

UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S)	GENERAL COURT-MARTIAL
)	
v.)	DEFENSE MOTION
)	FOR APPROPRIATE RELIEF
DOUGLAS WACKER)	(Motion to compel the
CAPTAIN)	Government to answer the
U.S. MARINE CORPS)	defense's discovery requests;
)	approve Capt Wacker's site
)	visit request; and produce
)	witnesses request)

1 September 2010

Capt Wacker now moves this Court to order the Government to answer his pending discovery requests in this case.

Capt Wacker also moves this Court to order the Government to authorize and fund site visits for Capt Wacker, his detailed counsel and a defense clerk in this case to travel to New Orleans, Louisiana and Seattle, Washington (the scenes of some of the alleged offenses in this case).

Capt Wacker asks this Court to order his bill of particulars answered

Capt Wacker also asks the Court to order the Government to produce the defense requested lay and expert witnesses denied.

Facts

The below facts are provided to this Court in order to create a record of the discovery in this case to date:

- a. On 18 June 2010, the defense sent its first consolidated discovery request to the trial counsel, which it responded to on 1 July 2010. The bill of particulars was denied out right and the Government granted and denied in part the witnesses and discovery requested by the defense.
- b. In regards to the 18 June 2010 defense discovery request, the following was never answered or provided:

- myspace and facebook and other social media entries from Elizabeth Easley and Jessica Brooder.
- all correspondence related in any way to the transfer of Captain Wacker from MCRD to Miramar.
- a list of the days the government calculates for speedy trial clock purposes from preferrral until when the speedy trial clock stopped.
- All emails or correspondence in the possession of, sent to, sent by or received by LtCol G. F. Bond, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by Maj S. E. Jackson, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by Col S. Smith, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by Col C. Huenefeld, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by Col Richardson, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by BGen A. Salinas, USMC relating in anyway to Capt Wacker or this case.
- All emails or correspondence in the possession of, sent to, sent by or received by NCIS SA John R. Burges relating in anyway to Capt Wacker or this case.

- c. In regards to the 18 June 2010 defense witnesses requested, the following were denied by the Government in its 1 July 2010 response:

All witnesses relevant to the New Orleans incident that testified at the Article 32 hearing.

Name: Unknown lobby worker(s)

Contact Info: Unknown, New Orleans, LA
Subject: The Defense requests that the lobby worker(s) of the St. Charles Royal Hotel working the evening of 3 April 07 be produced at trial because this witness(es) (if they recall the incident) would offer testimony to the effect that the alleged rape victims in this case did not appear so intoxicated that they were unable to consent to sexual intercourse.

Name: Unknown Funky Pirate bar workers
Contact Info: Unknown, New Orleans, LA
Subject: The Defense requests that the employees of the Funky Pirate Bar working the evening of 3 April 07 be produced. These employees would testify that they did not see the Accused put date rape drugs into the drinks of the alleged victims.

Name: Unknown Big Easy bar workers
Contact Info: Unknown, New Orleans, LA
Subject: The Defense requests that the employees of the Big Easy Bar working the evening of 3 April 07 be produced. These employees would testify that they did not see the Accused put date rape drugs into the drinks of the alleged victims.

Name: Unknown Razzoo's (sic?) Club workers
Contact: Unknown, New Orleans, LA
Subject: The Defense requests that the employees of the Razzoo's (sic?) Club working the evening of 3 April 07 be produced. These employees would testify that they did not see the Accused put date rape drugs into the drinks of the alleged victims.

Name: Michelle Reuter, General Manager
Contact: Royal St. Charles Hotel, 135 St. Charles Avenue, New Orleans, LA 70130,
Phone: (504)587-3700
Subject: Aware that employees working at Royal St. Charles Hotel on 3 April 07 no longer work there. Can testify to the fact that no video evidence allegedly exists.

Name: James Kessler, BGen, USMC
Contact Info: 3dMLG, james.kessler@usmc.mil
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was the Accused's CO at H&S Bn, 3d FSSG (Okinawa). He wrote the Accused a positive recommendation letter for the FLEP program. The Accused was in the top 2 of 1stLt FitReps the General had written at the time. The Accused had Thanksgiving dinner with the General's family in 2003. The witness would best know the Accused in a professional capacity, but with some personal experiences.

Name: James Lavine, Col, USMC
Contact Info: 13th MEU, james.lavine@usmc.mil
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was the Accused's CO at the 13th MEU. As the S-6A, the Accused had a lot of interaction with this witness and the other officers of the command element both professionally and socially.

Name: William Pigott, LtCol, USMC
Contact Info: 13th MEU, pigottwn@state.gov
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was the SJA at the 13th MEU. The Accused had a lot of interaction with him and the other officers of the command element both professionally and socially. The Accused and this witness frequently discussed law school and the legal profession. The Accused considers the witness to have been one of his mentors at the MEU.

