case after he left active duty, taking with him any knowledge he had of the case. Again, in the accused's case, both detailed counsel continued to represent the accused. The *Hutchins* case never addressed losing detailed counsel, but continuing to have those counsel represent you in a civilian capacity. Rather, the case was one of losing the experienced attorney close in time to the actual

trial. Therefore, the facts at bar are distinguishable from not only the *Hutchins* case, but also from *United States v. Baca*, 27 M.J. 110 (C.M.A. 1988); and *United States v. Iverson*, 5 M.J. 440 (C.M.A. 1978).

Third, in *Hutchins*, the military judge gave a misstatement of the law by indicating that after the attorney left active duty, there was no way the accused was entitled to keep him on as his attorney. The military judge in *Hutchins* effectively severed the accused's ACR by misinforming the accused and then getting an unintelligent waiver. No misstatement of the law occurred in the instant case by the military judge. There was no misinforming, misleading, or flawed legal or factual logic. Rather, there was simply a lack of due care by all concerning getting a waiver from the accused or releasing the attorneys for good cause shown.

Both Mr. Vokey and Mr. Faraj stopped submitting requests to modify their retirement dates in the summer of 2008, which was well before there was any appellate rulings regarding this case. In essence, the case at the trial level was in limbo, waiting out the appellate litigation. At this point, when it appeared that litigation was dragging on and there was no end in sight for when the case might be tried, all parties should have made known to the Court of the impending retirements of the two detailed defense counsel. Then, the previous military judge should have held a hearing to determine whether good cause existed or not to release the two attorneys as detailed defense counsel for cause or by getting the accused's permission. Absent good cause, the officers, perhaps, would have remained on active duty.

But none of that was done in this case. And then to further compound the error, Mr. Vokey secured employment at a firm who was representing one of the other alleged shooters in the incident. He did so without securing a waiver from the accused regarding this potential conflict of interest. Evidently, no one thought there would be issues with this course of action and Mr. Vokey continued to represent the accused for almost two years from his hiring. Now, however, on petition from the defense, the Court released Mr. Vokey from all further participation in this case approximately

seven weeks before the trial. Errors by both the trial and defense teams by not petitioning the Court for redress have led us to where we are now regarding Mr. Vokey. However, he shares some blame by knowingly hiring on with the Fitzpatrick law firm where he was told about a potential conflict of interest and then failing to get a waiver of this issue from the accused. Regardless, the unfortunate outcome is that he is now conflicted from representation of the accused.

The core of the Sixth Amendment right to counsel “has historically been, and remains today, the “opportunity for a defendant to consult with an attorney and have him investigate the case and prepare a defense for trial.” *Wiechmann*, at 464 (Judge Ryan concurring), citing *Kansas V. Ventris*, __ U.S. __, 129 S.Ct. 1841 1844-45 (2009). “Of course, the military right to counsel is broader than the right to counsel guaranteed to civilians...But these broader rights are the creations of statute and regulation, not of the Constitution.” *Id.*, at 465. When an ACR persists, an accused does not suffer prejudice simply because the status of that attorney changes from detailed defense counsel to civilian counsel.

It is true that because the government and the defense were asleep at the switch in seeking redress from the Court for this issue. As a result, Mr. Vokey is now unable to participate in the trial because of his choice of employment. It is unfortunate that it took the defense so long to ascertain that there really was a conflict in this case between Mr. Salinas and the accused. However, because the Court found good grounds to release Mr. Vokey, there can now be no further representation by him at the court-martial.

The Court specifically finds that the accused will not be unduly hindered from a meaningful defense based on the removal of Mr. Vokey due to the facts that: 1) Mr. Faraj, a native Arabic speaker is very familiar with the case and is acting as lead counsel; 2) the accused has been and continues to be represented by Mr. Puckett (a former military judge) and Mr. Zaid, two accomplished civilian attorneys with extensive military background experience (again, see Mr. Puckett’s website,

<http://www.puckettfaraj.com>); 3) the defense also has the services of an experienced detailed defense counsel, located locally, in Major Meredith Marshall; 4) The defense team has had extensive time to prepare their case due to the appellate litigation; 5) The defense team had an extra 7 weeks to prepare their case due to a continuance granted for the government, pushing the trial off from September to November; 6) the defense team has a videographer, that went with the accused and Mr. Vokey to Iraq for a site visit, who could lay the foundation for any videos or maps of the area seen; 8) the Court will allow Mr. Faraj to read into the record all of his personal awards for the members and explain to them that he was on active duty when this case started; and 9) the Court will grant a continuance for any extra time the defense needs to prepare for trial based upon a proper showing.

When a Sixth Amendment claim involves a governmental act or omission affecting the right on an accused to the assistance of counsel, the Court of Appeals for the Armed Forces considers whether the infringement involves a structural error, an error so serious that no proof of prejudice is required, or whether the error must be tested for prejudice. *United States v. Wiechmann*, 67 M.J. 456, 462-3 (C.A.A.F. 2009). A structural error exists when a court is faced with the difficulty of assessing the effect of the error or the error is so fundamental that harmlessness is irrelevant. Structural errors involve errors in the trial mechanism that are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence. *Id.*, at 463. There is a strong presumption that an error is not structural. *Id.*, at 634 (Senior Judge Booker concurring) (citations omitted).

