

UNITED STATES MARINE CORPS
IN THE WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S)	GENERAL COURT-MARTIAL
)	
v.)	<u>MOTION TO STRIKE GOV. RESP.</u>
)	<u>BRIEF</u> TO DEF. MOTION
DOUGLAS WACKER)	TO EXCLUDE EVIDENCE: DNA
CAPTAIN)	expert testimony and DNA
U.S. MARINE CORPS)	evidence
)	
)	
)	28 October 2010

I. Nature of Motion.

The defense hereby moves the court, pursuant to Rule for Court-martial 906(b) to strike the government's response brief to the above referenced defense motion. RCM 906(b) states: "The following may be requested by motion for appropriate relief. This list is not exclusive." Capt Day's response brief unfairly and personally attacks the defense counsel's integrity and the truthfulness of the facts alleged in the defense motion. From speaking with other defense attorneys, ***this is not the first time or first case that Capt Day has made such unfair accusations against a defense counsel in this circuit.*** The purpose of this brief is to address on the record the inaccuracies and personal attacks of Capt Day's brief that are prejudicial to Capt Wacker's ability to obtain a fair trial.

II. Summary of Facts.

- a. Capt Day begins his Gov. Resp. p. 1. by writing of "false claims of evidence contamination made in the defense motion."
- b. Capt Day then wrote in his 1st paragraph of his facts section "The government disputes the summary of facts provided by the defense, and contends that **the summary provided by the defense is not merely misleading, but materially false** in critical aspects that underlie the entire theory of the defense motion." Gov. Resp. p. 1.
- c. Then, Capt Day wrote in his response brief "At no time did Ms. Johnson's testing show in any way "that no sperm was present and that a male's DNA other than a suspect's was present on a clothing sample of a victim." Gov. Resp. p. 2.
- d. However, Capt Day provided in discovery, Exhibit A, which on its face showed CBJ (Examiner Christies Johnson?) detecting a different male's DNA on an article of clothing during DNA testing at USACIL...as well as other apparent errors at the lab in several cases. See Exhibit A and Exhibit D (Capt Day's email to defense in Wacker's case that disclosed these DNA errors).
- e. The defense made clear in their motion that this event happened in "a suspect's" case according to the discovery provided by Capt Day, himself in Wacker's case; but that defense was unsure if this was in "Capt Wacker's case" or some other persons' case(s). At Exhibit A, the errors listed in apparently many DNA tests at USACIL by "CBJ," "MK," "CB," and "DKH" covered

the time period of when this case initiated (early 2007) until 2010.

f. A cover letter by USACIL or Capt Day explaining this report of DNA testing errors by CBJ would have been extremely helpful. The defense still does not understand why these documents showing errors at USACIL were provided in Capt Wacker's case without any obvious explanation by Capt Day. Based on Capt Day's email, the defense assumed they had something to do with Wacker's case, otherwise why would Capt Day email them to defense counsel? See Capt Day's email (Exhibit D) of the DNA evidence at Exhibit A with no explanation provided, just an attachment showing USACIL committing a lot of errors. Somebody (Capt Day?) stamped "U.S. v. Capt Wacker" on the bottom of EVERY page that chronicled the DNA errors at USACIL by CBJ. What was the defense supposed to think for why Capt Day gave them these documents in U.S. v. Wacker? That these documents stamped "US v. Capt Wacker" had nothing to do with Capt Wacker's case?

g. The evidence Capt Day provided in discovery was confusing to the defense. See pp. 6, 8-9 of the Def. Mot. On those pages, the defense brief makes its VERY clear: "Capt Wacker's or some other person's? ...the discovery by the Government is unclear." Def. Mot. p. 9. Because of this confusion, the Defense wrote that "the burden is on the Government to show by clear and convincing evidence that Capt Wacker's DNA was obtained upon a valid search

authorization supported by lawful probable cause." Def. Mot. p. 9.

h. Additionally, proving Capt Day's personal attacks about the defense counsel were uncalled for, Capt Day may have failed to read: "Whether Bates 443 to 452 concerns Capt Wacker or some unknown males needs to be reevaluated and explored in depth." Def. Mot. p. 11.

i. Then at Gov. Resp. p. 7, Capt Day wrote "The defense allegation that SA Burge and Ms. Johnson colluded to falsify a test result is uncorroborated and false."

j. Nowhere in the defense brief does the defense write the words "conspire," "plan," "colluded," "false," "falsify," "lied," or "tamper."

