



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

IN REPLY REFER TO:
5800
DEF
23 August 2010

From: Detailed Defense Counsel
To: Trial Counsel

Subj: 2nd REQUEST FOR DISCOVERY IN U.S. V. CAPTAIN DOUGLAS WACKER,
USMC; PRODUCTION REQUEST 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) CV of Dr. Henry Lee

1. **Production request:** Regarding discovery, as provided in the references, the defense requests all documents for the following subject areas:

- a. Notes from any command or NCIS investigator concerning this case. We specifically want the notes of SA John Burge.
- b. Victim Advocate notes concerning Jessica Brooder, Elizabeth Easley and Nicole Cusack.
- c. Color videos, photos or other recordings related to this investigation or case in anyway, specifically ALL recorded NCIS interviews with witnesses and alleged victims.
- d. DNA, fingerprint or other forensic examinations or results and reports, if they exist and related to this case in anyway.
- e. The name and contact information of the Government's expert witnesses and consultants. Specifically, provide the contact information for the Government's forensic DNA examiner and toxicologist.
- f. 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.
- g. Criminal background information, checks and CLEOC searches for these witnesses: Elizabeth Easley, Nicole Cuscack, Rebecca Barker, Jessica Brooder, SA John Burge.

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- h. Color digital photographs for all NCIS photos taken in this case, specifically the ones previously turned over to the defense in discovery.
- i. The negative or positive results of San Diego County, Los Angeles County and Orange County police and court records checks for Elizabeth Easley, Nicole Cuscack, Rebecca Barker, Jessica Brooder, SA John Burge.
- j. 1 April 2007 until present email, Facebook and myspace records are requested to be subpoenaed by the trial counsel from the accounts of Elizabeth Easley, Nicole Cuscack, Rebecca Barker, Donald Cook, Justin McLish, Jessica Brooder. The Government is requested to not ask for this information, but to subpoena it. The defense believes that witnesses will attempt to delete derogatory information on those accounts if requested to produce it themselves. The Government subpoenaed similar information from the email of the accused and the Defense merely wants equal opportunity to prepare its case in accordance with the references.
- k. Complete psychiatric, psychological and other counseling records concerning Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
- l. Phone records for the months of 1 April 2007 until December 2008 for Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
- m. Contact information (address and phone numbers and emails are requested) for Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
- n. Derogatory information (criminal history, NJP's, page 11's, adverse fitness reports, firings from jobs, tickets, prison time, convictions, mental disorders, etc.) for Elizabeth Easley, Nicole Cuscack, Jessica Brooder.
- o. All evidence that the Government intends to introduce at trial or at sentencing.
- p. Government's witness list for trial and sentencing.
- q. Any evidence in the government's possession concerning this case that the government does not intend to introduce.
- r. That all witness testimonies at the Article 32 hearing be transcribed and presented to the defense in advance of trial.

2. Witness request: the following Additional witnesses are requested at trial for the merits and sentencing:

- Mrs. La Nita Wacker, Mother of Capt Wacker, as a sentencing witness if necessary. She lives in Seattle, WA. 2065423906.

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This witness will testify regarding the childhood of the accused as well as his generally peaceful and good character.

- Ted Wacker, brother of Douglas Wacker, as a sentencing witness. 7142644620. This witness will testify regarding the childhood of the accused as well as his generally peaceful and good character. His testimony is different from Mrs. Wacker's testimony because of the nature of his interactions with Capt Wacker.

3. Expert witness request: The defense is informed that the Government has retained or is using forensic DNA expert that will testify at trial concerning the DNA found on the person or property of the accuser in this case that allegedly belongs to the accused. The defense asks that the Government find the defense its own forensic DNA expert. The defense anticipates that the amount of hours the Government's own forensic DNA expert worked on this case and will work on this case in the future will be approximately the same amount of hours that the defense forensic DNA expert will need. Further, the Government has given the defense evidence that indicates that the DNA sample taken in this case was contaminated. The Defense is entitled to its own DNA expert to inquire into the nature and extent of the Government's report of contamination.

4. Case law from CAAF indicates that "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." See United States v. Lee, 64 M.J. 213 (CAAF 2007) and United States v. McAllister, 64 M.J. 248 (CAAF 2007) for the same analysis regarding defense experts. See also United States v. Warner, 62 M.J. 114 (CAAF 2005), which held that the defense expert must be comparable to the government's expert in terms of qualifications.

5. Accordingly, because the Government has seen fit to grant itself a forensic DNA expert, the Accused requests the same comparable expert. The defense proposes that the Government retain the services of forensic DNA expert Dr. Henry Lee for the accused's case. His CV is attached and Dr. Lee would be more than qualified to be an expert on this case.

6. Alternatively, if the Government declines to entertain the Defense request to hire a civilian forensic DNA expert like Dr. Lee, and such a qualified forensic DNA expert already exists

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within the Government's employment; the defense requests that the Government locate a forensic DNA expert with the same or better qualifications as the government's own expert.

7. Please inform the defense counsel immediately if any of the above witnesses or 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