NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR APPROPRIATE RELIEF
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps	)	(Compel 64 known and multiple unknown lay and expert witnesses)
	)	28 October 2010

1. Nature of Motion

This is the government's response (in part) to the defense motion to compel production of witnesses. For purposes of simplicity, the government will submit its response to the portion of the defense motion seeking to compel discovery, funding for site visits, and a response to a purported "Bill of Particulars" in another response. The government opposes the motion.

2. Summary of Facts

Except as noted below, the government concurs with the facts stated at parts a, c, and e-g of the Summary of Facts in the defense motion.

a. The government directs the court's attention to the fact that the defense requests production of 60 named lay witnesses on the merits,[1] all but two of whom (Michelle Reuther and Robert O'Brien) are purely character witnesses, and four categories of unknown witnesses. The government also directs the court's attention to the fact that the defense proffers regarding a large number of requested character witnesses are copied verbatim or nearly verbatim from each other. In a few cases, the defense even failed to change the gender pronouns on its cut-and-pasted proffers, and in at least one case, forgot to change a statement apparently from the

[1] The government notes that the trial counsel lived for several years in a town with a population smaller than the combined total number of merits and motions witnesses requested by the defense in this case.

accused from first to third person (defense motion at 15- "She has heard about the situation from someone else and I'm not sure where she stands now, but she always liked me before."). Three military character witnesses (LtCol McCann, Maj Hines, and Capt Arroyo) who are identified by the defense as being stationed at the Joint Law Center, MCAS Miramar have in fact not been stationed at MCAS Miramar for years. Several witnesses have no contact information or means of locating them provided, and, in four cases, even the names of the requested witnesses are not provided.

b. In denying the defense requested character witnesses, the trial counsel specifically invited the defense to re-submit a request for a reasonable number of witnesses, with a more detailed proffer regarding the relevance of each witness, some showing that the requested witnesses would actually testify as claimed, and a showing of how the requested witnesses are not cumulative with each other. The trial counsel has attempted to re-engage the defense on this matter several times, by phone, by email, and in person. Although the civilian defense counsel indicated in person and by email that the trial counsel's request was reasonable, the defense has not submitted a renewed request for a reasonable number of character witnesses with an adequate showing of necessity for each witness.

c. The trial counsel has spoken to witnesses on the defense witness list who indicated that the defense has never contacted them, nor made any effort to contact them.

3. <u>Discussion</u>

a. <u>The defense requests for "unknown lobby workers", "unknown Funky Pirate bar workers", "unknown Big Easy bar workers", and "Unknown Razoo's Club workers", Michelle Reuther, Robert O'Brien, Nancy Velie, and Benjamin (Jamie) Hadden are not compliant with R.C.M. 703 and should be denied.</u>

Article 46, UCMJ provides that both the government and defense are entitled to equal access to relevant and necessary witnesses. However, Rule for Courts-Martial 703(c)(2)(B) sets forth basic steps that the defense must follow in order to show that the defense is entitled to production of witnesses. The rule notes that a request for production of witnesses by the defense "*shall* include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity" (emphasis added). In the present case, the defense fails to provide not only contact information for several witnesses (whose contact information is listed as "unknown") but even a bare minimum amount of information such that the witness can be located upon the exercise of due diligence.

The defense also asks the government to produce several unknown witnesses from various establishments in New Orleans based on conjecture about what they would say. The defense request fails the requirements of RCM 703 in two ways. First, the requests do not provide enough information about the hypothetical witnesses such that the witnesses could be found upon the exercise of due diligence. Second, the defense proffer of what these witnesses would say rests on numerous layers of speculation, including: that the exercise of due diligence would necessarily locate a particular bar worker who happened to be not only working on a particular night, but had a particular vantage point; that the unknown bar worker would have sufficient memory of the night in question to be competent to testify about those events; that the unknown bar worker would have a specific enough memory to identify the accused and alleged victims; and that the unknown bar worker not only had constant observation of each and every drink purchased by the accused throughout the night, but is able to recall his or her constant, unbroken observation of the accused; and finally, given all these unlikely elements, that such an

unknown person would actually testify as proffered by the defense. The request for such an individual amounts to no more than a daydream of defense counsel. Moreover, the request is so vague that it is difficult to see how the motion could even be granted by the military judge, and if it were granted how the government could ensure compliance with it. Therefore, the request for hypothetical unknown witnesses should be denied.

