

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

UNITED STATES)	
)	GENERAL COURT MARTIAL
v.)	
)	DEFENSE MOTION FOR
FRANK D. WUTERICH)	APPROPRIATE RELIEF TO DISMISS
XXX XX 3312)	ALL CHARGES AND
Staff Sergeant)	SPECIFICATIONS FOR VIOLATION
U.S. Marine Corps)	OF RIGHT TO DETAILED COUNSEL
)	
)	26 August 2010

I. Facts.

The accused in this case was detailed two counsel, one was an active duty U.S. Marine Corps Lieutenant Colonel –LtCol Colby Vokey- and the other an active duty U.S. Marine Corps Major –Maj Haytham Faraj. Both officers had service time as ground combat officers before becoming attorneys.

LtCol Colby Vokey and Maj Haytham Faraj were detailed to the case on 11 and 17 January 2006 respectively. At the time of his detailing, LtCol Colby Vokey was in the billet of Regional Defense Counsel for the Western Region. Maj Haytham Faraj was the Senior Defense Counsel at Legal Team Echo, Camp Pendleton, CA. Both officers were scheduled to retire from active duty on February 1, 2008. As this case lingered with the development of issues that were appealed by the government to the NMCCA and higher. Both detailed counsel requested and extended their retirement dates until May 1, 2008. In April of 2008 both officers requested further extensions until August 1, 2008. Both officers desired to continue to represent their client, SSgt Wuterich. The extensions were, therefore, requested in order to continue representation. On August 1, 2008, Maj Faraj was retired and went into private practice. LtCol Colby Vokey requested another extension and remained as the sole detailed counsel on the case.

LtCol Vokey's request for an extension was approved until November 1, 2008, with an admonishment from Col Patrick Redmon that he would receive no more extensions. LtCol Vokey sought to persuade Marine Corps manpower that he was ethically and duty bound to remain on the Haditha case to represent his client. But he was told that he would receive no more extensions.

LtCol Vokey was a key member of the defense team and invaluable to the preparation of the defense in this case. He is the only attorney that traveled to Iraq to conduct a site visit. He walked through the houses where the alleged crimes occurred. He walked through the town of Haditha and took photos. 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 also entered all the houses where the alleged unlawful shootings occurred. He deposed all the Iraqi witnesses and interviewed numerous other bystanders and percipient witnesses that were present but unknown. Throughout the period of the site visit and the conduct of the depositions, LtCol Vokey was accompanied by SSgt Wuterich who provided him key information and assisted him in his survey of the area and his interview of the witnesses.

LtCol Vokey also took on a sizable portion of the case preparation. He interviewed numerous witnesses who are located in the U.S. He spent hundreds of hours getting to know SSgt Wuterich and his family to better understand his character and personality so that he may genuinely advocate for his client.

When LtCol Vokey was denied his request to continue to represent SSgt Wuterich, and admonished his requests for extension would no longer be approved, he retired from the Marine Corps. Unsure of the status of his requested extensions he sent his family to his home state of Texas so that they may have some stability while he waited. With his family gone but with the

continuing desire to continue to represent SSgt Wuterich, 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 SSgt Wuterich and SSgt Wuterich was wholly satisfied with that representation. With SSgt Wuterich as his sole client, LtCol Vokey devoted all his working hours to preparing the case. He was in the process of turning the RDC billet over to his replacement, allowing him even more time to prepare the case.

When his last request for an extension was denied, out of time and without other options, LtCol Vokey packed the remainder of his personal gear and left the Camp Pendleton area in August of 2008. He called SSgt Wuterich to notify him that he was being forced to leave. SSgt Wuterich was left wondering what happened to his lawyers, and voiced that concern.

LtCol Vokey left Camp Pendleton and headed to Texas to join his family and to seek employment. He searched unsuccessfully for weeks because he neglected to prepare himself for his post military career as he dedicated all his time to preparing SSgt Wuterich's case. In October of 2008, Mr. Vokey was offered a position with the Law Firm of Fitzpatrick, Hagood, Smith and Uhl, LLP. This is the same firm that represented Sgt Hector Salinas. Sgt Hector Salinas is one of the shooters alleged to have fired on some of the people killed on November 19, 2005, facts that were the basis of the charges against the accused in this case. He was also the only Marine to witness the sniper firing from the vicinity of one of the houses soon to be cleared by him and his Marines. It was at Sgt Salinas's insistence that his platoon commander authorized the clearing of the Iraqi houses to the south of the site of the initial attack on the Marines.

Recognizing the conflict between his previous representation of SSgt Frank Wuterich and employment with the law firm representing a witness who may be adversarial in the case, Mr.

