

**UNITED STATES MARINE CORPS
WESTERN JUDICIAL CIRCUIT
NAVY-MARINE CORPS TRIAL JUDICIARY**

UNITED STATES)	SPECIAL COURT-MARTIAL
)	
v.)	
)	DEFENSE MOTION FOR APPROPRIATE
Jose Brio)	RELIEF: CONTINUANCE REQUEST
Sergeant)	
U.S. Marine Corps)	
)	27 SEPTEMBER 2010
)	

1. **Nature of Motion** Per RCM 906, this is the Defense’s motion to continue the 1 September 2010 scheduled motions due date until 26 September 2010, the date the UCI and Article 13 motions were filed.

2. **Summary of Facts**

- a. The facts that form the basis of this case mostly occurred in the Fall of 2008.
- b. Motions from either side were due 1 September 2010.
- c. Motion responses were due 6 September 2010.
- d. The defense filed several motions by the deadline, but then after the deadline, Sgt Brito contacted his defense attorneys and informed them of what actions the command had taken towards him before and following his release from the brig after about 83 days of pretrial confinement (i.e. after a neutral IRO officer found no basis to continue confinement of Sgt Brito, contrary to the wishes of the same command that Sgt Brito alleges Article 13 and 37 violations against).
- e. Prior to the motion’s deadline, the defense had been aware of some of the facts that form the basis of the Article 13 and 37 motions, but were unaware of the events that took place towards Sgt Brito after 1 September 2010. Further, the Defense was not fully aware of

ALL of the events Sgt Brito described in the Article 13 motion's fact section until Sgt Brito called attention to the command's actions towards him following 1 September 2010. The Article 37 motion incorporated the facts of the Article 13 motion.

- f. Sgt Brito's report of a violation of Article 13 and 37, prompted the Defense to rigorously and thoroughly investigate how Sgt Brito's command had treated him since the very beginning of when Sgt Brito was accused of a crime.
- g. On 21 September 2010, defense counsel Capt Hur notified the Court and the trial counsel of the Defense's intent to file "an additional motion for Article 13 pretrial punishment relief."
- h. On 26 September 2010, the defense filed an unlawful command influence motion and an Article 13, illegal pretrial punishment motion. Both motions relied on the same facts in support. The defense requested dismissal of all charges as the remedy for both motions.
- i. The motion's hearing (Article 39a hearing) date in this case is scheduled for 30 September 2010.
- j. In an RCM 802 hearing on 27 September 2010, civilian attorney Haytham Faraj asked the Military Judge LtCol Keane to argue the Article 13 and the UCI motions during the week of the trial, before trial started; so as to avoid any need to continue the trial.

3. **Discussion**

Article 40, UCMJ allows a military judge to grant a continuance to any party, for such time, and as often as may appear to be just, for reasonable cause. Reasons for a continuance to be granted include: insufficient time to prepare for trial; unavailability of an essential witness; the illness of an accused, counsel, military judge, or member. R.C.M. 906(b)(1) at Discussion. The military judge must be convinced that if a continuance is not granted, the substantial rights

of the moving party would be prejudiced. United States v. Perry, 1996 CCA Lexis 472, 6 (N-M.C.C.A. July 1, 1996). A military judge should exercise caution before denying a continuance, where one of the parties might be denied an essential service. United States v. Allen, 31 M.J. 572, 620 (N-M.C.M.R. 1990). Thus, a military judge should liberally grant motions for delay as long as it is clear that a good cause showing has been made. Id.

CAAF holds that the standard of review of a military judge's decision to deny a continuance is abuse of discretion; there is an abuse of discretion where the 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. See United States v. Weisbeck, 50 MJ 461 (CAAF 1999). Weisbeck concerned a case where the Defense asked for a continuance so that a defense expert could testify, but that continuance was denied. On appeal, the conviction and sentence were set aside because of the trial judge's denial of the continuance request. Weisbeck specifically held, emphasis added:

The only justification for denying the continuance was expeditious processing.

Because the Fort Rucker court-martial was a replay of the Fort Devens court-martial, **the defense wanted the same expert witness to attack the credibility** of the Rucker boys and the Devens boys in the same way that he had successfully done so in the Fort Devens court-martial. The military judge recognized the importance of the Fort Devens court-martial when he denied the motion to exclude the Devens' boys testimony and observed that "the record of trial in the previous case is, in fact, the defense's defense." **The record reflects no justification for denying the continuance other than holding the defense's feet to the fire. "[U]nreasonable and arbitrary insistence upon expeditiousness in the face of justifiable request for delay" is an abuse of discretion.**"

In the instant case, the Defense has uncovered Article 13 and Article 37, illegal pretrial punishment and unlawful command influence; that call into question Sgt Brito's ability to get a fair trial with a fair members panel. If an Article 13 or 37 violation is found, then dismissal with prejudice may be a legal remedy for Sgt Brito.

The facts within those two defense motions concern serious accusations that call into question the fairness of the military justice system. This court and military judge is aware of another Article 37 accusation and an Article 13 accusation against this same command and a member of the command that was named in this case's UCI motion (e.g. US v. SSgt Glenn Hendee). Some of the accusations by Sgt Brito concern conduct that allegedly took place after the deadline for the motions in this case had passed. All of the allegations in the Article 13 and UCI motions needed to be thoroughly investigated by the Defense before filing. The Defense did not rush to file these motions without a significant amount of preparation and investigation. Further, there is no good reason to deny this continuance request other than speedy processing...the same basis the trial judge in Weisbeck used before it was reversed and remanded on appeal.

For these reasons, the Defense requests that the Court order continued the due date for the motions filed date from 1 September 2010 until 26 September 2010.

4. **Evidence and Burden of Proof.**

The burden is on the moving party to demonstrate by a preponderance of the evidence. The Defense hereby attaches the case US v. Weisbeck as evidence and also refers to the facts cited in the Article 13 motion.

5. **Relief Requested.**

Respectfully, the Defense requests that the Court order continued the due date for the motions filed date from 1 September 2010 until 26 September 2010.

6. **Oral Argument**. The Defense desires to make oral argument on this motion.

I served this pleading on the Court and parties on 27 September 2010.

/s/

C. P. HUR
Defense Counsel