



UNITED STATES MARINE CORPS
DEFENSE SECTION
OFFICE OF THE STAFF JUDGE ADVOCATE
MARINE CORPS RECRUIT DEPOT/WESTERN RECRUITING REGION
3700 CHOSIN AVENUE
SAN DIEGO, CALIFORNIA 92140-5197

IN REPLY REFER TO:

5801
DEF
10 Jan 11

From: Detailed Defense Counsel
To: Trial Counsel

Subj: 10 JAN 11 REQUEST FOR DISCOVERY IN U.S. V. CAPTAIN DOUGLAS WACKER,
USMC; PRODUCTION REQUEST, BILL OF PARTICULARS, AND WITNESS REQUEST

Ref: (a) R.C.M. 701, M.C.M., 2008
(b) R.C.M. 703, M.C.M., 2008
(c) R.C.M. 707, M.C.M., 2008

Encl: (1) Fee schedule and CV for Dr. Norah Rudin

1. Pursuant to the references, the Accused through counsel asks for the above referenced discovery.

2. **Production request:** Regarding discovery, as provided in the references, the defense requests:

a. A complete transcript of the Article 32, specifically the transcripts of the witnesses that testified. This can be used to impeach witnesses that testify at trial.

b. Please produce all discovery in accordance with the Defense "REQUEST FOR DISCOVERY IN U.S. V. CAPTAIN DOUGLAS WACKER, USMC; PRODUCTION REQUEST, BILL OF PARTICULARS, AND WITNESS REQUEST" (hereafter "Defense Request for Discovery") dtd 18 Jun 10, and responded to and denied by Trial Counsel on 1 Jul 10, particularly paragraphs: "o" and "s-z". Trial Counsel denied the above request on the grounds that "The requested information is irrelevant to the current proceedings and therefore unnecessary."

c. Please produce any and all communications between personnel aboard MCRD and MCAS Miramar, CA, as well as between said personnel and Headquarters Marine Corps (HQMC) regarding the transfer of Captain Wacker and any and all investigations, reports, notes, interviews, correspondence, and/or findings involving alleged misconduct by personnel aboard MCRD tending to involve Unlawful Command Influence (UCI) in military justice cases between June 2008 and the present.

3. The above information is requested upon the following justification:

a. Rule 701 states that trial counsel shall disclose "Any books, papers, documents, photographs, tangible objects, buildings, or places, or

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copies of portions thereof, **which are within the possession, custody, or control of military authorities**, and which are material to the preparation of the defense...." (R.C.M. 701(a)(2)(A).) Note that "military authorities" includes all levels of the military, not just what is in the possession of trial counsel at the time the request is received. Trial counsel has a responsibility to conduct due diligence in the retrieval of such documents and has a continuing duty to disclose such documents as they come into existence. (R.C.M. 701(d).).

b. The withdrawal of charges against the Accused at Marine Corps Recruit Depot, San Diego, CA (MCRD) under the authority of the convening authority, Commanding General, Brigadier General Bailey, USMC, dtd 18 Nov 2009, signed by trial counsel, Major Keske, USMC, did not state on the record the reason for the withdrawal of charges, after the case, U.S. v. Wacker, had been arraigned at MCRD (See M.R.E. 604).

c. The withdrawal came after a motion to dismiss was filed on or about 15 Oct 09 by the Defense providing notice of the suspected UCI at issue in the Accused's case.

d. The motion to dismiss was never heard by the military judge assigned to the case aboard MCRD.

e. The motion to dismiss was refiled by the Defense once charges were re-referred at 3d Marine Aircraft Wing (3d MAW), MCAS Miramar, CA by the convening authority, Major General Conant, USMC.

f. The motions to dismiss on the grounds of UCI and wrongful withdrawal of charges under M.R.E. 604 has put the issue before the present court. Therefore, the information included in any and all communications between MCRD personnel, 3d MAW, and HQMC, as well as investigations at MCRD (or higher authorities) regarding UCI and/or the Accused's case is now of paramount importance to ensure the integrity of the adversary process, the interest in the fair and efficient administration of military justice, and the potential prejudice to the truth-determining function of the trial process (see M.R.E. 701 (discussion)) is not impaired. Furthermore, the Defense is entitled to inspect such documents to ensure the constitutional and codal rights of the Accused have been protected (see M.R.E. 604), that any withdrawal was not more onerous on the Accused, and in keeping with the rights to a speedy trial and due process under the Constitution, the Uniform Code of Military Justice, and the Rules for Courts Martial.

g. The Defense asserts that its request for such discovery, previously, was relevant, timely, and proper; therefore, any destruction of such documents in the interim by any Government personnel prejudices the Accused.