The defense requests that the court compel production of two witnesses, Michelle Reuther and Robert O'Brien, who are presumably fact witnesses. As of the time of the defense request on 18 June 2010, the defense had never made any effort to contact Ms. Reuther despite having had her contact information for over a year. However, the very brief defense proffers for both witnesses fall far short of establishing any relevance for their proffered testimony. With regard to Ms. Reuther, the defense states that she is "aware that employees working at Royal St. Charles Hotel on 3 April 07 no longer work there" and "can testify to the fact that no video evidence allegedly exists." With regard to Mr. O'Brien, the defense states that he "attended law school" and "was on the trip to New Orleans" with the accused, but provides no further proffer of what observations, either from law school or the New Orleans trip, that Mr. O'Brien would testify to. Assuming that both Ms. Reuther and Mr. O'Brien would testify exactly as proffered by the defense, nothing about this testimony would have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil.R.Evid. 401. Therefore, the defense fails to establish the relevance and necessity of their testimony.

b. <u>The defense requests for production of witnesses on sentencing fail to show why the witnesses' personal appearance will be necessary.</u>

In addition to the requirements of contact information and a sufficient synopsis of testimony required for a defense request for witnesses on the merits, a defense request for production of witnesses on sentencing must also contain a statement of "reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(e)." R.C.M. 703(c)(2)(B)(ii). R.C.M. 1001(e) specifically notes that during sentencing "there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses," and provides limitations to the circumstances under which the military judge should order a sentencing witness produced. These limitations include a showing that alternate forms of evidence, including testimony by remote means, are insufficient to meet the needs of the court-martial in the determination of an appropriate sentence, and that the significance of the personal appearance of the witness outweighs the practical difficulties of producing the witness.

The defense failed to make any showing whatsoever why the personal appearance through government subpoena and travel orders of Ted Wacker or LaNita Wacker is required under the rule. The defense has therefore failed to comply with the plain language of R.C.M. 703, and the defense motion to compel production of these witnesses on sentencing should be denied.

c. <u>The court should not compel the production of 58 defense character witnesses at the government's expense and using the government's coercive power when the defense refuses to do its homework in order to demonstrate the relevance and necessity of each witness.</u>

Rule for Court-Martial 703(b)(1) provides, "Each party is entitled to the production of any witnesses whose testimony on a matter in issue on the merits…would be relevant and necessary." R.C.M. 703(b)(1), M.C.M. (2005 ed.) The R.C.M. 703(b)(1) discussion provides, "Relevant testimony is necessary when it is not cumulative and when it would contribute to a

party's presentation in some positive way on a matter in issue." *See* Discussion, R.C.M. 703(b)(1), M.C.M. (2005 ed.). Rule for Court-Martial 703(c)(2)(B)(i) provides:

> A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

R.C.M. 703(c)(2)(B)(i), M.C.M. (2005 ed.).

The United States Navy-Marine Corps Court of Military Review has provided perhaps the most thorough analysis regarding witness production in *United States v. Allen*, 31 M.J. 572 (1990). The Court ruled, "The right to compel the attendance of witnesses, however, is not absolute; the defense must demonstrate that witnesses are both material and necessary before any order to produce is required." *Id*. at 610. The Court continued to define materiality as "embracing the reasonable likelihood that the evidence could have affected the judgment of the military judge or court-members." *Id*. "A witness is material when he either negates the government's evidence or supports the defense." *Id*. The defense bears the burden to establish materiality by a preponderance of the evidence. *Id*. The witness must be produced unless the averments of the defense are inherently incredible on their face, or unless the Government shows…that the averments are untrue or that the request is otherwise frivolous." *Id*. The Court further established a seven-point balancing test for the Military Judge's discretionary use. *Id*. When determining whether a material witness must be produced, the Military Judge must balance:

> (1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by

> nonamenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. But, considerations other than materiality have no role in determining whether the Government must produce the requested witness.

Id. at 610, 611. "The decision whether a material witness must be ordered produced by a military judge, therefore, must be analyzed on a case-by-case basis with the military judge weighing "the materiality of the testimony sought against the equities of the situation." *Id*. at 611.