Name: Robert E. McCarthy, LtCol, USMC
Contact Info: Unknown
Subj: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was the Accused's mentor and coach of the Quantico Rugby Team in 2002.

Name: Thomas McCann, LtCol
Contact Info: MCAS Miramar,
thomasgmccann@hotmail.com, (808) 351-5097
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was the Deputy SJA for 3d MAW under Col Ary when the Accused worked at the MCAS Miramar Joint Law Center. The witness was a mentor and initiator of the Miramar Law Center's Surf Club. The witness attended USD Law on the SEP Law Program for International Law during the Accused's 2L year. The witness and the Accused had a lot of interaction at school and the witness continued to be a mentor for the Accused.

Name: Ed Esposito, MAJ, USMC
Contact Info: 13th MEU,
ed_esposito@emcorgroup.com, (858) 967-6139
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was a Staff Platoon Commander in the Accused's company at TBS. He was the S-4A at the 13th MEU. The Accused had a lot of interaction with the witness and the other officers of the command element both professionally and socially. The witness was one of the Accused's close friends and mentors at the MEU.

Name: Ken Lee, MAJ, USMC

Contact Info: 13th MEU,
kenneth.lee1971@gmail.com, (858) 245-2232
Subject: This witness is relevant and
necessary because he would offer good
military character testimony in support of
the Accused's reputation for peacefulness
and honesty. The witness was the Deputy SJA
for the 13th MEU. The Accused had a lot of
interaction with him and the other officers
of the command element both professionally
and socially. The Accused and the witness
frequently discussed law school and the
legal profession. He was one of the
Accused's close friends and mentors at the
MEU.

Name: Koh Terahira, Maj, USMC
Contact Info: 13th MEU,
kohtaro.terahira@usmc.mil, (760) 819-9838
Subject: This witness is relevant and
necessary because he would offer good
military character testimony in support of
the Accused's reputation for peacefulness
and honesty. The witness was the S-2A for
the 13th MEU. The Accused had a lot of
interaction with him and the other officers
of the command element both professionally
and socially. The witness was one of the
Accused's close friends at the MEU.

Name: Brian Proctor, LtCol, USMC
Contact Info: 13th MEU,
proxie99@hotmail.com, (858) 472-0780
Subject: This witness is relevant and
necessary because he would offer good
military character testimony in support of
the Accused's reputation for peacefulness
and honesty. The witness was the Air
Officer for the 13th MEU. The Accused had a
lot of interaction with him and the other
officers of the command element both
professionally and socially. He was one of
the Accused's close friends at the MEU.

Name: John Knotts, Maj, USMC
Contact Info: 13th MEU, (760) 525-6956

Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was the Asst. Air Officer for the 13th MEU. The Accused had a lot of interaction with him and the other officers of the command element both professionally and socially. He was one of the Accused's close friends at the MEU.

Name: Michael Gaffney, Maj, USMC
Contact Info: 13th MEU,
michael.g.gaffney@usmc.mil, (760) 522-6939
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was the Fires Officer for the 13th MEU. The Accused had a lot of interaction with him and the other officers of the command element both professionally and socially. He was one of the Accused's close friends at the MEU.

Name: Glen Hines, Maj, USMC
Contact Info: MCAS Miramar,
glen.hines@usmc.mil
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was the Military Justice Officer at the Miramar Joint Law Center. He was the Accused's Reporting Senior during his summer fun after the Accused's 1L year. He was a mentor and initiator of the Law Center's Surf Club.

Name: Christopher Shaw, LtCol (sel), USMC
Contact Info: HS BN, MCRD, San Diego, CA;
jurismarine@gmail.com, (617) 875-1630
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was in the SEP Law Program

for International Law at USD during the Accused's 3L year. He is a mentor and close friend of the Accused.

Name: Katie Arroyo, Capt, USMC
Contact Info: MCAS Miramar,
kmarroyo2000@yahoo.com, (917) 405-3374
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was a JA in military justice at the Miramar Joint Law Center. She became a mentor and close friend while the Accused was there for summer fun. The Accused also interacted with her socially.

Name: Omaar Hernandez, Capt, USMC
Contact Info: 13th MEU, omaarh@hotmail.com,
(760) 207-0054
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. He was the Accused's roommate at TBS. He was a pilot with the squadron attached to the 13th MEU. The two have been friends and have stayed in touch since 2001.

Name: Jiemar Patacsil, Capt, USMC
Contact Info: G Btry, 2/11,
patacsilusmc@gmail.com
Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was an enlisted Marine with the Accused at 4th LAAD Bn in the Marine Corps Reserve. He was a Sgt, the Accused was a Cpl, but because the Accused was commissioned first, he was the Accused's first salute. The Accused and the witness went to TBS together and the Accused has been friends with him and his wife, Jennie, since 1998. The Accused is their son's godfather.