Vokey discussed with SSgt Wuterich the fact that a conflict now existed. He explained that he would try his best to assist but that SSgt Wuterich had to understand that a conflict existed. Left without recourse as to representation, SSgt Wuterich accepted that initial assessment.

The case wallowed as issues were being appealed and re-appealed between CBS and the Government from February 2008 and December 2009.

In December of 2009, CBS relented and turned over the CBS 60 Minutes outtakes sought by the Government. On May 13 and 14 of 2010, both sides were back in court without a detailed counsel. Mr. Vokey made an appearance as a civilian counsel though he took no active participation. Subsequent to that appearance, the defense team began to prepare the case again and realized the conflict that now existed in having Mr. Vokey on the team.

Concurrent with the realization of the conflict, the defense team became aware of the NMCCA decision in the case of *U.S. v. Hutchins* which essentially rejected EAS as the basis for severing the attorney client relationship. Like the facts in *Hutchins* there was nothing extraordinary that would have prevented the government from continuing LtCol Vokey on active duty as he had repeatedly and forcefully requested. By contrast, the Government trial team kept two reserve judge advocates on active duty so that they may continue to work on the Haditha case –LtCol Paul Atterbury and LtCol Sean Sullivan. Both officers are reservists who were extraordinarily extended and allowed to reach sanctuary for the purpose of retirement.

By forcing the two detailed defense counsel off active duty, the defense lost the advantage of proximity to witnesses, the advantage of having an office space adjacent to the courthouse, the authority inherent to the rank of two field grade officers to request resources, witnesses and engage in trial negotiations, the irreplaceable impact the credibility, respect and command presence of an attorney in uniform decorated with numerous personal awards and

campaign ribbons would have on a panel of jurors, and the loss of ready access to the tens of thousands of documents located at offices adjacent to the courthouse. Both Mr. Vokey and Mr. Faraj live in different states than the state in which the court-martial is being held. The trial counsel wielded their governmental powers to delay the case by filing an appeal that yielded evidence of no additional prosecutorial value but that caused the loss to the accused of two detailed counsel. At the same time, trial counsel applied the same powers to delay transfers of trial counsel and make extraordinary extensions of active service of reserve prosecutors who reached retirement sanctuary just so they may remain on the case.

SSgt Wuterich was informed by both LtCol Vokey and Maj Faraj that they may be leaving active duty if the Marine Corps did not keep them on. SSgt Wuterich expressed his desire that both detailed counsel remain on his case as detailed counsel. He was told that although he has a right to continue his attorney-client relationship, discharge of the two officers from active duty would sever that A-C relationship with his detailed counsel. He was further assured by both officers that they would not abandon him but that the relationship would not be as detailed counsel. SSgt Wuterich was never informed that he had a right to object to the impending departure. Both his military lawyers explained to him that although that it is his right to have counsel of his choosing, the Government was refusing to continue to allow them to serve as his detailed counsel.

LtCol Vokey and Maj Faraj raised the issue in court on numerous occasions and submitted affidavits as part of the Defense' challenge to the jurisdiction of the NMCCA to hear the Article 62 appeal on the CBS outtakes issue because the delay would sever their attorney-client relationship with SSgt Wuterich which would prejudice his defense. *See United States v. SSgt Frank D. Wuterich*, Crim. App. No 200800183, P. 17 (dissenting opinion). In her dissenting

opinion Judge Ryan identifies and discusses the issue of the prejudicial impact delay will have on the defense through the loss of counsel that the Government also conceded in its oral argument before the Court of Appeals for the Armed Forces.

SSgt Wuterich did not request that his attorneys withdraw from the case. Furthermore, no good cause existed to sever the attorney-client relationship between SSgt Wuterich and his detailed counsel.

II. Discussion.

a. WHETHER AN ACCUSED'S RIGHT TO COUNSEL IS VIOLATED WHEN HIS DETAILED MILITARY COUNSEL, OVER THAT COUNSEL'S OWN OBJECTIONS, IS DISCHARGED FROM ACTIVE DUTY SEVERING THE ATTORNEY-CLIENT RELATIONSHIP WITHOUT THE EXPRESS CONSENT OF THE ACCUSED AND BARRING A SHOWING OF GOOD CAUSE FOR THE SEVERANCE OF THE RELATIONSHIP.

