

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

UNITED STATES)	
)	GENERAL COURT-MARTIAL
v.)	GOVERNMENT MOTION IN LIMINE
)	(COMPEL DISCOVERY)
Frank D. Wuterich)	
XXX XX 3221)	
Staff Sergeant)	
U.S. Marine Corps)	2 August 2010
)	

1. Nature of Motion. Pursuant to Rule for Courts-Martial 906(b)(13), the Government moves the Court to compel reciprocal discovery pursuant to the court-ordered trial schedule, R.C.M. 701 and R.C.M. 703.

2. Summary of Facts.

a. The accused is charged with dereliction of duty, voluntary manslaughter, aggravated assault, reckless endangerment, and obstruction of justice, violations of the Uniform Code of Military Justice (UCMJ) Articles 92, 119, 128, and 134. See the Charge Sheet dtd 27 December 2007.

b. On 8 July 2010, the defense served a "Resubmission of Defense Expert Consultant/ Witness Requirements Re: U.S. v. Frank Wuterich. In it, the defense requested additional funding for three expert witnesses; one in the area of forensic pathology, another in the area of trajectory and a third in the area of crime scene reconstruction. Enclosure 1.

c. On 19 July 2010, witness lists were due in the subject case. Enclosure 2.

d. On 13 July 2010, the government made a request for discovery from the

defense. In it, the government requested the production of, among other things, all materials related to crime scene reconstruction, forensic pathology, blood stain analysis, firearms trajectory..." Enclosure 3.

3. Discussion.

RECIPROCAL DISCOVERY

R.C.M. 701 establishes the standard for discovery in military courts. The prosecution and the defense "shall have equal opportunity to obtain witnesses and other evidence" *See* R.C.M. 703(a); Article 46, UCMJ. To ensure that R.C.M. 701 will have meaning, R.C.M. 701(e) states, "[e]ach party shall have an adequate opportunity to prepare its case and interview witnesses and inspect evidence," and no party shall impede access to a witness or evidence.

The defense has retained expert witnesses/ consultants in the areas of forensic pathology, bloodstain patterns, forensic firearms and trajectory, and forensic reconstruction. On 8 July 2010, the defense team requested additional funding for three out of four of their experts. Based on the additional hours requested, particularly the sixty hours requested for their crime scene reconstruction expert, it is the government's belief that the defense intends to present testimony and evidence at trial related to their expert's efforts to date.

On 13 July 2010, the government requested discovery of documents, case notes, reports or results of examinations, tests or analysis conducted by any witness related to crime-scene reconstruction, forensic pathology, blood stain pattern analysis, firearms trajectory analysis or any other materials generated by any expert related to any reconstruction of the events of 19 November 2005 in Haditha, Iraq that the defense


intends to introduce as evidence at trial, or will be relied upon by any witness to the defense intends to call at trial, or otherwise relates to that witness' testimony. The defense has not responded to the government's discovery request of 13 July 2010. The government respectfully requests the defense identify what expert testimony it intends to introduce at trial, and turn over all discoverable materials to the government sufficiently in advance of trial to avoid any delay in the case.

To avoid unnecessary delays, the prosecution requests voluntary, or Court ordered, disclosure of any demonstrative aids or similar evidence such as animations, simulations, documents, notes, reports in the possession of the defense in advance to expedite the proceedings. Without timely disclosure the prosecution will be disadvantaged in its ability to adequately prepare.

4. Burden of Proof. Pursuant to R.C.M. 905(c), the burden of proof is a preponderance of the evidence, and is assigned to the government as the moving party.

5. Relief Requested. The Government moves the Court to compel the defense to comply with its outstanding reciprocal discovery obligations (to include the disclosure of any demonstrative aids/evidence), and requests a preliminary ruling from the Court on the disclosure of animations and other demonstrative evidence pursuant to R.C.M. 701 and 703 in the possession of the defense to avoid delaying the proceedings.

6. Argument. The government respectfully requests oral argument.


J. G. Van Norman
Capt, U.S. Marine Corps
Assistant Trial Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel by electronic mail on 2 August 2010.



J. G. Van Norman
Capt, U.S. Marine Corps
Assistant Trial Counsel

8 July 2010

From: Civilian Defense Counsel
To: Commander, U.S. Marine Corps Forces Central Command
Via: Trial Counsel

Subj: RESUBMISSION OF DEFENSE EXPERT CONSULTANT/WITNESS
REQUIREMENTS RE: US.V SSGT FRANK WUTERICH

Encl: (1) Current fee schedule of Lucien Haag of Forensic Science Services.