k. The defense **DID** point out that NCIS SA Burge told DNA Examiner Ms. Johnson exactly what she needed to find in order for him to have probable cause to get a sample from Capt Wacker **before** she apparently disclosed her findings to NCIS SA Burge. See Enclosure B.

f. The defense **DID** point out that Ms. Johnson had been told by NCIS SA Burge (from the SJA Col Smith) that results were needed expeditiously in order to determine whether law student Capt Wacker would be sent to follow on training (Naval Justice School?). See Enclosure C.

g. Because of SA Burge's and Ms. Johnson's communications at Exhibit B and C (that Capt Day provided) the Defense **DID** write

"There was no blind, impartial test done here. One Government Agent told the other Government Agent exactly what he needed in order to nail his perp." Def. Mot. p. 8.

h. Then, ironically, Capt Day wrote that the Defense's citation to United States v. Latorre, 53 MJ 179 (CAAF 2000) "...is nearly as wide of the mark as the defense summary of facts."

i. However what Capt Day likely didn't know was that the defense's summary of US v. Latorre came almost verbatim from CAAF's own accurate digest summary of its opinion at:

<http://www.armfor.uscourts.gov/digest/IIIC32.htm>.

III. Discussion (law and analysis).

A. Capt Day's brief contains unprofessional slanders against the Defense counsel that are baseless and his brief should be stricken.

"Prosecutorial misconduct is generally defined as 'action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon.'" United States v. Rodriguez-Rivera, 63 M.J. 372, 378 (C.A.A.F. 2006), citing United States v. Meek, 44 M.J. 1, 5 (C.A.A.F. 1996); United States v. Thompkins, 58 M.J. 43, 47 (C.A.A.F. 2003).

In Fletcher, the court found reversible error in trial counsel's open criticism and personal attack upon defense counsel. United States v. Fletcher, 62 M.J. 175 (C.A.A.F. 2005). In Fletcher, the trial counsel also inferred that the defense

counsel was a liar and inserted her personal opinions into the record of trial.

Fletcher's court wrote "It is improper for a trial counsel to interject herself into the proceedings by expressing a "personal belief or opinion as to the truth or falsity of any testimony or evidence." United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980) (quoting ABA Standards, The Prosecution Function, § 5.8(b) (1971)); see also United States v. Knickerbocker, 25 C.M.A. 346, 2 M.J. 128, 129-30, 54 C.M.R. 1072 (C.M.A. 1977). When a trial counsel offers her personal opinions, they become "'a form of unsworn, unchecked testimony and tend to exploit the influence of [the] office and undermine the objective detachment [*180] which should separate a lawyer from the cause for which she argues.'" United States v. Fletcher, 62 M.J. 175, 179-180 (C.A.A.F. 2005).

"Not only is it improper for a trial counsel to interject her personal views into a case, it is also improper for a trial counsel to attempt to win favor with the members by maligning defense counsel." United States v. Fletcher, 62 M.J. 175, 181 (C.A.A.F. 2005).

"(T)he military judge chastised the trial counsel for her personal attacks on defense counsel. This single rebuke was not curative and was not enough to remedy the trial counsel's severe and pervasive misconduct." United States v. Fletcher, 62 M.J. 175, 185 (C.A.A.F. 2005).

In this case, Capt Day is (without justification) personally attacking the defense counsel because he does not like their argument. This is improper and prejudicial to Capt Wacker. Personal attacks by Capt Day have no place on the record and serve no purpose other than to convince the military judge that Defense Counsel are liars. Capt Wacker may yet decide to go military judge alone for a forum selection. Capt Day's personal attacks on Defense Counsel now additionally call into question Capt Wacker's ability to get a fair trial in light of the UCI facts previously alleged by the SJA in this case and the wrongful withdrawal of Capt Wacker's case from MCRD.

IV. Relief Requested.

The defense respectfully requests that Capt Day's response brief to the Defense motion be stricken in full and that the Government be permitted to file another brief without the implied and direct personal attacks on counsel.

V. Evidence and Burden of Proof.

a. The following exhibits are provided:

Exhibit A- Wacker bates stamp 443-452 DNA CONTAMINATION AND OTHER MALE

Exhibit B- email from SA Burge to Ms. Johnson

Exhibit C- memo by Johnson regarding SJA

Exhibit D- Capt Day email with the discovery attachments that contain Ms. Johnson's report of DNA testing errors that were disclosed in US v. Capt Wacker.

b. The burden is on the Defense to prove its facts in support of this motion. The burden is a preponderance of the evidence.

VI. Argument.

The defense desires oral argument. This motion was served on the Court and parties on 28 October 2010.

/s/

C. P. HUR
Captain, USMC
Detailed Defense Counsel