The Sixth Amendment to the United States Constitution affords a Defendant the right to be represented by counsel in a criminal proceeding and recognizes a qualified right to choose that counsel. *United States v. Swafford*, 512 F.3d 833, 839 (6th Cir. 2008) (internal citations omitted). Where no factors exist to lead the court to believe that representation by a certain attorney will have an adverse impact on the integrity of the proceeding, a court commits a fundamental constitutional error that can never be harmless by denying a defendant his or her attorney of choice. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149-51 (2006) (holding that district court erred in denying *pro hac vice* motion of defendant's counsel of choice and reversing defendant's conviction).

The right to counsel of one's own choosing is a settled issue under the Sixth Amendment to the United States Constitution barring extraordinary circumstances. "The right to effective

assistance of counsel and *to the continuation of an established attorney-client relationship is fundamental* in the military justice system.” *United States v. Hutchins*, NMCCA 200800393 at 7(En Banc)(Emphasis in original) (Citing *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988)) (internal citations omitted). Whether an established attorney-client relationship is properly severed is a question of law which we review *de novo*. *United States v. Allred*, 50 M.J. 795, 799 (N.M.Ct.Crim.App. 1999). When the Government decided to take an interlocutory appeal on an evidentiary matter in this case, it had an obligation not to disturb the status quo of the defense team representing SSgt Wuterich. Instead, it went to extraordinary lengths to *maintain* the status quo of the trial counsel team *who are all fungible and refused to extend detailed counsel* on active duty so that they may continue to represent SSgt Wuterich. SSgt Wuterich had an absolute right to keep his detailed counsel once that relationship was formed. Although a military accused does not have a right to select a detailed counsel of his choosing, once counsel is detailed and A-C forms an accused has an inviolable right to keep that attorney. When SSgt Wuterich was arraigned he was explained his rights by the Military Judge he was told “SSgt Wuterich, you have the right to be represented by LtCol Vokey and Maj Faraj, your detailed military defense counsels. They are provided to you at no expense to you.” See DA PAM 27-9 at 2-1-1. The notification of rights provided by the judge at an arraignment originates under Article 27 of the Uniform Code of Military Justice and is enabled through R.C.M. 506(a) which grants an accused a right to counsel or an individual military counsel. Once an attorney-client relationship forms, a detailed counsel may only be excused upon request of the accused under R.C.M. 505(d)(2)(B)(ii), or upon a showing of good cause. R.C.M. 505(d)(2)(B)(iii). The unanimous *en banc* decision by the NMCCA in *United States v. Hutchins*,

definitively rejects a detailed counsel's end of active service, and by extension retirement, as good cause to sever the attorney-client relationship.

Permitting the Government to discharge military counsel, thereby terminating an accused's right to detailed counsel, would render the right to detailed counsel meaningless. If the relationship could be severed by governmental actions, such as severance of the attorney-client relationship through an involuntary discharge or even a voluntary discharge of detailed counsel, it would give the Government the unhindered power to take certain actions that would inevitably result in the release of counsel. Reassignments, deployments, delays, transfers, and discharges would all enable the Government to manipulate the process to rid itself of effective defense counsel. Even if the Government did not act with a nefarious purpose, the appearance of impropriety would cast grave doubt on the military justice system. *See United States v. Allen*, 31 M.J. 572, 590 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991). Permitting such an outcome from Governmental action eviscerates the right to detailed counsel. Government counsel and Convening Authorities unhappy with a vigorous defense, as was happening in this case and as previously occurred in the Hamdaniya¹ case of *U.S. v. Trent Thomas*, could simply file interlocutory appeals, delay trials to await defense counsel's discharge or cause the transfer of defense counsel to sever the attorney client relationship.

Throughout early 2008, LtCol Vokey and Maj Faraj recognized that their pending discharges raised a problematic matter with respect to the A-C relationship in the case and requested delays to their retirement. They were both extended a few months but were then sternly warned that no further extensions would be granted. *See Exhibit*_____.

¹ Mr. Faraj represented Cpl Trent Thomas in a murder trial arising out of events in Hamdaniya Iraq. That case was tried against the same trial team which demonstrated visible consternation when the members returned findings and a sentence favorable to the defense.

The denial of the requests of defense counsel to extend on active duty not only ended the attorney client relationship, it had effects that went far beyond those immediately obvious. The defense team in this case was assigned a file room in the defense building to store and organize their case files. They were also assigned a defense clerk, an NCO whose sole duty was to keep files organized and manage the case file. When both detailed counsel left the case, the clerk assigned to the case was also reassigned. The case file was left in the file room to be taken over by a new detailed counsel who was not assigned until July of 2010, who is located at a base about 30 miles away, and who was assigned to satisfy the military judge's constant inquiries of the government as to why no detailed counsel was yet assigned as late as May of 2010. The files have since been moved; some have disappeared, and what remains lack any sense of organization.