1. In preparation for the scheduled subject court-martial, this resubmission of defense expert consultant/witness requirements is provided. In 2007, the defense requested a number of expert consultants in preparation for SSgt Wuterich's case. These experts included: Dr. Michael Baden, Forensic Pathologist; Dr. John Thornton, bloodstain pattern expert; Lucien Haag, forensic firearms and trajectory expert; and James Gripp, crime scene reconstruction expert. All of these experts were approved by the Convening Authority in 2007. Additionally, some of the subject experts required additional hours, in addition to what was originally requested. Those requests were previously approved. Due to interlocutory appeals and other delays, these defense experts suspended work on the case while the case delays continued. Given that these experts have not continued to work on or review this case since the delays began in early 2008, some additional time will be required for some of these experts to again review the case after over two years of inactivity.

2. Dr Thornton was requested as an expert consultant on 12 Jul 07. That request was approved for 20 hours on 3 Aug 07. On 6 Feb 08, the defense requested an additional 40 hours for Dr. Thornton. That request was approved by the Convening Authority.

3. Mr. Haag was requested as an expert consultant on 18 Jul 07. It is believed that this request was approved in August 07 for a total of 60 hours at rate of \$250 per hour. Mr. Haag's current expert rate is \$350.00 an hour. A copy of his current fee schedule is enclosed (Encl (1)). It is estimated that an additional 15 hours will be required for Mr. Haag.

4. Dr. Baden was requested as an expert consultant on 18 Jul 07. Dr. Baden was approved as a defense expert consultant for a total of 60 hours. Dr. Baden's fee schedule remains the same. Dr. Baden has expended approximately 30 hours on the case so far. With his presence being required at the trial, in at least an expert consultant capacity, it is estimated that an additional 45 hours will be required to provide the necessary expert assistance to the defense.

5. Mr. James Gripp was initially requested as a defense expert consultant on 19 Jul 07. The defense resubmitted a request for Mr. Gripp as a crime scene reconstruction expert on 25 Jan 08. On 28 Jan 08, the Convening authority approved Mr. Gripp as a defense consultant for 80 hours at a rate of \$200 per hour. On 14 Feb 08, the defense submitted a request and detailed justification for additional hours for Mr. Gripp for an additional 190 hours. On 16 Feb 08, this request was approved by the convening authority for the requested 190 hours. It total, Mr. Gripp was approved for a total of 270 hours. It is estimated that the defense will require an additional

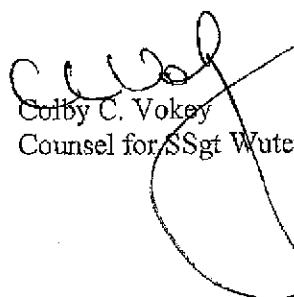
ENCLOSURE (1)

65 hours for Mr. Gripp to provide the defense with the required assistance. Mr. Gripp's fee schedule remains the same.

6. As those contracts were completed in previous fiscal years; it is necessary to resubmit the defense experts for current contracts in order to support the defense preparation for trial in September 2010. The following list includes the name of the experts, the hours previously provided, the hours already used, and any needs for additional hours. Although not listed below, travel costs will also be required for Dr. Baden and Mr. Haag.

<u>Name</u>	<u>Hrs Approved</u>	<u>Hrs Used</u>	<u>Add Hrs Req</u>	<u>Total Hrs Req</u>
Dr. Thornton-	60	60	0 **No new contract needed	
Mr. Haag-	60	27.25	15	75
Mr. Gripp	270	187.1	65	335
Dr. Baden	60	30	45	105

7. Detailed justification for these expert witnesses has been previously provided in prior defense expert requests. Additional information will be provided upon request.


