

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

UNITED STATES	)	GENERAL COURT-MARTIAL
)	
v.	)	GOVERNMENT RESPONSE TO
	)	DEFENSE MOTION FOR A
Frank D. Wuterich	)	CONTINUANCE OF 11 JAN 2011
XXX-XX-3312)	
Staff Sergeant)	
U.S. MARINE CORPS	)	12 January 2011

1. Nature of Motion. The government does not oppose the defense continuance request dated 11 January 2011 (Encl. 1). The government does however, respectfully request that this Honorable Court reschedule the trial to a start date of 12 April 2011, or a similar date certain, and not grant an indefinite continuance as proposed by the defense.

2. Summary of Facts.

- a. On 28 October 2010, the eve of a 1 November 2010 trial start date, the Accused filed an extraordinary writ with the Navy-Marine Corps Court of Criminal Appeals to consider, pretrial, the Military Judge's ruling on a defense motion to dismiss for improper severance of an attorney client relationship.
- b. On 29 October 2010, the NMCCA denied the petition for extraordinary relief without reaching its merits, ruling that "[t]his matter seems to fit squarely in the normal course of review under Article 66, UCMJ, if necessary." *Wuterich v. Jones*, NMCCA NO. 200800183 (N-M. Ct. Crim. App. Oct. 29, 2010) (order).
- c. On 20 December 2010, the C.A.A.F. ordered the N.M.C.C.A. to take specific action, complete its review, and return the case no later than 10 January 2011.
- d. On 7 January 2011, N.M.C.C.A. completed its further review of the matter and denied

the defense writ and returned the record to C.A.A.F. *Wuterich v. Jones*, NMCCA NO. 200800183 (N-M. Ct. Crim. App. Jan.7, 2011).

- e. The case was placed back on the C.A.A.F docket on 7 January 2011.
- f. On 11 January 2011 the C.A.A.F. ordered a 35 day briefing on the merits of the defense extraordinary writ. (Encl. 2).
- g. On 11 January 2011, the defense requested an indefinite continuance in the subject case from the Military Judge. (Encl. 1).
- h. On 11 January 2011, after consultation between the parties, the defense indicated that they were available to commence the trial on 12 April 2011. During an RCM 802 conference of 12 January 2011 between the Military Judge, Mr. Puckett, and the undersigned trial counsel, the defense reiterated that the defense team was available to commence trial on 12 April 2011.

3. **Discussion.**

Article 40, UCMJ and RCM 906 authorize a military judge to grant a continuance. Only a military judge can grant a continuance request. R.C.M. 906(b)(1). Generally, the military judge should grant a continuance request by any party for as long and as often as is just, so long as a showing of reasonable cause can be made by the requesting party. R.C.M. 906(b)(1), discussion. Courts traditionally look to four factors in determining whether there is reasonable cause for a continuance: 1) the basis for the request compared to the adverse consequences of delaying the trial; 2) the number and length of previous continuances; 3) what inconvenience would the continuance cause to the parties; and 4) whether the delay would prejudice the accused. *See, United States v. Allen*, 31 M.J. 572 (NMCCR 1990).

- a. An application of the *Allen* factors demonstrates good cause to grant the

continuance request.

The Government may be prejudiced if a ruling is issued from the C.A.A.F. in close proximity to, or after, 24 January 2011 because of the highly complex logistics involved in witness production. A short time frame to start or stop over forty-five government and defense witnesses traveling from across the nation and various countries, including Afghanistan, will cause disruption to the witnesses, commands, and will consume significant government resources in terms of travel and the costs attendant thereto. Each individual witness must be contacted to determine travel and appearance scheduling, which is dependent not only on the Government's efforts to contact that witness, but on that witness' responsiveness as well. Once a witness is contacted and times are agreed upon, travel orders must be created and approved, which requires the coordination and approval of various civilian and military agencies within the Department of Defense. A short time frame to stop and restart witness production in this case will create travel complications potentially leaving witnesses in various stages of travel, and potentially result in delayed appearances of both government and defense witnesses.

While there have been previous continuances requested in this case, the issue now presented before the C.A.A.F. should be disposed of with finality before the start of the trial in order to avoid any possibility of having to re-litigate the case. In regards to the final two factors in the *Allen* analysis, this continuance is made at the request of the accused, and therefore, is not prejudicial to the accused. With significant advance notice, the government should be able to rearrange witness travel and avoid the possibility of last minute witness production issues. Therefore, so long as the government is provided with sufficient advance notice, the inconvenience to the parties will be mitigated.

- b. The trial should be rescheduled for 12 April 2011 or a similar date certain for purposes of witness administration.

The trial should have a certain date set in the event of a rescheduling as opposed to an "indefinite continuance." Defense counsel has indicated that they are available to commence trial on 11 April 2011. The main reason that the government requests a date certain to commence the trial is to facilitate the orderly administration of justice. Here, the government must produce approximately 45 government and defense witnesses for the trial (located around the nation and the world) and doing so absolutely requires certainty in the form of a set trial date. Without a definite trial date, it will be nearly impossible to coordinate an orderly witness production process for this case; subpoenas and travel orders cannot be produced for a trial without a date certain.