Continuity on the prosecutor's side, on the other hand, continued undisturbed. The same Trial Counsel remain on the case supported by an army of assistants. They continue to be located at the same building aboard the same base with access to witnesses and evidence. Although the defense has no access to their files, one can only imagine that after two years, their case file would be even more organized and their trial preparations complete.

b. WHETHER THE IMPROPER SEVERANCE OF THE ATTORNEY CLIENT RELATIONSHIPS PREJUDICES THE ACCUSED'S STATUTORY RIGHT TO COUNSEL SO THAT THE ONLY REMEDY TO THE GOVERNMENTAL ACTION IS DISMISSAL OF THE CASE.

The right to counsel is inviolate under the Sixth Amendment to the U.S. Constitution. Amend. Sixth, U.S. Constitution. *See Scott v. Illinois*, 440 U.S. 367 (1979). Article 27 of the U.C.M.J. and R.C.M. 506(a) incorporate those constitutional rights and extends them to military defendants. The President went further in providing military defendants with counsel rights by

mandating that each military accused benefit from the representation of detailed counsel regardless of indigency. *Id.* The right to effective assistance of counsel and to the continuation of an established attorney-client relationship is fundamental in the military justice system.” *United States v. Baca*, 27 M.J. 110, 118 (C.M.A. 1988). In *U.S. v. Hutchins*, the Navy Marine Court of Criminal Appeals addressed the propriety of the severance of an attorney client relationship for good cause 68 M.J. 623 (N.M.Ct.Crim.App. 2010). Finding that end of active service can never be good cause to sever an attorney-client relationship, the court set aside the findings and sentence. *Id.* In this case, the attorney client relationship was severed despite a herculean effort to continue representation by the detailed counsel - namely LtCol Colby Vokey. He submitted numerous requests to extend his retirement date so that he may continue to represent SSgt Wuterich. He moved into a trailer located at a camp ground. He made calls, pleading his case to manpower, to persuade the decision-maker to allow him to remain on active duty to represent his client but to no avail. Release of a defense counsel from active duty should occur only with the approval of the military judge for good cause, or with the "express consent" of the accused. *United States v. Hutchins*, 68 M.J. 623, 628 (N-M.C.C.A. 2010). "Good cause" is defined to include, "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. *Id.* at 628-9. (citing Rule for Court-Martial 505(f), Manual for Courts-Martial, United States (2005 ed.)). There can be no greater example of normal conditions of military life than the commonality of an end of service of a military member. All military members eventually end their military service. The majority join with the knowledge of an exact day of when their service will end. The military services know exactly when members

are scheduled to be discharged or retired. Accordingly, such an event is common, regular and countenanced as a part of everyday military life. Defense counsel in this case recognized that their ending service would interfere with their obligation to represent their client. They notified the Government and requested extensions. Instead of assisting the defense lawyers in extending their retirement dates so that they may continue to represent their client, the government impeded any further extensions. Meanwhile, trial counsel were extended in their assignments even though the prosecution has no right to any particular counsel. One reservist trial counsel in the same rank as the senior detailed defense counsel was extended on active duty until he reached sanctuary for retirement - an event so rare that it only happens in the most extraordinary of circumstance because it disrupts the statutory limits on the number of officers each military service may have on active duty under Title 10 of the United States Code. Going to such extraordinary lengths to keep the prosecution team together while ignoring the case law counseling that excusal for good cause be authorized “only in cases where there exists ‘truly extraordinary circumstance[s] rendering virtually impossible the continuation of the established relationship.’” *Hutchins*, 68 M.J. 629. (Quoting *United States v. Iverson*, 5 M.J. 440, 442-443 (C.M.A. 1978).

The circumstances in this case, on the other hand, were quite *ordinary*. The Government had advance warning and a compelling reason to act. But even in the absence of warning of the impending separations, they were still required to act. Instead, they failed to act, causing the severance of the attorney client relationship while going to unusual lengths to overcome statutory hurdles to keeping reserve officers on active duty when the actions served the interests of the Government. Such astonishing efforts in service of the prosecution and to the detriment of the defense in violation of the accused’s fundamental statutory right to the same detailed counsel he

was assigned and whom he desired to continue to represent him calls for a remedy worthy of the violation and the misconduct. Moreover, in light of the *Hutchins* decision that clearly defined the “good cause” requirement for governmental severance of the attorney-client relationship, the only remedy available to this court is dismissal of the charges with prejudice because that relationship can now never be restored.

c. WHETHER THE HARM OR PREJUDICE RESULTING FROM THE GOVERNMENTAL ACTION IN IMPROPER SEVERING THE ATTORNEY-CLIENT RELATIONSHIP BETWEEN ACCUSED AND DETAILED COUNSEL IS REMEDIED WHEN THE SAME COUNSEL CONTINUES REPRESENTATION AS A CIVILIAN.