There is no structural error in the accused's situation and, therefore, no proof of prejudice is required. There is no doubt in the Court's mind that the accused can receive a fair trial and that the criminal trial can reliably serve its function as a vehicle for determination of guilt or innocence. The Court, as the gatekeeper, may take whatever measures it deems necessary to ameliorate any affect of the accused now losing the services of Mr. Vokey on the defense team, to include: relaxing the rules of evidence, if necessary, for the admission of items garnered during Mr. Vokey's trip to

Iraq. The *Hutchins* Court specifically noted that “our determination to presume prejudice is very fact specific. Another case with other facts might well be more amenable to a reasoned prejudice analysis.” *Id.*, at 631. Looking at both specific and general prejudice, (*Id.*, at 637) this Court is persuaded beyond a reasonable doubt that the accused will receive a fundamentally fair trial and that he will not be unduly prejudiced by the removal of LtCol Vokey as counsel.

Although all of the parties (to include the previous military judge) should have been alerted as to the fact that counsel who plan on leaving active duty need to be properly released by the Judge, it is worth noting that the Navy-Marine Corps Court of Criminal Appeals ruling in *Hutchins* came more than a year and a half after Mr. Vokey and Mr. Faraj retired.

The defense seems to believe that the *Hutchins* ruling means that a Court can never sever an ACR for an attorney who is retiring or leaving active duty. This is an unnecessary and overbroad reading of the case. The *Hutchins* Court had issues with the military judge’s (and everyone else’s) conclusion that just because the defense counsel was leaving active duty, that action constituted good cause in severing an ACR during an ongoing trial. The *Hutchins* Court meant what it said: “severance of the relationship can only be proper when good cause is shown on the record.” *Hutchins*, at 628. But again, in this case, the ACR was never severed for the two detailed defense counsel until Mr. Vokey was removed at his own behest in September 2010.

Taking the defense position to the extreme, a senior defense counsel should never detail a young officer to a general court-martial if that officer wanted to leave active duty after one tour, because, potentially, the court-martial could be appealed for years and that officer could never be released while the litigation was ongoing. Or, using another example, the Officer in Charge of the Legal Services Support Section may never wish to put an attorney to work in defense unless that attorney signs a paper indicating that he or she will agree to stay on each court-martial case, regardless of

personal circumstances, for however long it takes, even if it is years. Of course, this is absurd and the *Hutchins* Court never endorsed this view.

The *Hutchins* Court did say that “good cause” must “be assessed on a sliding scale which considers the contextual impact of the severance of the client.” *Id.*, at 629. After an ex parte hearing requested by the defense, this Court found that Mr. Vokey’s excusal in this case was for “truly extraordinary circumstances which rendered “virtually impossible the continuation of the established relationship.” *Id.*, quoting *United States v. Iverson*, 5 M.J. at 442-443.

Like in the *Hutchins* case, “[t]he multiple errors and inattention leading to deprivation of counsel in this case reflect something of a perfect storm.” *Id.* Although the two detailed defense counsel wanted to continue to represent the accused, they did not seek redress from the Court, the Convening Authority (LtGen Mattis, who was very amenable to assist the defense, as shown in the UCI motion), their Commanding Officers or the Officer in Charge of the Legal Services Support Section. Neither defense attorney availed himself of the provisions of paragraph 2004.8(c), of MCO P1900.16F. Clearly, their ACR with the accused would fall under the regulation’s criteria for granting modifications and cancellations of retirement. With no end in sight for the appellate litigation, the defense counsel assumed they had to retire and continue representing the accused.

Next, Mr. Vokey secured employment at a law firm whose interests ran counter to his client. Further, the government counsel stood by watching, with no meaningful intervention on behalf of the two detailed defense counsel. By the time the appellate litigation finished, the two detailed defense counsel were retired. But the bottom line is that both detailed defense counsel continued to represent the accused for almost two years after their retirement. Mr. Faraj continues to represent the accused and Mr. Vokey was removed for “good cause” by the Court.

Practically speaking, what is the appropriate remedy for the missteps at this point in the process? Abating the proceeding does nothing to assist the accused or the government because there is nothing to cure, and nothing to wait for. Due to Mr. Vokey's ill-advised hiring at the law firm of Fitzpatrick, et. al., sans a waiver from the accused, he is now conflicted out of the case. As previously mentioned, if the Court felt the defense needed more time to prepare, the Court would grant it. But the unspoken reality is that the parties have had plenty of time to get ready for trial and the trial has been delayed long enough. The Court knows that Mr. Faraj is a very able attorney. He has practiced in front of this judge many times in the past and, in fact, effectively litigated the first contested case of the Hamdaniyah cases, Cpl Thomas, in front of this judge (one of Sgt Hutchins' co-conspirators).

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 trial and defense teams. 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 receive very fine representation from 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