

UNITED STATES AIR FORCE
TRIAL JUDICIARY

UNITED STATES)	
)	
)	DEFENSE MOTION FOR A
v.)	CONTINUANCE
)	
FIRST LIEUTENANT PATRICK T. BURKE)	2 August 2011
9th Bomb Squadron (ACC))	
Dyess AFB, TX)	

MOTION

1st Lt Burke, by and through counsel, hereby moves for a continuance of the trial scheduled to commence on 8 August 2011 until 10 October 2011. This motion is made pursuant to Article 40 of the Uniform Code of Military Justice and R.C.M. 906(b)(1). A continuance is appropriate and necessary because: 1) based on the results of a R.C.M. 706 exam report, the defense requires additional time to engage the assistance of an active duty Army forensic psychiatric expert whom the defense has determined to be reasonably available but who has yet to evaluate 1st Lt Burke; 2) the defense counsel have various conflicts between the currently scheduled trial date and the proposed trial date; and 3) the defense will need additional time to prepare a proper lack of mental responsibility motion and/or defense.

FACTS

1st Lt Burke's general court-martial was scheduled to begin 8 August 2011, by mutual agreement between trial and defense counsel, and by order of the military judge. On 19 May 2011, the defense requested the assignment of an expert in forensic toxicology, based on the facts arising from the Article 32 investigation regarding the amount of Dexedrine, sleep deprivation and alcohol involved in the incidents that gave rise to the charges. That request was granted by the convening authority. Then on 31 May 2011, the court ordered a sanity board to be conducted in this case, in accordance with R.C.M. 706. On 6 July 2011, the defense received the short report of the R.C.M. 706 exam, signed by three Air Force mental health professionals. The board concluded that 1st Lt Burke was, at the time of the alleged criminal conduct, suffering from a severe mental disease or defect and that "he was not able to appreciate the nature and the consequences of his conduct." On 7 July 2011, Mr. Haytham Faraj filed his notice of appearance in the case as assistant civilian defense counsel. The defense received the long report (defense report) of the R.C.M. 706 exam on 7 July 2011. On 15 July 2011, the defense requested the convening authority to assign a forensic psychiatrist, active duty Army Colonel David Benedek, MD, to the defense team to assess and advise the defense relative to the investigation of and possible assertion of a lack of mental responsibility defense for our client. The defense had been advised that the Trial Counsel and Wing SJA had recommended approval of this expert because the government was in the process of seeking and obtaining its own expert in the area of forensic psychiatry. On 27 July 2011, the 12th Air Force Commander denied the defense request for Dr. Benedek, citing an inadequate basis for appointing an expert in forensic Psychiatry. The defense

was surprised by this denial given the diagnosis of a severe mental disease or defect and the opinion that 1st Lt Burke was not mentally responsible for his conduct at the time, coupled with the fact that government fully intended to receive approval for such an expert to advise the trial counsel. We assert that this denial was in bad faith and may need time to litigate the issue should the government persist in its denial of another request to be filed forthwith.