Name: Sarah McGinley, LT, USN
Contact Info: 13th MEU/USS Tarawa,
mcginsa@gmail.com, (858) 752-4347
Subject: This witness is relevant and
necessary because she would offer good
military character testimony in support of
the Accused's reputation for peacefulness
and honesty. The witness was an
intelligence officer with the USS Tarawa.
The witness and the Accused became friends
during workups and dated in the past. The
witness and the Accused were in a
relationship for approximately 9 months. The
Accused broke up with the witness because he
was attending law school and she had a
difficult time with the Accused being
occupied with school. She liked to argue,
but the Accused refused to do so. The two
are amicable, but don't speak or see each
other often. She lives in D.C. and works at
the Defense Intelligence Agency. She was
interviewed by NCIS.

Name: Allen Snyder, Professor
Contact Info: University of San Diego,
asnyder@sandiego.edu, (619) 260-4380
Subject: This witness is relevant and
necessary because he would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. He has been a professor for two of
the Accused's classes (Lawyering Skills II
(Trial Advocacy) and Interviewing &
Counseling). He was in the Army during
Vietnam and is the faculty advisor for the
Veteran Law Students Association (VLSA), of
which the Accused was the President the
President. The Accused has been to two wine
tastings (for 8 people) at his home as part
of a charity auction. He is a clinical
professor, so much of his job involves
getting to know students and assisting them
in practical training.

Name: Shaun Martin, professor

Contact Info: University of San Diego,
smartin@sandiego.edu, (619) 260-2347
Subject: This witness is relevant and
necessary because he would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. He has been a professor for three
of the Accused's classes (Civil Procedure
I&II, Law of Love, and Professional
Responsibility). He volunteered to act as
the faculty advisor for the Accused during
the recent "interim leave" situation with
the school. The witness does some consultant
work for both civil and criminal cases and
has argued several cases before the U.S.
Supreme Court. He was interviewed by NCIS.

Name: Laura Berend, Professor
Contact Info: University of San Diego,
lberend@sandiego.edu, (619) 260-2345
Subject: This witness is relevant and
necessary because she would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. She is a former criminal litigator
and she was a professor for the Accused's
Criminal Clinic class.

Name: Robin Barnes, Professor
Contact Info: University of San Diego,
rbarnes@sandiego.edu, (619) 894-3004
Subject: This witness is relevant and
necessary because she would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. She is a visiting professor from
Univ. of Connecticut Law School. She taught
the Accused's Constitutional Law II class
and his First Amendment-Free Speech class.
Her focus is race and gender in
constitutional law. She knows about the
Accused's situation and was interviewed by
NCIS.

Name: Margie Cartwright, Career Services
Counselor

Contact Info: University of San Diego,
mcartwright@sandiego.edu, (619) 260-4701
Subject: This witness is relevant and
necessary because she would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. She is a counselor in the career
services office who knows the Accused well.
She can speak to the Accused's
professionalism and active involvement in
the school.

Name: Carrie Wilson, Associate Dean for
Student Affairs
Contact Info: University of San Diego,
carrie@sandiego.edu, (619) 260-6851
Subject: This witness is relevant and
necessary because she would offer good
character testimony in support of the
Accused's reputation for peacefulness and
honesty. She knew about the Accused's
situation from the very beginning. She has
been the spokesperson from the law school.
She can speak to the Accused's actions and
conduct throughout law school. The Accused
has worked with her on several student
organization projects. She stated that the
speaker panel the Accused organized last
semester, "Guantanamo Bay After Boumediene
and Hamdan: What Happens Now?" was the best
event that she has seen at the law school in
the past 20 years. It required organizing 6
different student groups and raising over
\$3,000. 150 people attended from the law
school and local community.

Name: Kelly Lowry
Contact Info: kelly_lowry@hotmail.com,
(951) 454-3740
Subject: This witness is relevant and
necessary because they would offer good
military character testimony in support of
the Accused's reputation for peacefulness
and honesty. The witness is a past roommate
of the Accused. The witness Roommate, 2000-
01 and 2004-Present. Specifically, the
witness is the Accused's current roommate

(2004-Present), along with his younger brother, Kevon Lowry. Kelly and the Accused were in the same pledge class in the Sigma Nu Fraternity at UCLA. They became friends during college and were roommates during his senior year (2000-01). The witness is a special education teacher at Mission Bay High School and is also a Captain in the Army National Guard.

Name: Katharine Tremblay
Contact Info: katharinetremblay@gmail.com,
(858) 775-9718

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was the Accused's girlfriend from September 2008 until August 2009. She is currently a 2L at USD.