4. **Witness request for trial:** the following additional witnesses are requested at trial in US v. Wacker:

- a. Cory Christianson. 206-769-5637. corychristianson@gmail.com. Seattle, WA. This witness was present during the first evening Capt Wacker and Nicole Cusack hung out in Seattle, WA. He can comment that he saw Nicole Cusack flirting with Capt Wacker by using physical body language and words expressing that she was interested in a relationship with Capt Wacker. This witness is also a good character witness of Capt Wacker and has known him since Capt Wacker was 4 years old.
- b. Kelly Lowry, 951-454-3740. kelly_lowry@hotmail.com. Kelly has been in Capt Wacker's life since 1997, the beginning of college. She will testify that Capt Wacker is a gentleman as far as she has known and observed and that he has never done anything to take advantage of a woman as alleged in this case.

5. **Witness request for the UCI motion:** the following additional witnesses (on 26 October 2010, the Defense listed several witnesses it wanted for preen for the motion) are requested for the next motion hearing in US v. Wacker:

- a. Maj T. Shibata (HSBN MCRD, CA),
- b. Mr. Nicholas Phillipowski (formally a Marine attached to HSBN MCRD, CA; [nickphillipowsky@gmail.com]).
- c. The following witnesses are not needed during the UCI motion: Capt D. Cote and Capt J. Torresala.

6. **Expert request:** a forensic DNA expert and retest of the DNA evidence is requested in US v. Wacker:

- a. DNA Expert: In accordance with US v. Lee and US v. Warner, the Government has seen fit to give itself a DNA expert and has provided in discovery of its intent to put on DNA evidence to try and persuade the jury to convict the accused, therefore the defense is entitled to comparable expert assistance for consultation and trial. "Where the Government has found it necessary to grant itself an expert and present expert forensic analysis often involving novel or complex scientific disciplines, fundamental fairness compels the military judge to be vigilant to ensure that an accused is not disadvantaged by a lack of resources and denied necessary expert assistance in the preparation or presentation of his defense." United States v. Lee, 64 M.J. 213 (CAAF 2007).

- b. On 5 January 11, the trial counsel wrote in part:

- Regarding the DNA expert, I need a new request from you which is compliant with RCM 703 (the first one was not, due mainly to the lack of a fee schedule and estimated cost of employment). I sent you an email previously with one suggestion and a list of other labs in California. The one private lab expert I contacted (Dr. Norah Rudin, in Mountain

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View, who was requested by Capt Dunn on the US v Collins case here last year) indicated that she was available for the trial dates as of the time I emailed her. As a caveat, Dr. Rudin is a suggestion only- the approval needs to come from the CA. If you send me a new request, I will forward to the CA immediately. Dr. Rudin indicated that the standard practice in most cases she dealt with was to get an initial approval for 10 hours of consultation, then submit follow-up requests for additional funding for further consultation, testing, and testimony, if necessary.

c. On 5 January 11, the trial counsel also wrote in part:

On the same note, I note that both USACIL reports indicated that samples remain available for testing, but it's your decision whether to request any additional testing.

- d. Accordingly, the defense requests that the Government retain the services of Dr. Norah Rudin as a defense expert consultant and testifying witness in this case because her assistance is both relevant and necessary. Testimony from Dr. Rudin is relevant because DNA evidence is a scientific process whose significance can be explained in a way that would assist the fact finder in reaching their decision. With a scientific knowledge that the defense lacks, her testimony is necessary for the defense because she can evaluate the credibility of the USACIL reports and tests authored by Dr. Christie Johnson for credibility and impeachment purposes. Dr. Rudin can also discuss whether or not the DNA evidence indicates that sexual intercourse occurred and/or the plausibility of a semen transfer from Capt Wacker to Jessica Brooder by a means other than intercourse. 10 hours of consultation are requested as well as the additional hours necessary for Dr. Rudin to be present during the trial for the testimony of the Government's expert that will testify. She requires a \$2000 minimum retainer.
- e. The defense also requests a retest of the DNA evidence in this case because presently the defense must rely upon the Government's expert that semen from Capt Wacker was even found on Jessica Brooder's clothes. A retest by Dr. Rudin may indicate that Capt Wacker's DNA was not found on Jessica Brooder's clothing. At present, the defense must rely on the Government for this conclusion, the same party that is trying to convict Capt Wacker. This is why a retest is both relevant and necessary.
- f. Dr. Rudin's contact info: (Dr.) Norah Rudin, Ph.D., Forensic DNA Consultant, norah@forensidna.com, Main: 650 605-3411, 650 Castro St., Ste. 120-404, Mountain View, CA 94041,
<http://www.forensidna.com>,
<http://www.forensidna.com/Bookstore/index.html>

6. Please inform the defense counsel immediately if any of the evidence will be denied and provide the basis for denial. The Defense also requests that the Government continue to disclose information as it is obtained in accordance with this discovery request.

/s/

C. P. HUR
Captain, USMC