Colby C. Vokey
Counsel for SSgt Wuterich

FORENSIC SCIENCE SERVICES, INC.
P.O. Box 5347
Carefree, AZ 85377

2009 GENERAL FEE SCHEDULE FOR FORENSIC SERVICES¹

RATE: \$350.00 / hour

Checks should be drawn from a government agency, law firm or insurance carrier and payable to FORENSIC SCIENCE SERVICES, INC., Carefree, AZ (EIN 86-0452931). Statements are to be paid within 30 days of receipt. A 10% surcharge will be applied for each month thereafter. Payment is the responsibility of the agency or law firm, not the client

RETAINERS:

Retainers are based on an estimate of the initial work involved prior to court appearance or deposition and customarily range from 8 to 16 hours advance payment for retention of services and/or listing as an expert witness by the inquiring firm or attorney. The first 4 hours (\$1400) of the retainer is non-refundable in the event the matter is resolved or settled after being retained but before completing the work requested.

*Retainers are *not* required from governmental agencies.

IN-STATE DEPOSITIONS, INTERVIEWS, TRIAL or HEARING APPEARANCES:

Such appearances require advance payment of the appropriate minimum fee checked below. \$1000 of which is non-refundable in the event the matter is continued or canceled within two days of the calendared appearance.

\$1500- Phoenix/Scottsdale metropolitan area-local law firms

\$2000- *outside* the Phoenix/Scottsdale metropolitan area (Mesa, Tempe, Chandler)

Additional charges at \$350/hr. for each hour following 4 hours of deposition interview, trial or hearing.

Note: pre-payment *not* required for depositions by governmental agencies

CHARGES FOR OUT-OF-STATE SERVICES or DEPOSITIONS:

Pre-payment of \$2800 for an out-of-state deposition, 1-day trial appearance or on-site forensic services with prepaid travel and lodging arranged by one of the parties.

Portal-to-portal travel charges at \$50/hr, lodging and meals are the responsibility of the party requesting the deposition, trial appearance or forensic services unless special arrangements have been made as indicated under the "Terms" section below. These charges are payable prior to or at time of appearance. Trips by air of greater than two hours or 600 miles are to be either business class or first class.

TERMS In the MATTER of:

RETAINER REQUIRED:

FIRM / INDIVIDUAL ADVISED or CONTACTED:

DATE:

ACKNOWLEDGMENT

¹ Forensic Services includes laboratory testing, case review, field examinations, research, consultation, report preparation and appearances at trials, hearings, interviews or depositions.



UNITED STATES MARINE CORPS
LEGAL SERVICES SUPPORT SECTION
BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

IN REPLY REFER TO:
5810
LSSS/nlg
29Jul10

FIRST ENDORSEMENT on Mr. Vokey's ltr 8 July 2010

From: Trial Counsel

To: Staff Judge Advocate, U.S. Marine Corps Forces Central Command

Subj: RESUBMISSION OF DEFENSE EXPERT CONSULTANT/ WITNESS REQUIREMENTS RE:
U.S. V. SSGT FRANK WUTERICH

1. Forwarded for you consideration.

A handwritten signature in cursive script, appearing to read "N. L. Gannon", is written over the typed name.

N. L. GANNON

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ENCLOSURE (/)

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES)	GENERAL COURT-MARTIAL
)	
v.)	GOVERNMENT MOTION FOR APPROPRIATE
)	RELIEF
FRANK WUTERICH)	(Docketing Request)
XXX XX 3321)	
Staff Sergeant)	
U.S. Marine Corps)	<i>26</i> 25 March 2010

1. **Nature of Motion.** The parties move the court to docket trial dates and set judicial milestones in the above-captioned case.

2. **Trial Dates and Deadlines.** Counsel are available for the dates listed below. The parties respectfully request that the Court order the following dates and milestones in the above captioned case:

Event	Date
a. Government discovery / Reciprocal discovery due:	<u>5 April 2010</u>
b. Defense witness requests due:	<u>5 April 2010</u>
c. Government response to witness requests due:	<u>19 April 2010</u>
d. Motions by either side due:	<u>26 April 2010</u>
e. Responses to motions due:	<u>7 May 2010</u>
f. Article 39(a) motions date:	<u>13-14 May 2010</u>
g. Submission of notice under MRE 505(h):	<u>1 June 2010</u>
h. Motions by either side due:	<u>2 August 2010</u>
i. Responses to motions due:	<u>16 August 2010</u>
j. Article 39(a) motions date:	<u>26-27 August 2010</u>
k. Written notice of pleas and forum due:	<u>19 July 2010</u>
l. Required notice of certain defenses due:	<u>19 July 2010</u>
m. Members Questionnaires, Witness Lists, Voir dire, Proposed Instructions due:	<u>19 July 2010</u>
n. TRIAL DATES:	<u>13 Sep - 1 Oct 2010</u>