Name: Jodi McShan [Elizabeth Jo McShan]
Contact Info: jodimcshan@gmail.com, (214)
797-8883, 4530 Noyes Street, San Diego, CA
92109

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The witness attended USD. The witness and the Accused were in the same section their 1L year at USD and became close friends. Based on her knowledge of the Accused's character, thinks the charges are outrageous.

Name: Sherlin Tung
Contact Info: sherlintung@gmail.com (909)
576-9703

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She and the Accused attended USD together and knew each other quite well.

Name: Andrew Haden

Contact Info: andrew.haden@gmail.com, (619) 665-3165

Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. He graduated from USD. He was a Lieutenant in the Navy prior to law school. At USD, he was the Chair of the Moot Court Board and the President and Founder of the VLSA. He was a mentor to the Accused in law school.

Name: Jenny Meeker

Contact Info: jlmeecker@gmail.com, (619) 884-7106

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She was a friend of the Accused and a graduate of USD. She was the Accused's TA for Lawyering Skills I along with Carolina Bravo-Karimi.

Name: Marshall Skaletsky

Contact Info: marshsd@gmail.com, (858) 449-4995

Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was a 3L at USD and was the SBA President. He was also on the Moot Court Board with the Accused. The witness and the Accused became friends through moot court last year.

Name: Ben Shiftan

Contact Info: benjamin@shiftan.com, (858) 775-7040

Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The witness was a 3L at USD and was on the Moot Court Executive Board with

the Accused. The witness and the Accused became friends through intramural soccer during their 1L year.

Name: Hillary Mueri
Contact Info: hmueri@gmail.com
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She was a law school student at USD and was the Executive Vice President of the VLSA. She was a Lieutenant in the Navy prior to law school.

Name: Dane Voris
Contact Info: danevoris@yahoo.com
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. He was a 1L at USD and is the Operational Vice President of the VLSA. He was a Lieutenant in the Navy prior to law school. The Accused was his mentor at law school.

Name: Joni Borzcik
Contact Info: jborzcik@gmail.com, (714) 801-1744
Subject: This witness is relevant and necessary because she would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. She is currently a 3L at USD. The Accused was her mentor during her 1L year.

Name: Maureen Abdelsayed
Contact Info: maureen82@gmail.com, (917) 533-3946
Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She graduated from USD law school. The Accused and the witness were in the same

section their 1L year. The Accused and the witness were on the Moot Court Board together. The Accused dated her roommate, Samin Adib (who was also in their section 1L year), during the fall semester, but the relationship didn't last.

Name: Carolina Bravo-Karimi

Contact Info: c.bravokarimi@gmail.com,
(949) 885-6763

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The witness is a friend of the Accused and graduated from USD law school in 2008. She was the Accused's mentor for Lawyering Skills along with Jenny Meeker. She was also on the Moot Court Board with the Accused last year. She has heard about the situation from someone else and I'm not sure where she stands now, but she always liked me before.

Name: Catherine Tran

Contact Info: cltran@gmail.com (858) 472-7372

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She graduated from USD. The Accused and the witness became friends through school functions and had a class together last year. She was on the trip to New Orleans.

Name: Kristen Santerre

Contact Info: kristensanterre@gmail.com
(858) 245-2266

Subject: This witness is relevant and necessary because he would offer good military character testimony in support of the Accused's reputation for peacefulness and honesty. She graduated from USD last year. She was the organizer of the New Orleans trip and the Accused and the witness

became friends from there. The witness began dating Andrew Haden the next year and the Accused and the witness have always been friends.

Name: Ahnie Smith

Contact Info: ahniesmith@gmail.com (925) 639-0666

Subject: This witness is relevant and necessary because she would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. She attended law school at USD. She was on the Moot Court Board with the Accused last year.

Name: Katie Santon

Contact Info: ksanton@gmail.com (760) 224-4963

Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The witness is the Accused's friend and was a 3L at USD. The witness and the Accused met through friends and during moot court competitions, although she was not on the Moot Court Board. She dated Joe Gorman, so the Accused and her became closer friends.

Name: Amber Davis

Contact Info: (206) 718-7827

Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty.

Name: John Compton

Contact Info: (206) 915-2667

Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty.

Name: Kati Burpee
Contact Info: (253) 797-7728
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness owns a bar in Seattle and has interacted with the Accused socially since 2001.

Name: Sarah Kusch
Contact Info: (310) 945-7768
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness attended UCLA with the Accused between 1999-2001. This witness dated the Accused and has stayed in contact with the accused to the present.

Name: Colleen (Cassidy) Blosser
Contact Info: (760) 224-6667
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness has known the accused socially for the past 3 years. This witness is a Registered Nurse and a Lieutenant in the U.S. Navy.