With regard to the issue of witness necessity, the Court ruled, "The accused has no right to compel the attendance of witnesses whose testimony would be merely cumulative with testimony already available to the defense." *Id*. When determining whether a witness is cumulative, the Military Judge must determine:

> (1) Is the credibility and demeanor of the requested witness greater than that of the attending witness? (2) Is the testimony of the requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of attending witnesses? (3) Will any benefit accrue to the accused from an additional witness saying the same thing that other witnesses have already said?

Id. at 612. An improper denial is not an automatic ground for reversal of an otherwise valid conviction. *Id*. Rather, reversal only occurs when a fair risk of prejudice results. *Id*. at 612, 613. "Prejudice is determined by whether it can be said beyond a reasonable doubt that presentation of the live testimony of the absent witness, on the key issue of credibility, would not have tipped the balance in favor of the accused." *Id*.

With regard to defense requests for good character witnesses (e.g., good military character, law-abidingness, peacefulness, truthfulness, etc.) a helpful (and controlling) discussion is found in *United States v. Breeding*, 44 M.J. 345 (C.A.A.F. 1996). In *Breeding*, a case where

the accused was a lieutenant colonel, the defense requested the production of a total of 23 witnesses, of which 12 were granted and the defense unsuccessfully attempted to compel the production of eight, several of whom related to the accused's character. *Id*. at 347. The court noted that

> "R.C.M. 703(c)(2)(B)(i), in conjunction with Mil.R.Evid. 405, is satisfied by setting forth: (1) the name of the witness; (2) whether the witness was a member of the same community or unit as appellant; (3) how long the witness has known appellant; (4) whether the witness knew appellant… in a professional or social capacity; (5) the character trait known; and (6) a summary of the testimony about it."

The court went on to consider the proffers regarding the expected testimony of the denied defense witnesses, and found them lacking. Simply by mentioning how the requested witness knew the appellant and asserting baldly that the witness would offer good character testimony, the defense proffers failed to satisfy the required foundational showing for production of character witnesses. *Id*. at 351. In any event, the proffered testimony of the denied witnesses was cumulative with the testimony of six witnesses who were produced to testify about the accused's good military character and character for peacefulness. *Id.* at 352.

In the present case, the government does not dispute that the accused has a legal and ethical right to present evidence of the accused's alleged good character, potentially including the production of some good character witnesses. In fact, on multiple occasions, the government has specifically invited the defense to negotiate an agreement between counsel regarding production of a reasonable number of character witnesses. What the government opposes in this response is the defense's continuing effort to abuse the discovery and witness production process by overreaching, submitting a facially absurd request for production of an excessively large number of witnesses, and refusing to do even the most basic defense homework in order to meet the defense's obligations prior to obtaining witnesses at government expense.

The government respectfully submits that very few, if any, of the proffers submitted by the defense meet all of the standards enumerated in *Breeding*. Most of the defense proffers consist of a few words about where the witness may have known the accused, and a cut-and-pasted statement that the witness would offer some sort of good character testimony. The request is a mile wide and an inch deep. Even assuming that each proffer made the required showing on its face, the sheer number of witnesses requested suggests that the defense does not in fact have a reliable basis to believe that every requested witness would actually testify as proffered. Indeed, some of the mistakes in the defense witness request, such as the "I'm not sure where she stands now, but she always liked me before" line inadvertently left in the defense request, strongly imply that all the defense has done is copy the accused's email contacts list and pasted boilerplate language about good character based on the mere expectation or hope that the witnesses would say positive things about the accused. Viewed in a less favorable light, the defense request appears to be an effort to impose extraneous administrative burden and cost on the government, while at the same time investing minimal effort on the part of defense counsel in the process of achieving that goal.