Nick Gannon
26 MAR 2010

Nick Gannon
Major, U. S. Marine Corps
Trial Counsel

LXXIV (74)
PAGE 1 OF 2
ENCLOSURE (L) Appendix B

AE _____

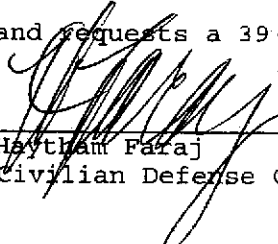
Motion Response

1. Defense Counsel, in response to the above motion:

Does not oppose it and agrees to the trial and pretrial dates proposed.

Opposes the dates proposed and requests a 39(a) session on _____

APR 26, 2010
Date



Haytham Faraj
Civilian Defense Counsel

Court Ruling

The motion is granted. All delay from the date of this request until the date of trial is excludable under Rule For Courts-Martial 707, Article 10, UCMJ and any other applicable speedy trial authorities. It is hereby ordered that all parties shall comply with the trial deadlines set forth above and shall appear before the Court at on:

_____ for an Article 39(a) session; and

_____ for commencement of trial.

Date

Military Judge

EXXIV
APPENDIX B
PAGE 2 OF 2

WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY

UNITED STATES)

GENERAL COURT-MARTIAL

v.)

GOVERNMENT WITNESSES

WUTERICH, Frank D.)

XXX XX 3221)

Staff Sergeant)

U.S. Marine Corps)

19 July 2010

The Government intends to call the following witnesses during its case in chief:

Naval Criminal Investigative Service (NCIS):

1. Special Agent Thomas Brady
2. Special Agent Brian Brittingham
3. Special Agent Matthew Marshall
4. Special Agent Matthew Timmons

Civilian Witnesses:

5. Amir H. Alkaysey
6. Jarrett Bilskie
7. Roel Ryan Briones
8. Daniel D. Callaway
9. John B. Casiday
10. James Crossan
11. Shanen Dawson
12. Vincent Di Maio, M.D.
13. Trent A. Graviss
14. Martha-Ann Hawley
15. William Kallop
16. Mike Maloney
17. Brian McDermott
18. James Prentice
19. Michael S. Richard
20. Rene Rodriguez
21. Hector Salinas
22. Jose Sanchez
23. Edward Sax
24. Justin Sharratt
25. Steven Tatum
26. Gregory Watt
27. Brian D. Whitt
28. Andrew Wright
29. David Wuterich

ENCLOSURE (2)

30. Rosemarie Wuterich

Military Witnesses:

31. LtCol Elizabeth R. Rouse, USAF
32. Maj Lucas McConnell, USMC
33. Maj David Mendelson, USA
34. Maj Kathryn Navin, USMC
35. Capt Max D. Frank, USMC
36. Capt Warren Frank, USMC
37. LTJG Clyde Legaux, USN
38. 2ndLt Indranil Das, USMC
39. MSgt Larry Dunlap, USMC
40. GySgt Travis M. Fields, USMC
41. SSgt Justin Laughner, USMC
42. SSgt Kelly McDaniel, USMC
43. Sgt Sanick Dela Cruz, USMC
44. Sgt Humberto Mendoza, USMC
45. Sgt Glen Mefford, USMC
46. Sgt Robert Stafford, USMC
47. HN Kyle Hatch, USN

 19 JULY 2010

N. L. GANNON
Major, USMC
Trial Counsel

ENCLOSURE (2)



UNITED STATES MARINE CORPS
LEGAL SERVICES SUPPORT SECTION
LEGAL SERVICES SUPPORT TEAM E
BOX 555607
CAMP PENDLETON, CALIFORNIA 92055-5607

5811
LSST-E
JUL 13 2010

From: Major Nick Gannon, Trial Counsel
To: Defense Counsel, U.S. v. Wuterich

Subj: RECIPROCAL DISCOVERY REQUEST IN THE CASE OF UNITED STATES V.
STAFF SERGEANT FRANK D. WUTERICH, XXX-XX-3221, USMC

Ref: (a) R.C.M. 701, Manual for Courts-Martial (2008 Ed.)
(b) R.C.M. 914, Manual for Courts-Martial (2008 Ed.)