Name: Henry de Vere White
Contact Info: (206) 650-9915
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was a bartender in Seattle in 2001 and became a close friend of the Accused. This witness has socialized frequently with the Accused.

Name: Tina de Vere White
Contact Info: (916) 284-5719
Subject: This witness is relevant and necessary because they would offer good

character testimony in support of the Accused's reputation for peacefulness and honesty. This witness has interacted with the Accused in social situations since 2006.

Name: Matthew Keasling
Contact Info: (916) 601-2507
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness has interacted with the Accused in social situations since 2007.

Name: Naisha Covarrubias-Keasling
Contact Info: (949) 419-7314
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness has interacted with the Accused in social situations since 2007.

Name: Mr. John Carter (MGySgt, USMC, ret.)
Contact Info: MCRD San Diego, CA
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness worked with the Accused between May and October 2009.

Name: Thad Trapp, LtCol, USMC
Contact Info: MCRD San Diego, CA
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness worked with the Accused between May and October 2009.

Name: Christopher Conlin, Col, USMC
Contact Info: MCRD San Diego, CA
Subject: This witness is relevant and necessary because they would offer good character testimony in support of the Accused's reputation for peacefulness and

honesty. This witness worked with the Accused between May and October 2009.

Name: Robert O'Brien
Contact Info: Unknown
Subject: This witness attended law school with the Accused at USD. He was on the trip to New Orleans with the Accused in April 2007.

Name: Nancy Velie
Contact Info: Unknown
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. This witness was a secretary and athletic coordinator at Shorecrest H.S. and worked closely with the Accused.

Name: Heather McKimmie
Contact Info: (206) 851-0624
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The accused attended elementary through high school with the Accused.

Name: Johanna Figurelli
Contact Info: (206) 851-0624
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The accused attended elementary through high school with the Accused.

Name: Matthew Majorowicz
Contact Info: (206) 437-8548
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The accused attended high school with the Accused.

Name: Benjamin (Jamie) Hadden
Contact Info: Unknown
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The accused attended elementary through high school with the Accused.

Name: Cory Christianson
Contact Info: (206) 769-5637
Subject: This witness is relevant and necessary because he would offer good character testimony in support of the Accused's reputation for peacefulness and honesty. The accused attended elementary through high school with the Accused.

- d. In regards to the 23 August 2010 defense 2nd discovery request, the following was never answered or provided:
- The results of US v. Henthorn reviews for derogatory information for any NCIS agent, CID agent or investigating officer that investigated this case, especially SA John Burge.
 - Contact information (address and phone numbers and emails are requested) for Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
 - Complete psychiatric, psychological and other counseling records concerning Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
- e. In a 25 August 2010 response to the 2nd discovery request witness request for Ms. LaNita Wacker and Mr. Ted Wacker as sentencing witnesses, the Government said it was denying them.
- f. To date, the defense has requested a psychiatrist, a toxicologist, an obgyn, a SANE and a DNA expert.
- g. The government approved the toxicologist and the obgyn experts for the defense, and a comparable DNA expert too; but denied the SANE and the psychiatrist defense experts.
- h. The defense also submitted a site visit request for a visit to Seattle, WA and to New Orleans, LA. Col Michael Richardson, former MCRD SJA (and current military judge), approved both site visits in this case's previous incarnation before the charges were

dismissed without prejudice following UCI being disclosed. The grounds for the site visit are attached in a letter as an exhibit to this motion. The Government has not as of the date of this brief responded to the site visit requests.

III. LAW AND ANALYSIS

In trials by courts-martial, the Capt Wacker is afforded equal access to witnesses and evidence as the Government. United States v. Lee, 64 M.J. 213, 214 (C.A.A.F. 2006). This means that despite not having the same subpoena power as the Government, the Government needs to provide access to evidence and witnesses that are material for the preparation of Capt Wacker's defense. However "material" is used liberally and historically courts err on the side of full disclosure to the defense to ensure that persons like Capt Wacker can get a fair trial.

Discovery practice under Article 46 and R.C.M. 701 promotes full discovery that eliminates 'gamesmanship' from the discovery process and is quite liberal. United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

Providing broad discovery at an early stage reduces pretrial motions practice, surprise, and delay at trial. Roberts, citing Manual for Courts-Martial, United States (2002 ed.), Analysis of Rules for Courts-Martial A21-32. "The military rules pertaining to discovery focus on equal access to evidence to aid the preparation of the defense and enhance the orderly administration of military justice. To this end, the discovery practice is not focused solely upon evidence known to be admissible at trial." Roberts at 325, referencing United States v. Stone, 40 M.J. 420, 422 (C.M.A. 1994) (citing United States v. Lloyd, 301 U.S. App. D.C. 186, 992 F.2d 348, 351 (D.C. Cir. 1993)). "The parties to a court-martial should evaluate pretrial discovery and disclosure issues in light of this liberal mandate." United States v. Roberts, 59 M.J. 323, 325 (C.A.A.F. 2004).