4. Evidence and Burden of Proof.

- a. Pursuant to R.C.M. 905(c), the burden of proof is a preponderance of the evidence, and is assigned the moving party, however, as indicated above, the government does not object to this defense continuance request.

- b. Evidence to be offered:

- a. Enclosure 1 – Defense Continuance Request via Email dated 11 January 2011

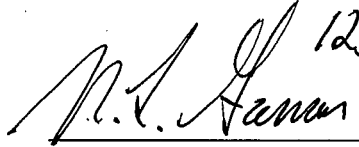
- b. Enclosure 2 – C.A.A.F. Briefing Schedule dated 11 January 2011

5. Relief Requested.

The government does not oppose the defense continuance request, so long as the Military Judge sets a date certain for the commencement of trial. After consulting with the defense counsel, the government respectfully requests that the Military Judge set the trial for 12 April 2011.

6. Argument.

The Government does not requests oral argument. However, if the Military Judge is unable to rule on the defense continuance request by 17 January 2011, the government does request oral argument.

 12 JAN 2011

N. L. GANNON
Major, U.S. Marine Corps
Trial Counsel

Certificate of Service

I hereby attest that a copy of the foregoing motion was served on the court and opposing counsel electronically on 12 January 2011.



N. L. GANNON
Major, U.S. Marine Corps
Trial Counsel

Gannon Maj Nicholas L

From: Puckett Neal [neal@puckettfaraj.com]
Sent: Tuesday, January 11, 2011 10:59 AM
To: Jones LtCol David M
Cc: Sullivan LtCol Sean; Dempsey Capt Suzanne M; Faraj Haytham; Marshall Maj Meridith L; Gannon Maj Nicholas L; Brower Capt Matthew R; Myers SSgt Kara C; Keane LtCol Stephen F; Rubin LtCol Peter R; Sullivan Dwight; Richardson COL Michael B; CODE Sripinyo Kirk Major NAMARA 45
Subject: Continuance request
Attachments: WUTERICH_Order_1-11-11.pdf; Deleted Attachment.txt

Your honor,

Attached is the briefing order just issued by CAAF. You'll note the schedule extends out 35 days from today (11 Jan 2011). Col Sullivan, Maj Sripinyo, Mr. Faraj and I will now be turning to on the briefs ordered by CAAF. CAAF's intent to resolve this matter by way of the Extraordinary Writ process, and therefore pretrial, is clear. We have no way of knowing whether oral argument may be request or granted or how long CAAF will take to rule after the conclusion of those 35 days.

The defense therefore is compelled to request an indefinite continuance until this issue is finally resolved through the Extraordinary Writ process.

R/r,

Neal A. Puckett, Esq
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On Jan 8, 2011, at 6:01 AM, Jones LtCol David M wrote:

All,

Here is the latest from NMCCA, to CAAF.

We will proceed to trial as scheduled: 24 January 2010 = 0830 with counsel; and 25 January = 0830 with members.

R,

LtCol David M. Jones
Military Judge
Western Pacific Judicial Circuit
Navy-Marine Corps Trial Judiciary
Office: 645-7287 / 2156

Fax: 645-2035

From the U.S.: 81-611-745-7287 / 2156

**United States Court of Appeals
for the Armed Forces
Washington, D.C.**

Frank D. WUTERICH,	)	USCA Misc. Dkt. No. 11-8009/MC
	)	Crim. App. Dkt. No. 200800183
Appellant)	
	)	<u>NOTICE</u>
v.	)	and
)	
	)	<u>ORDER</u>
David L. Jones, Lieutenant Colonel, U.S. Marine Corps, in his official capacity as Military Judge,)	
)	
And)	
)	
UNITED STATES,)	
Appellees)	

In compliance with this Court's order ___ M.J. ___ (Daily Journal, December 20, 2010), the United States Navy-Marine Corps Court of Criminal Appeals completed further review of the above-captioned matter and returned the record to this Court on January 7, 2011. The case has been placed on the docket this date.

In view of the fact that the parties have not had an opportunity to submit additional pleadings on the most recent review by the Court of Criminal Appeals, it is, by the Court, this 11th day of January, 2011,

ORDERED:

That consistent with Rule 19(e), Rules of Practice and Procedure of the United States Court of Appeals for the Armed Forces, Appellant shall file a supplemental brief within 20 days of the date of this order. Appellees shall file an answer brief

within 10 days of the filing of Appellant's brief. Appellant may file a reply brief within 5 days of the filing of Appellees' brief.

Counsel may contact the Clerk's Office regarding access to the sealed material and the transcript of the Article 39(a) sessions held on September 13 and 14, 2010.

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (SULLIVAN)
Appellate Government Counsel (KELLER)