The inadequacy of the defense proffers is far from the only fatal defect in many of the defense requests for witnesses. As discussed *supra*, several of the witness requests fail to include adequate information to locate the witness through the exercise of due diligence. A number of witnesses are described only as childhood or college friends of the accused, meaning that their contacts with the accused are too remote in time from the charged offenses to carry any significant probative value as to his character at the time of the charged offenses. See *Breeding*, 44 M.J. at 351 (character witnesses properly denied where proffered contacts with accused were remote in time from the charged offenses). A number of the witnesses only appear to have had

any contact with the accused well after the charged offenses. See *United States v. Midkiff*, 15 M.J. 1043, 1047 (N.M.C.M.R. 1983) ("proof of reputation generally has been limited to the existing reputation of the accused prior to and not remote from the date of the offense charged," with exception for accused's reputation for testimonial honesty).

Perhaps even more significantly for the purposes of this motion, large numbers of the defense requested witnesses are blatantly cumulative with other requested witnesses in that the cover the same time periods and the same types of interaction with the accused. See *Breeding*, 44 M.J. at 352. Given the unreasonably large number of witness requests submitted by the defense, it should not be the job of the government and the court to conduct extensive investigation in order to figure out which witnesses actually have the necessary foundation to testify about the accused's character and are not cumulative, and therefore untangle the mess created by the defense shotgun approach. In light of the strong implication that the defense is simply overreaching and abusing the witness production process, the government submits that an appropriate response to this motion would be for the court to deny the defense motion for production of witnesses *in toto* as it stands, and allow the defense an opportunity to re-submit a more reasonable witness request after doing its homework regarding every single witness requested.

d. The defense requests for production of expert witnesses should be denied because the defense fails to establish the relevance or necessity of the requested experts.

"An accused is entitled to an expert's assistance before trial to aid in the preparation of his defense upon a demonstration of necessity. But necessity requires more than the 'mere possibility of assistance from a requested expert.' The accused must show that a reasonable probability exists 'both that an expert would be of assistance to the defense and that denial of

expert assistance would result in a fundamentally unfair trial.'" *United States v. Bresnahan*, 62 M.J. 137, 143 (C.A.A.F. 2005) (citations omitted).

In order to establish the necessity of a government-funded expert, the defense must show (1) why the expert assistance is needed; (2) what the expert assistance would accomplish for the accused; and (3) why the defense counsel were unable to gather and present the evidence that the expert assistance would be able to develop. *Id*., citing *United States v. Gonzalez,* 39 M.J. 459, 461 (C.M.A. 1994), *United States v. Ndanyi*, 45 M.J. 315, 319 (C.A.A.F.1996).

The Navy-Marine Corps Court of Criminal Appeals has articulated additional factors to determine whether the necessary showing has been made: "In particular, the defense must show what it expects to find; how and why the defense counsel and staff cannot do it; how cross-examination will be less effective without the services of the expert; how the alleged information would affect the Government's ability to prove guilt; what the nature of the prosecution's case is, including the nature of the crime and the evidence linking him to the crime, and how the requested expert would otherwise be useful." *United States v. Thomas*, 41 M.J. 873, 875 (N-M.Ct.Crim.App. 1995), citing *United States v. Allen*, 31 M.J. 572, 623-24 (N.M.C.M.R.1990).

In accordance with the *Gonzalez* test and the additional *Thomas* factors, it is vitally important to understand the reasons for providing expert assistance. Expert assistance is required by the Due Process Clause to provide the accused with a fair trial. *Ake v. Oklahoma*, 470 U.S. 68 (1985). It is to help the defense prepare for trial, *Short*, 50 M.J. at 373, to help the defense counsel understand complex issues and help him prepare for cross-examination of a government expert, *United States v. True*, 28 M.J. 1057 (N.M.C.M.R. 1989), to help him undermine government forensic testing, *Ndanyi*, 45 M.J. at 319, undermine government psychiatric testimony, *United States v. Huberty*, 50 M.J. 704, 715-16 (A.F.Ct.Crim.App. 1999), and to help

the defense gather relevant evidence. *United States v. Washington,* 46 M.J. 477, 480-81 (C.A.A.F. 1997).

It is not intended for the defense to go on a "fishing expedition," *United States v. Kinsler*, 24 M.J. 855, 856 (A.C.M.R. 1987), nor intended to help the defense "lay the groundwork for an expert witness request," *United States v. Mann*, 30 M.J. 639, 644 (N.M.C.M.R. 1990), nor to help the defense "find an expert who could tell him whether the government's expert could be contradicted," *United States v. Ford,* 51 M.J. 445, 456 (CAAF 1999), nor meant to make up for the lack of defense counsel's "hard work." *True*, 28 M.J. at 1062 n.5, or the defense counsel "doing his or her homework," *Short*, 50 M.J.at 373.