As to scheduling conflicts of the parties involved, the detailed military defense counsel, Capt Doser-Pascual, has a PCS, household goods packout and housing inspection scheduled for between 12 and 18 August 2011. She then anticipates delivery of household goods in Maryland between 24 and 30 August 2011. Capt Doser-Pascual is also scheduled to attend the Defense Orientation Course as a faculty member from 3-7 October 2011. The assistant civilian defense counsel, Mr. Faraj, has a sentencing hearing for a client in the Eastern District of Michigan on 18 August 2011 and then has a trial that begins on 29 August 2011 and is expected to last a full week. Also, he is scheduled to teach a class on 15 September 2011. Additionally, 1st Lt Burke and his wife are expecting their first child on 17 August 2011. Although Dr. Benedek is still not appointed, the defense anticipates that he will be, either by the convening authority or this court on a motion, and once appointed he will need to schedule time to meet with 1st Lt Burke for a full evaluation prior to advising the defense, and prior to the defense being able to provide notice required to raise any defense related to lack of mental responsibility, and/or bringing a motion to dismiss. These matters can take a considerable amount of time to determine and prepare. Dr. Benedek also reports that local mission requirements surrounding the merging of Walter Reed Army Medical Center and Bethesda Naval Medical Center, the implementation of new medical student curriculum, and preparation for a pending educational accreditation site visit will have him fully occupied through mid-September. Dr. David Lesser, the Forensic Toxicologist appointed to the defense, is the Deputy Chief of the Armed Forces Medical Examiner System, Division of Forensic Toxicology in Rockville, MD. That organization is undergoing an inspection during the month of August and the Director, Dr. Lesser's immediate supervisor, is gone for the month, leaving Dr. Lesser in charge. His duties include signing off on all autopsies and toxicology reports issued by its lab. He also exercises oversight over the entire laboratory. Additionally, he is in receipt of PCS orders, reporting to Bethesda Naval Medical Center on 1 September 2011. He reports that he won't be available fully until early October 2011.

As an additional matter, the defense has located and evaluated the qualifications of an expert in forensic audiology. Government evidence in this case includes a 911 telephone call from the accuser to the 911 operator in Rapid City, SD, to make a report from which the more serious of the current charges arise. That request will have to be approved and arrangements will need to be made to check that expert's schedule, as well. The defense was informed this week that this expert will be approved as the government has already approved its own expert in this field. We anticipate this work will require at least one month to complete.

LAW

Article 40 of the U.C.M.J. states that the military judge should, upon a showing of good cause, grant a continuance to any party for as long and as often as is just. 10 U.S.C. §840. A continuance may be granted only by the military judge. R.C.M. 906(b)(1). The standard of review of a military judge's decision to deny a continuance is abuse of discretion. *United States*

v. Weisbeck, 50 M.J. 461 (C.A.A.F. 1989). “There is an abuse of discretion where reasons or rulings of the military judge are clearly untenable and . . . deprive a party of a substantial right such as to amount to a denial of justice; it does not imply an improper motive, willful purpose, or intentional wrong.” *Id.* at 464 (C.A.A.F. 1999) citing *United States v. Miller*, 47 M.J. 352, 358 (1997) (internal quotations omitted). Among the factors considered to determine whether there is an abuse of discretion is timeliness of the request, availability of evidence or witnesses requested, length of continuance, prejudice to opponent, moving party receiving prior continuances, good faith of the moving party, use of reasonable diligence by the moving party, possible impact on the verdict and prior notice. *Id.*

ARGUMENT

1st Lt Burke is entitled to a delay to properly investigate and/or prepare a defense of lack of mental responsibility. It is rare in the extreme when a panel of three military mental health professionals agree on a diagnosis of a severe mental disease or defect and then go on to render an opinion that a military officer was rendered not responsible for his conduct at the time of the alleged offenses thereby. These findings are still relatively recent and owing to some delay on the part of the government in both finishing the R.C.M. 706 exam reports and then denying the defense request for an expert to pursue the new matter, the defense has been pushed up against the original trial date with inadequate preparation time remaining. Further, there is an additional expert which must be approved and employed and who also must be prepared for testimony. In conclusion, the defense can represent with a high level of confidence that all attorneys and all experts can be ready and available to begin trial on 10 October 2011. The defense has conferred with trial counsel, Capt Kouba, who provided that the proposed date of continuance would be acceptable to the Government and that their witnesses and experts are available on 10 October 2011 as well.

RELIEF REQUESTED

Based on the forgoing, the defense respectfully requests that this motion to continue this case from 8 August 2011 to 10 October 2011 be granted.

Respectfully submitted for the Defense,



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CERTIFICATE OF SERVICE

I hereby certify that on 2 August 2011, I electronically filed the foregoing defense motion for a continuance with the Military Judge and with the Government by email.



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