The only appropriate remedy in the case is dismissal of the charges. *See United States v. Hutchins*, 68 M.J. 623 (N.M. Ct. Crim. App. 2010). The continued service of previously detailed counsel in a civilian capacity is insufficient to satisfy the requirement established by Article 27 of the U.C.M.J. and R.C.M. 506(a). The Rule specifically affords a right to civilian counsel *and* detailed counsel. SSgt Wuterich was detailed counsel. Those counsel were LtCol Vokey and Mr. Faraj. Once the two detailed counsel formed an attorney client relationship with the client, their dismissal could only be effectuated through the client or by a showing of good cause before a military judge. R.C.M. 505(d)(2)(B). Good cause has already been discussed, *supra*. Improper governmental action or inaction resulted in severing the A-C relationship between detailed counsel and the accused. The Government should not be permitted to benefit from an action that was in clear and direct contravention of the law. *See United States v. Lewis*, 63 M.J. 405, 415 (C.A.A.F. 2006) (holding that whatever remedies are available would be insufficient because the government’s objective of unseating the military judge had been achieved thus requiring a dismissal of the charges with prejudice).

Even if R.C.M. 506(a) permitted replacement for a detailed counsel with a civilian counsel with the consent of the accused, continued representation of the accused by LtCol Vokey is prohibited under JAGINST 5803.1B and Title 18 U.S.C. 203. The regulation and the statute in essence prohibit a reserve or retired officer from representing a client for compensation if representation began while the officer was in government service. The only way for LtCol Vokey to continue to represent SSgt Wuterich is to do so without collecting compensation. And although the JAGINST authorizes compensated representation if the officer seeks permission from the JAG beforehand, Government counsel in this case accused the former detailed counsel in the case of United States v. Hoeman of ethical violations and solicitations of a federal offense when the civilian counsel in that case suggested the government pay the former detailed counsel an hourly retainer to resolve an improper severance of an attorney-client relationship.

There is no adequate remedy available in this case except a dismissal of the charges. The Government has achieved its objective of severing the client from the effective representation of two experienced detailed counsels. The two detailed counsel were senior in rank to the most of the trial counsel. They wielded the authority inherent to their field grade ranks. They had little or no additional duties but preparing for this case. They had access to resources, witnesses, the case file, and enjoyed the credibility associated with appearing in a uniform before members. SSgt Wuterich will never have the benefit of such representation even if both lawyers continued to represent him as civilians. SSgt Wuterich has been irreparably prejudiced by the Government's improper conduct which may only be ameliorated by dismissal of the charges with prejudice.

Finally, if the destruction of SSgt Wuterich's defense team is not prejudicial, why then did the Government keep their trial team together? LtCol Sullivan has been kept on active duty

even though he is a reservist, specifically to prosecute this case. And Major Gannon has been kept in the same location for over four years to also prosecute the case. These facts alone concede the prejudice of breaking up a defense team because the government refuses to allow the break-up of the prosecution team.

III. Evidence.

Exhibits

- a. Email to Ltcol Vokey dtd May 16, 2008, denying request to extend
- b. *United States v. Hutchins*, 68 M.J. 623 (N.M.Ct. Crim. App. 2010)
- c. Government brief regarding loss of counsel in the case of *United States v. Hohman*.
- d. CAAF decision in *United States v. Wuterich*, CAAF No. 086006; Judge Ryan M. Dissenting opinion; *CBS Broadcasting Inc. v. Navy Marine Corps Court of Criminal Appeals et al. and In re Frank Wuterich*, No. 08-0821/MC
- e. LtCol Vokey C. and Maj Faraj H. Affidavit to the Court of Appeals for the Armed Forces *CBS Broadcasting Inc. v. Navy Marine Corps Court of Criminal Appeals et al. and In re Frank Wuterich*, No. 08-0821/MC.

IV. Relief Requested.

Wherefore, the accused, by and through undersigned counsel, requests that all charges and specifications be dismissed with prejudice for violation of the accused right to counsel under the Sixth Amendment to the U.S. Constitution and Article 27 of the UCMJ as implemented by R.C.M. 506(a)

V. Oral Argument.

Respectfully requested.

By: /S/

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26 August 2010

Date

CERTIFICATE OF SERVICE

I certify that a copy of this document was served upon government counsel on August 26, 2010.

By: /S/

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