"We also have interpreted these rules to ensure that discovery and disclosure procedures in the military justice system, which are designed to be broader than in civilian life, provide the accused, at a minimum, with the disclosure and discovery rights available in federal

civilian proceedings.” United States v. Williams, 50 M.J. 436, 440 (C.A.A.F. 1999).

It is because of this equal access to obtain evidence that the defense seeks site visits to the locations of the incidents. Regarding Seattle, WA, the trial counsel has given notice that it will put on evidence to the members at trial about the Nicole Cusack story. Defense Counsel needs to travel to Seattle, WA to locate additional evidence that will contradict Ms. Cusack’s claims.

a. The Government should produce the defense requested lay witnesses because they provide exculpatory evidence and establish good military character.

Under RCM 703(b) each party is entitled to witnesses whose testimony would be relevant and necessary.

The case of United States v. McElhaney, 54 MJ 120 (CAAF 2000) is illustrative of the equal rights of defense to call witnesses. The McElhaney court held that the parties to a court-martial are given equal opportunity to obtain witnesses and are entitled to production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary.

McElhaney went on to hold that a military judge’s ruling on a request for a witness is reviewed for abuse of discretion and should be reversed only if, on the whole, denial of the defense witness was improper; judicial denial of a witness request will not be set aside unless there is a definite and firm conviction that the military judge committed a clear error of judgment in the conclusion it reached upon weighing relevant factors.

McElhaney stated in part that some of the factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the witness to those issues; whether the witness is called on the merits or the sentencing portion of the case; and whether the witness’s testimony would be cumulative.

United States v. Warner, 62 M.J. 114 (CAAF 2005) held that under Article 46, UCMJ, the defense’s opportunity to obtain witnesses is to be equal to the government’s.

The defense requested fact and character witnesses (on the merits and at sentencing) in this case in a witness request that also offered expected witness testimony. The Defense believes that this proffered testimony meets the requirements of RCM 703. In a response, the Government responded that it was denying the vast majority of defense requested witnesses because the witnesses were not necessary or cumulative.

For those fact witnesses not yet approved by the Government, and in support of this motion, the Defense will put the witnesses on the stand so that the Military Judge can determine their relevance and also determine that they are necessary. The Defense asks for the Government's assistance to produce for the motion's hearing all denied defense witnesses telephonically or in person so that they can explain their relevance to the military judge should the defense proffer be insufficient.

In the meantime, the proffers of the merits and sentencing lay witnesses (found at Defense Discovery requests 1 and 2) that have not yet been approved by the Government; speak for themselves about the necessity and relevancy of the testimony they would offer for Capt Wacker at trial.

Capt Wacker seeks to put on good military character evidence for all stages of his career (both before and after he was preferred and referred charges). That is why the defense requested all of these character witnesses: to show the members that despite the Government's remaining accusations against Capt Wacker, he is truly a good person and U.S. Marine.

Essentially, by their denial of Capt Wacker's witnesses, the Government would have Capt Wacker go to trial with almost no character witnesses to say that he is a good Marine. The summary denial of defense witness requests is not fair and this is not equal access as the defense has no input into whom the Government produces as a witness at trial. The current rules allow the Government to summarily deny all defense witnesses while permitting the Government to produce whomever they want without restriction.

This hamstringing by the prosecution to prevent Capt Wacker from defending himself is another example of why the current rules of discovery as found at RCM 701 to 703

violate Capt Wacker's constitutional right to have a fair criminal trial.

The US Supreme Court has written that "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." U.S. v. Scheffer, 523 U.S. 303, 327, 118 S.Ct. 1261, (US 1998).

"The sixth amendment right to compulsory process does not mandate otherwise. This provision ensures that a defendant has subpoena power to summon witnesses so that the jury may hear the defendant's version of the facts." U.S. v. Taylor, 728 F.2d 930 (CA Ill 1984), citing, Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

Therefore, the defense asks this Court to order all of Capt Wacker's denied lay witnesses and for such other relief as is just. Regarding the defense requested expert denied, the defense will comment on that issue in the appropriate subsection below.

b. The Defense Experts should be produced.

"(A)n accused servicemember has a limited right to expert assistance at government expense to prepare his defense." United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

"(T)his Court articulated a three step test for determining whether such government-funded expert assistance was necessary, as follows: There are three aspects to showing necessity. First, why the expert assistance is needed. Second, what would the expert assistance accomplish for the accused. Third, why is the defense counsel unable to gather and present the evidence that the expert assistant would be able to develop." United States v. Ndanyi, 45 M.J. 315, 319 (C.A.A.F. 1996).