Dr. Thomas Grieger

"A fundamental premise of our criminal trial system is that 'the jury is the lie detector.' Determining the weight and credibility of witness testimony, therefore, has long been held to be the 'part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men.' *United States v. Scheffer*, 523 U.S. 303, 318 (1998), quoting *United States v. Barnard*, 490 F.2d 907, 912 (C.A.9 1973), cert. denied, 416 U.S. 959 (1974), *Aetna Life Ins. Co. v. Ward*, 140 U.S. 76, 88 (1891).

In light of the foregoing language, it should give the court pause that the defense request for Dr. Grieger and the motion to compel funding for his assistance mention numerous times, and in no uncertain terms, that the defense intends to introduce testimony from Dr. Grieger regarding the credibility of government witnesses. Specifically the defense states that an alleged victim in this case, Ms. Elizabeth Easley Cook, "may be less able to testify truthfully as compared to another person" and requests Dr. Grieger to "determine if she is capable of testifying truthfully in this case" and "shed light on why Ms. Easley would fabricate a version of

events" in this case. Such proffered testimony is clearly impermissible "human lie detector" testimony and therefore should be excluded by the court.

The defense also proffers that "Dr. Grieger, a toxicologist, might opine about the effects of alcohol on a user like Ms. Easley and Ms. Brooder and their ability to accurately recall events. He would discuss what pass out and what black out is. This is also expert testimony that only a trained and educated professional like Dr. Grieger can testify about." Of course, this is also expert testimony that a trained an educated professional like Dr. Jacobs, the toxicologist who has already been granted to the defense to assist the defense regarding exactly the same subject matter, could testify about. The defense does not show why it is entitled to two experts to provide the same testimony.

Finally, the defense states that Dr. Grieger could help the defense develop a theory that the alleged victims in this case might not recall events accurately because of prior sexual assaults either vaguely alluded to (in Ms. Cook's case) or non-existent but hypothesized by the defense (in Ms. Brooder's case). As discussed in the government's response to the defense motion to introduce evidence pursuant to Mil.R.Evid. 412, the defense has no basis whatsoever for the wild theory under which they seek to admit such testimony. The defense is attempting to smuggle otherwise impermissible evidence of sexual activity involving the victims in this case through the testimony of a hired-gun expert. To the extent that the defense suggests that they need Dr. Grieger to develop such a theory and determine whether it is viable at trial, the defense is not entitled to a tour guide on a fishing expedition at taxpayer expense.

If the court is inclined to grant the defense assistance in this field, the government requests that the court grant the government a suitable but definite window of time to locate an appropriate alternative at lower cost to Dr. Grieger. Finally, if the defense is granted an expert in

order to help develop its far-fetched theory regarding the alleged impact of prior sexual assault experiences on the victims' memories, the government moves the court to order a *Daubert* hearing in order to determine the admissibility of such testimony prior to trial.[2]

Ms. Lovette Robinson

The defense requests that a Sexual Assault Nurse Examiner (SANE) be produced as a defense expert witness in order to talk about what steps would have been taken had a sexual assault forensic examination (SAFE kit) or similar exam been performed in this case. The proffered testimony is irrelevant, because no such testing was performed in this case. The absence of a rape kit being performed is not "evidence that Capt Wacker didn't rape Ms. Easley or Ms. Brooder," it is evidence that a rape kit was not performed. The defense reasoning behind their motion to compel a SANE as an expert witness is analogous to requesting expert on video recording technology to testify on the capabilities of such technology, in order to show that a recording could potentially confirm or refute either side's version of events *if* a videocamera had happened to be recording at the time and place where the crime occurred. Alternative history may make entertaining reading, but it has no place under the Military Rules of Evidence. In any event, to the extent that the absence of a SAFE kit has any relevance in this case, that fact can be placed before the members without a SANE's testimony. Testimony regarding the details of a test that was not performed would only serve to waste time and confuse the members.

