

**UNITED STATES NAVY-MARINE CORPS TRIAL JUDICIARY
NORTHERN JUDICIAL CIRCUIT
SPECIAL COURT-MARTIAL**

UNITED STATES)	
)	
)	
v.)	GOVERNMENT RESPONSE TO
)	DEFENSE MOTION TO COMPEL
Marina D. LOPEZ)	WITNESS PRODUCTION
Staff Sergeant)	
U.S. Marine Corps)	24 June 2011
)	
)	

1. **Nature of Motion.** This is the government's response to the defense motion to produce thirty-nine witnesses.

2. **Summary of Facts.**

a. The Charges and specifications in the above captioned case were preferred on 17 February 2011 and referred on 18 February 2011.

b. This Court arraigned the accused on 09 March 2011.

c. On 30 March 2011, defense counsel submitted its request for the personal appearance of:

e. Each of the candidates from First Platoon, Charlie Co., Fall 2010 are all percipient witnesses as to each and every specification on the charge sheet. Those who did not graduate or did not accept commissions and are, therefore, out of area, are listed on enclosure (1) and their personal appearance is requested. Their contact information has been requested by the undersigned via a request for copies of the candidate record books. However, copies of the candidate record books have not been produced to the undersigned. Such records (and the contact information) are in the government's control and are therefore not provided herein.

d. On 31 March 2011, the government denied the production of the thirty-nine Officer candidates as the defense's request did not state any basis for which the defense believes each of these thirty-nine witnesses are relevant and necessary.

e. The government has informed defense that officer candidate record books are maintained by the Coordinator of Student Activities. Defense has been informed that the record books are

available for inspection at any time with advance notice given to the POCs listed in the government's response to defense discovery request dated 28 March 2011 and the government's response to the defense request for a bill of particulars 01 Apr 2011 (Attachments 1 and 2).

f. The government has provided contact information for the thirty-nine witnesses which are the subject of this motion in initial discovery (Attachment 3).

g. To date, the defense has not proffered a synopsis of the expected testimony sufficient to show each witnesses relevancy and necessity.

3. Discussion.

a. Applicable Law.

Rule for Court-Martial 703(b)(1) provides, "Each party is entitled to the production of any witnesses whose testimony on a matter in issue on the merits... would be relevant and necessary." R.C.M. 703(b)(1), M.C.M. (2005 ed.) The R.C.M. 703(b)(1) discussion provides:

Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation in some positive way on a matter in issue.

See Discussion, R.C.M. 703(b)(1), M.C.M. (2005 ed.). Rule for Court-Martial 703(c)(2)(B)(i) provides:

A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

R.C.M. 703(c)(2)(B)(i), M.C.M. (2005 ed.).

The United States Navy-Marine Corps Court of Military Review has provided perhaps the most thorough analysis regarding witness production in United States v. Allen, 31 M.J. 572 (1990). The Allen Court ruled, "The right to compel the attendance of witnesses, however, is not

absolute; the defense must demonstrate that witnesses are both material and necessary before any order to produce is required.” Id. at 610. The Court continued to define materiality as “embracing the reasonable likelihood that the evidence could have affected the judgment of the military judge or court-members.” Id. “A witness is material when he either negates the government’s evidence or supports the defense.” Id. The defense bears the burden to establish materiality by a preponderance of the evidence. Id. The witness must be produced unless the averments of the defense are inherently incredible on their face, or unless the Government shows...that the averments are untrue or that the request is otherwise frivolous.” Id. The Court further established a seven-point balancing test for the Military Judge’s discretionary use. Id. When determining whether a material witness must be produced, the Military Judge must balance:

(1) the issues involved in the case and the importance of the requested witness to those issues; (2) whether the witness was desired on the merits or on sentencing; (3) whether the witness' testimony would be "merely cumulative;" (4) the availability of alternatives to the personal appearance of the witness such as depositions, interrogatories, or previous testimony; (5) the unavailability of the witness, such as that occasioned by nonamenability to the court's process; (6) whether or not the requested witness is in the armed forces and/or subject to military orders; (7) the effect that a military witness' absence will have on his or her unit and whether that absence will adversely affect the accomplishment of an important military mission or cause manifest injury to the service. But, considerations other than materiality have no role in determining whether the Government must produce the requested witness.

Id. at 610, 611. “The decision whether a material witness must be ordered produced by a military judge, therefore, must be analyzed on a case-by-case basis with the military judge weighing "the materiality of the testimony sought against the equities of the situation." Id. at 611.

b. Analysis.

In the case at hand, the defense has failed to show either in its witness request or motion that the thirty-nine witnesses they are requesting are necessary witnesses under Rule for Court-Martial 703(b)(1). The defense proffers that all thirty-nine witnesses are percipient witnesses to "each and every specification on the charge sheet." This is simply not the case, some of the witnesses requested by the defense left Officer Candidate School prior to some of the alleged misconduct. Additionally, due to the nature and inherent chaos of officer candidate school not all thirty-nine requested witnesses are "percipient witnesses to each and every specification on the charge sheet."

The thirty-nine witnesses are cumulative and would not "contribute to a party's presentation of the case in a positive way on a matter of issue." *See* Discussion, R.C.M. 703(b)(1), M.C.M. (2005 ed.). The accused's right to call witnesses on her behalf does not extend to cumulative witnesses. U.S. v. Williams, 3 M.J. 239 242 (CMA 1997). While the government conceded that there is some inherent value in repetitive testimony there comes a point in which the value of additional witnesses testifying to the same exact facts as previous witnesses becomes unnecessarily cumulative. Thirty-nine witnesses are unnecessarily cumulative.

4. Evidence and Burden of Proof.

According to R.C.M. 905(c), the defense as moving party has the burden of persuasion by a preponderance of the evidence.

5. Oral Argument.

The government respectfully requests oral argument on this motion

6. Relief Requested.

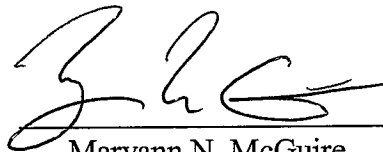
The government respectfully requests that the military judge deny the defense motion to compel witness production.



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Certificate of Service

I hereby attest that a copy of the foregoing response was served on the court and opposing counsel on 24 June 2011.



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