The defense asked for Dr. Thomas Grieger (or any comparable psychiatrist-toxicologist), whose CV was provided to the government, to be assigned for consulting purposes to the defense team of Capt Wacker. The defense indicated that it may later designate this witness to testify in this case.

Ms. Easley (an accuser on the charge sheet who claims Capt Wacker raped her) is expected to testify that she has received significant psychological counseling and treatment over the years because of her past claims of sexual abuse by Capt Wacker and another person.

The defense hypothesis that supports the defense request for an expert is that: Elizabeth Easley has this mental health treatment which indicates that she may be less able to testify truthfully as compared to another person because of her mental conditions. Defense needs an expert psychiatrist like Dr. Grieger to examine Elizabeth Easley and review her medical records to determine if she is capable of testifying truthfully in this case or accurately recalling the events that occurred with Capt Wacker. For example, if Elizabeth Easley has some mental health condition, this is something relevant that the members need to consider when they are listening to Elizabeth Easley testify about how Capt Wacker raped her.

Defense needs a psychiatrist to tell us how her mental conditions impact her abilities to perceive and function as compared to an ordinary person. Such expert could also explain the characteristics of any condition that Ms. Easley or Ms. Brooder has.

The defense deserves the ability to impeach Elizabeth Easley and granting the defense psychiatrist as well as ordering Elizabeth Easley's requested documents produced (e.g. her mental health records) will enable this. Elizabeth Easley's claims against Capt Wacker are so inflammatory (that he raped her) that Capt Wacker deserves the opportunity to impeach this incredible testimony. Dr. Grieger can provide that opportunity.

Further, 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.

Regarding SARC Robinson, she can talk about what a sexual assault response kit could have done to verify or disprove whether rape occurred in this case. As a trained nurse, SARC Robinson could explain that such kit could have looked for particular injuries and bleeding as alleged. SARC Robinson could also talk about the significance, if any, regarding Ms. Brooder's report of vaginal bleeding following this incident in proximity to her reported recent menstruation (see attached NCIS summary of interview with Ms. Brooder). The significance of a rape kit test NOT being done in this case is evidence that Capt Wacker didn't rape Ms. Easley or Ms. Brooder and this evidence can only come in if SARC Robinson or a comparable expert testifies.

c. The Defense requested discovery should be produced because the defense needs the material to impeach the Government's witnesses and to prepare for trial.

United States v. Webb, 66 M.J. 89 (CAAF 2008) held that the Due Process Clause of the Fifth Amendment guarantees that criminal defendants be afforded a meaningful opportunity to present a complete defense; that guarantee requires the prosecution to disclose to the defense evidence favorable to an Capt Wacker where the evidence is material either to guilt or to punishment; favorable evidence includes impeachment evidence that, if disclosed and used effectively, may make the difference between conviction and acquittal.

Webb went on to hold that like other forms of exculpatory evidence, impeachment evidence is material to guilt or punishment only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; under the reasonable probability standard of materiality, the question is not whether the Capt Wacker would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial; therefore, a reasonable probability of a different result is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial; failing to disclose such evidence is a due process violation irrespective of the good faith or bad faith of the prosecution.

Webb further stated that in military practice, the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe; subject to certain exceptions and upon request of the defense, the trial counsel must permit the defense to inspect any documents within the custody, or control of military authorities that are material to the preparation of the defense; thus, an Capt Wacker's right to discovery is not limited to evidence that would be known to be admissible at trial; it includes materials that would assist the defense in formulating a defense strategy.

Additionally, United States v. Madigan, 63 M.J. 118 (CAAF 2006) held that RCM 703(f)(1) provides that each party is entitled to the production of evidence which is relevant and necessary. In particular, RCM 703(f)(2) provides that notwithstanding subsection (f)(1), a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process; however, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

Here, the defense has multiple times in writing asked for the criminal and adverse administrative records of the Government witnesses, including the NCIS agent SA Burge. Those records have not fully been provided, but they exist and those records would likely impeach the Government witnesses at trial.

The defense also asked for the subpoenaing of facebook and myspace records for key witnesses like Ms. Brooder and Elizabeth Easley.

The emails provided to date for Ms. Brooder indicate that from the very beginning of this case, these two women have behaved more like prosecutors hunting their defendant instead of like victims. Facebook and myspace records are expected to show the same. Further, the accounts of Ms. Brooder and Easley were set to private so that the defense cannot obtain this material.

The defense also asked for mental health records and derogatory information concerning Elizabeth Easley and Jessica Brooder. The defense suspects that other mental health records exist that have not yet been produced.

Elizabeth Easley indicates that she has a history of mental health counseling and this is relevant for the defense to explore in cross examination. Elizabeth Easley also claims Capt Wacker attempted to rape her and that she was previously assaulted sexually by someone else. If these claims are false, Elizabeth Easley should be impeached.