The defense also mentions that Ms. Robinson may discuss "the significance, if any, regarding Ms. Brooder's report of vaginal bleeding following this incident in proximity to her reported recent menstruation." Not only was this basis for Ms. Robinson's testimony not

[2] See the discussion of case law in the government's motion to exclude certain testimony from a defense OB-GYN expert.

mentioned in the defense's original request for her production on 29 June 2010, but the defense fails to explain why CAPT Leininger, the OB-GYN expert already granted to the defense, lacks the requisite expertise to assist the defense or testify regarding this matter.

4. Relief Requested

The government requests that the court deny the motion.

5. Evidence and Burden of Proof

The defense bears the burden of proof by a preponderance of the evidence. The government offers the emails from the trial counsel regarding production of character witnesses dated 1 July 2010 and 23 August 2010, and a response from civilian defense counsel dated 23 August 2010.

6. Oral Argument

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the court and defense counsel by electronic mail on 28 October 2010.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

From:	Day Capt Evan S
To:	Hur Capt Christian P;
cc:	Hatch MAJ Douglas C; Sullivan LtCol Sean; "farajh@gmail.com";
Subject:	Discovery and witness responses ICO US v Capt Wacker
Date:	Thursday, July 01, 2010 22:11:51
Attachments:	gov resp wit req ICO Wacker.pdf gov resp disc req ICO Wacker.pdf

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Gentlemen,

Please find attached the government's responses to the defense discovery and witness requests dated 18 June 2010.

Based on my conversation with Mr. Faraj, I believe there is some room to resolve a few of the witness issues between counsel, particularly with respect to character witnesses. I just need more information in order to do that.

Very Respectfully,
Captain Evan S. Day
Senior Trial Counsel, Military Justice Office
Joint Law Center
3rd MAW/ MCAS Miramar
Comm: 858-577-1887
DSN: 312-267-1887
Fax: 858-577-1734

-----Original Message-----
From: Hur Capt Christian P
Sent: Tuesday, June 29, 2010 18:41

To: Day Capt Evan S
Cc: Hatch MAJ Douglas C; Sullivan LtCol Sean; 'farajh@gmail.com'
Subject: RE: Expert Requests in US v. Capt Wacker

Capt Day,

Our expert requests are attached.

Christian P. Hur
Captain, USMC
Senior Defense Counsel
Telephone: (619) 524-8713
Fax: (619) 524-6784
Address: Defense Section, Bldg 12, 1st Floor, MCRD, San Diego, CA 92140

From:	Haytham
To:	Day Capt Evan S;
cc:	Hur Capt Christian P; Hatch MAJ Douglas C; Douvas Capt Alex G; Sullivan LtCol Sean;
Subject:	Re: Witness issues ICO US v. Wacker
Date:	Monday, August 23, 2010 15:16:41

Capt Day,
That's a fair request. We'll provide the Witness information and affidavit.

Haytham Faraj
760-521-7934
Sent from my iPhone

On Aug 23, 2010, at 1:04 PM, "Day Capt Evan S" <evan.s.day@usmc.mil> wrote:

> Gentlemen,
>
> I have a couple of issues regarding witnesses that I'd like to see if we can resolve without litigation.
>
> One is that Susan Minamizono, who the defense has requested, has a baby due shortly before the trial dates. I'd like to arrange some kind of alternative to testimony for her, and I'm open to reasonable suggestions as there are multiple alternatives with the consent of both parties (stipulation, phone testimony, affidavit, deposition, etc.). If we can't agree on anything, then I will probably submit a motion for a deposition.
>
> The second issue relates to character witnesses. As you probably recall, I denied the vast majority of the character witnesses in the defense witness request. I'm going to reiterate what I said in my original response and state that the government is willing to re-evaluate the request for production of a reasonable number of character witnesses, provided that the defense provides an adequate proffer showing, among other things, current (and verified) contact information, that the defense has actually contacted these witnesses (or made diligent efforts to), some evidence that they would testify as proffered (e.g. statement from the witness), and some explanation for why particular witnesses are not cumulative with other witnesses. I'm assuming that you will be filing some sort of motion to compel witnesses, so we can probably avoid some time litigating the issue.
>
> Very Respectfully,
> Captain Evan S. Day
> Trial Counsel, Military Justice Office

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