

UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT

UNITED STATES OF AMERICA)	
)	
v.)	
)	MOTION FOR CONTINUANCE
)	
SPC GARY SALEH)	
S&T Troop, Regimental Support Squadron)	
11th Armored Cavalry Regiment)	
Fort Irwin, CA 92310)	
)	2 June 2011

RELIEF SOUGHT

Pursuant to RCM 906(b)(1) and Article 40, UCMJ, the defense hereby requests a continuance in the trial by court-martial of SPC Gary Saleh from 27-29 June 2011 until 22 August 2011.

BURDEN OF PROOF AND STANDARD OF PROOF

As the moving party, the burden of proof is on the Defense by a preponderance of the evidence. R.C.M. 905(c)(1).

FACTS

1. CPT Jorge Velez preferred charges in violation of Articles 92, 120 and 134 against SPC Gary Saleh on 7 February 2011.
2. An Article 32 investigation into the charges was convened on 23 February 2011 by MAJ Derek Carlson. SPC Saleh was represented by civilian counsel Mr. Joseph Low and detailed military counsel CPT Laquisha Douglas. This case was referred to a General Court-Martial on 28 April 2011.
3. The trial counsel provided defense with an electronic docketing request on 29 April 2011. Military defense counsel forwarded this request to civilian defense counsel, who was unavailable due to an out-of-state case. SPC Saleh subsequently decided not to continue to retain Mr. Low as counsel.
4. Near the end of the month of May, SPC Saleh retained a new civilian defense counsel, Mr. Haytham Faraj. Around this same time, 27 May 2011, the military defense counsel and trial counsel completed the electronic docketing request. Mr. Faraj's availability was not entered in to this document. On Saturday, 28 May, the

trial counsel and detailed military defense counsel received notice that this case was docketed for 27-29 June 2011.

5. Mr. Faraj is unavailable on the following dates due to previously docketed cases: 27 June -22 July, U.S. v. Wuterich; 3-12 August, U.S. v. Lopez and U.S. v. Burke.
6. The defense anticipates obtaining both a DNA expert and Forensic Behavioral Psychologist to assist with the evidence in this case.

LAW

The Defense relies on the following authorities in support of its motion:

RCM 906(b)(1)
Article 40, UCMJ
United States v. Miller, 47 MJ 352 (CAAF 1997).

WITNESSES/EVIDENCE

The Defense requests no witnesses and presents no evidence in support of this motion.

ARGUMENT

Continuances may be granted by the military judge for reasonable cause and for such time as may appear to be just. Article 40, UCMJ. The discussion portion of R.C.M. 906 states that a reason for a continuance may be insufficient opportunity to prepare for trial.

Additionally, a military judge should grant a continuance in order to allow an accused a reasonable opportunity to obtain civilian counsel for the proceeding.” U.S. v. Miller, 47 M.J. 352, 358 (1997). (judge abused discretion in denying accused’s request for continuance to have civilian defense counsel present at *DuBay* hearing; if judge denies continuance for purpose of obtaining civilian counsel, prejudice is likely).

In Miller, the court articulated twelve factors useful for determining abuse of discretion in denying a request for a continuance. Those factors include; surprise, nature of evidence involved, timeliness of the request, substitute testimony or evidence, availability of witnesses or evidence, length of continuance, prejudice to opponent, prior continuances, good faith of the moving party, use of reasonable diligence by moving party, possible impact on verdict and prior notice. Miller at 358.

The factors articulated in Miller that are relevant to this analysis are set out and applied to this case below.

1. Surprise: This request is certainly not made with any surprise to the prosecution. Before completing the electronic docketing notification with the trial counsel, the detailed military defense counsel informed the trial counsel that the Accused had recently retained civilian counsel and that his availability would likely vary from the dates submitted in the electronic docketing notification.

2. Timeliness: This request is made in a timely manner. At present, there are still twenty five days until the trial date. Both defense and trial counsel were sent notice of the trial date on Saturday, 28 May. The TDS office was closed on Monday, 30 May as a result of the federal holiday. This request is submitted just three days after identifying the conflicts with respect to availability of counsel.

3. Good Faith of the Moving Party: The defense raises this motion in good faith as civilian defense counsel has previously scheduled trials for unrelated cases that prevent him from being available 27-29 June. Further, the defense has notified this court as quickly as possible of the issue, in order to reduce any prejudice to the prosecution.

Notwithstanding Miller, the defense requests a continuance in order to adequately prepare for trial. The defense needs time to identify and obtain a DNA expert in this case, as well as allow the expert adequate time to review the evidence. Additionally, the defense plans to identify a forensic behavioral psychologist to assist with the evidence.

CONCLUSION

For the reasons stated above, the defense respectfully requests that SPC Saleh's trial be delayed until 22 August 2011.

//signed//
LAQUISHA DOUGLAS
CPT, JA
Defense Counsel