Finally, Capt Wacker asked for UCI emails and other documentation concerning how he was moved from MCRD to MCAS Miramar following UCI being uncovered in this case. A motion on this subject is before the court. If the military judge does not order these records produced, the full extent of the UCI in this case will be buried and justice will be denied Capt Wacker.

These and other records not yet produced, but requested by the defense; are the subject of this motion.

d. The Defense requested bill of particulars should be answered so that Capt Wacker can prepare for trial.

In its third discovery request, Capt Wacker asked for a bill of particulars to clarify the vague charges Capt Wacker is facing. Specifically, Capt Wacker is facing specifications for allegedly sexually assaulting two fellow law students during a trip to the French Quarter in New Orleans. The defense inquires to know the full extent of what the Government's allegations are so that the defense can defend against them. The defense also inquires to know how the Article 133 offenses the Capt Wacker is facing constituted conduct unbecoming. Capt Wacker also seeks to know whether the 120 offenses he is facing are fairly captured by the 133 offenses he also faces. Is there overlap? Are ex post facto laws at play?

Case law provides that when the charges are vague or an accused like Capt Wacker is uncertain on how to defend the charges he is faced with, then a bill of particulars is appropriate.

For example, "If appellant was in any way uncertain as to the nature of the charge, she could have filed a motion for a Bill of Particulars under Rule for Courts-Martial (R.C.M.) 906(b)(6) prior to her pleas." U.S. v. McDaniel, Not Reported in M.J., 2008 WL 4525334 (AFCCA 2008).

"Discussion to R.C.M. 906(b)(6) explains that a bill of particulars serves "to inform the Capt Wacker of the nature of the charge with sufficient precision to enable the Capt Wacker to prepare for trial." See U.S. v. Harman, 66 M.J. 710, 712 (ACCA 2008) for its application.

See also U.S. v. Rivera, 62 M.J. 564, 566 (CGCCA 2005) which held that a bill of particulars assist a defendant "to avoid or minimize the danger of surprise at time of trial and to enable him to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague and indefinite for such purposes. United States v. Francisco, 575 F.2d 815, 818 (10th Cir.1978) (citing United States v. Haskins, 345 F.2d at 114); Rule for Court-Martial (R.C.M.) 906(b)(6) Discussion, Manual for Courts-Martial, United States, (2002 ed.). A bill of particulars is not a part of the indictment or of the charge to the jury. Francisco, 575 F.2d at 819. In military practice, the bill of particulars is not a part of the specification. R.C.M. 906(b)(6) Discussion."

That the trial counsel has not attempted to answer the defense's bill of particulars is an abuse of discretion and this Court should make such discovery orders that are just in addition to compelling the Government to answer the defense's bill of particulars.

IV. EVIDENCE AND BURDEN OF PROOF

a. The defense will submit these documents in support of its motion:

- Exhibit A- NEW CM Wacker discovery request 1
- Exhibit B- NEW CM Wacker discovery request 2
- Exhibit C- NEW CM Wacker defense reciprocal discovery response to 1 Jul 10 pros request
- Exhibit D- NEW CM Site Visit
- Exhibit E- gov resp wit req ICO Wacker
- Exhibit F- gov resp disc req ICO Wacker
- Exhibit G- Expert Request Letter SART Robinson

Exhibit H- Expert Request Letter OBGYN Leigninger
Exhibit I- Expert Request Letter Toxicologist Jacobs
Exhibit J- Gov resp to 2nd Def disc req
Exhibit K- Wacker CG denial of psych
Exhibit L- Gov denial of SANE
Exhibit M- Gov approval of toxicologist
Exhibit N- dr_lee_cv_resume
Exhibit O- gov expt approval OBGYN

b. If deemed necessary by the military judge, the defense will call all of the denied lay and expert witnesses telephonically to explain their relevance to the military judge. The Defense asks for the Government's assistance in ensuring that all defense requested witnesses denied are available telephonically or produced live at this hearing.

c. Burden of proof: the burden of proof in proving all facts in support of this motion falls upon the moving party, the defense. The burden standard is a preponderance of the evidence to prove the validity of all facts. See R.C.M. 905.

V. RELIEF REQUESTED

Oral argument is requested. The defense requests that this Court order that the Government will:

1. produce the defense requested lay witnesses for the merits and sentencing.
2. produce the defense requested expert witness denied.
3. provide Capt Wacker with requested discovery documents not yet produced.
4. compel the Government to answer the defense's bill of particulars request.
5. grant the defense site visit requests.

VI. ARGUMENT AND SERVICE

Oral argument is requested. A copy of the foregoing motion was served on the government on 1 September 2010.

/S/
C. P. HUR
CAPTAIN USMC
DETAILED DEFENSE COUNSEL