1. Pursuant to paragraph (b) of reference (a), consider this a request for the discovery of names of defense witnesses and all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case; disclosure of certain defenses; production of documents and tangible objects the defense intends to introduce in the defense case-in-chief at trial; and, production of reports of examinations or tests. This includes the names, addresses and contact information (i.e., phone number, e-mail) of all witnesses, other than the accused, whom the defense intends to call during the case-in-chief or at presentencing proceedings, as well as the right to inspect any written material that will be presented by the defense at any presentencing proceeding.

2. Besides the matters listed above in paragraph 1, consider this a request for the notice or disclosure of evidence required under the Military Rules of Evidence and the production of statements pursuant to reference (b).

3. Pursuant to the Uniform Code of Military Justice, the Rules for Courts-Martial and the Military Rules of Evidence and applicable case law, the government requests that the defense produce or disclose the following discovery materials:

a. Any written or recorded material that will be presented by the defense at any presentencing proceeding.

b. Any intention of the defense to offer the defense of:

(1) Alibi (include the place or places the defense claims the accused to have been at the time of the offense); or

(2) Lack of mental responsibility or attempts to introduce expert testimony regarding the accused's mental condition.

c. The government further requests that the names and addresses of any witnesses upon whom the accused intends to rely to establish any such defense.

d. Any intention of the defense to offer the affirmative defense of justification, obedience to orders, accident, entrapment, coercion or duress, inability, or ignorance or mistake of fact, duress, or defense of others.

e. Copies of (or the opportunity to inspect) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, that the defense intends to introduce as evidence in the defense case-in-chief or sentencing. This paragraph specifically includes any and all materials generated by Mr. James Gripp.

ENCLOSURE (3)

Subj: RECIPROCAL DISCOVERY REQUEST IN THE CASE OF UNITED STATES V.
STAFF SERGEANT FRANK D. WUTERICH, XXX-XX-3221, USMC

f. Copies of (or the opportunity to inspect) any results or reports of physical or mental examinations and of scientific experiments made in connection with this case which the defense intends to introduce in the case-in-chief at trial or which are prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness's testimony.

g. Any statement of a defense witness that relates to the subject matter about which the witness will testify or has testified in the past.

h. Notification of any intent by the defense to use evidence of a conviction more than ten years old.

i. Pursuant to M.R.E. 612, the government requests any writing that will be used by a witness to refresh his or her memory for the purpose of testifying.

j. Pursuant to M.R.E. 613, the government requests any prior statement, written or otherwise, made by a witness being examined concerning that prior statement.

k. Notification of any intent by the defense to use a hearsay statement not covered by the specified exceptions (include the particulars of the statement, to include the name and address of the declarant).

4. The government specifically requests the production of any case notes, case files, reports of examinations or testing conducted by any witness related to the accused's mental condition. This request includes any psychiatric or psychological examination or neuropsychological testing that the defense intends to introduce as evidence at any stage of the trial that was prepared by or will be relied upon any witness the defense intends to call.

5. The government specifically requests the production of any case notes, case files, reports of examinations, testing or analysis conducted by any witness related to crime-scene reconstruction, forensic pathology, blood stain pattern analysis, firearms trajectory analysis or any other materials generated by any expert related to any reconstruction of the events of 19 November 2005 in Haditha, Iraq that the defense intends to introduce as evidence at trial, or will be relied upon by any witness the defense intends to call at trial, or otherwise relates to that witness' testimony.

6. The government requests that the defense counsel identify which of the following experts the defense intends to call to testify at any stage of the trial:

- a. Dr. Michael Baden;
- b. Dr. John Thornton;
- c. Lucian Haag;
- d. James Gripp.

The government further requests that defense counsel make the notification in writing, complete with current contact information, no later than 20 July

Subj: RECIPROCAL DISCOVERY REQUEST IN THE CASE OF UNITED STATES V.
STAFF SERGEANT FRANK D. WUTERTCH, XXX-XX-3221, USMC

2010, and that the defense counsel authorize the trial counsel to contact and interview any of the above individuals named as witnesses.

7. The foregoing request is of a continuing nature and remains in effect until such time as final action is taken in this case.

 13 JULY 2010

N. L. GANNON
Major, USMC

CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a copy of this document electronically upon Defense Counsel on 13 JULY 2010.

 13 JULY 2010

N. L. GANNON
Major, USMC

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