NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

UNITED STATES	(	GENERAL COURT-MARTIAL
v.	(	
Aaron V. Wylde	(	RULING ON DEFENSE MOTION TO
XXX XX 0964	(	COMPEL WITNESS PRODUCTION
Private First Class	(	
U.S. Marine Corps	(	12 October 2010

STATEMENT OF THE CASE

The accused has been charged with multiple violations of two general orders prohibiting the possession, use, and distribution of spice, and with violations of Article 134 of the Uniform Code of Military Justice (UCMJ) for the manufacture, distribution (to a civilian "smoke shop") and introduction of spice onto a military aircraft.

The Defense filed a motion 2 September 2010 (AE VI) requesting the production of three character witnesses to testify on the accused's behalf, as well as the production of Investigator James Williams, Criminal Investigative Division, Naval Air Station, Fallon, Nevada as a percipient witness. Pursuant to the Defense witness request dated 30 July 2010, the Convening Authority did approve the production of Mrs. Amy Wylde (accused's mother) to provide character testimony for the accused at trial. However, the remaining three character witnesses were denied due to insufficient foundation, irrelevance of proffered character trait, and/or cumulativeness. The Defense proffers that each of the three requested character witnesses are relevant and necessary for the purpose of testifying to the accused's character traits for truthfulness, integrity and honor (witness request) as well as law-abidingness and peacefulness.

The Government opposes the Defense motion for production of the four requested witnesses, but indicates in its written response (AE VII) to the Defense motion that it will produce Investigator Williams at trial.

During the hearing on the motion held on 1 Oct 10, the Defense withdrew its request for production with regards to witnesses Lisa Erickson and Victor Urbina. Further, the Defense modified the justification provided for witness John Wylde, the accused's father, to be one of character witness for sentencing only, specifically, for rehabilitative potential of the accused if the case were to go to sentencing. At this point, the only witness whose production is under consideration is Mr. John Wylde.

STATEMENT OF THE LAW

The defense must show that a requested witness is both material and necessary in order to compel that witness's attendance at trial. The test for materiality is whether there is a reasonable likelihood that the evidence from the requested/denied witness could have affected the judgment of the military judge or the court members. A witness is also said to be material when he either negates the government's evidence or supports the defense. Consideration of a request for the production of witnesses is made within the framework provided by R.C.M. 703

and *U.S. v. Allen*, 31 MJ 572 (NMCMR 1990). Once the Defense meets its burden on witness materiality and necessity, the military judge must balance seven factors in determining whether a witness must be produced. These factors are:

1) Issues involved in the case and importance of requested witness to those issues;
2) Whether the witness was desired on the merits or sentencing;
3) Whether the testimony of the witness would be merely cumulative;
    a) Is credibility and demeanor of requested witness greater than that of the attending witness?
    b) Is testimony of requested witness relevant to the accused with respect to character traits or other material evidence observed during periods of time different than that of attending witness?
    c) Will any benefit accrue to the accused from an additional witness saying the same thing that other witnesses have already said?
4) Availability of alternatives to personal appearance of the witness such as depositions, interrogatories, or previous testimony;
5) Unavailability of the witness;
6) Whether the requested witness is in the armed forces or subject to military orders;
7) Whether the absence of the witness will adversely affect accomplishment of an important military mission or cause manifest injury to the Service.

ANALYSIS (*Allen* factors)

1. Issues involved in the case and the importance of the requested witness to those issues.

A. Neither the original defense request for the production of witnesses dated 30 Jul 10 nor AE VI contain detail as to the particular testimony expected from, or how important a witness Mr. Wylde is for the accused. The Government has already approved the production of the accused's mother for the trial, production founded on the exact same justification as that provided for Mr. Wylde, that is, "...may be called as a character witness on the merits or as a witness at sentencing, if necessary." Mr. Wylde's production though was further justified during the hearing on this motion as counsel detailed that Mr. Wylde and the accused have in the past had a troubled relationship. But that relationship improved in the June 2007 time frame just before the accused had reported to boot camp. The accused began responding more favorably to the father's parental guidance and advice, and their relationship improved markedly. The Defense proffer was to demonstrate the accused's good rehabilitative potential during any sentencing case.

B. The Defense did not distinguish between the desired character evidence expected from the mother and that proffered from the father. Their respective foundational bases in order to be able to express this opinion evidence would be expected to be very similar, and the Defense didn't provide any information to establish otherwise. *U.S. v. Breeding*, 44 M.J. 345, 350-351 (CAAF 1996) (citing *U.S. v. Toro*, 37 M.J. 313, 317 (CMA 1993).

C. The Government position on this prong of the analysis is that this is a matter of sentencing and is not expected to be a hotly contested matter on the merits. Trial counsel did not expect to factually challenge what Mr. Wylde would say during any sentencing case.

D. While establishing the accused's rehabilitative potential during any presentencing hearing is potentially a matter of great importance, this prong of the analysis does not support production of Mr. John Wylde for live in-court testimony. Rehabilitative potential is a sentencing matter, and is not expected to be factually contested by the Government in any significant manner.

2. The witness is desired on sentencing rather than on the merits, which does not support production of the witness.

3. Whether the testimony would be cumulative.

A. Except for the detail about reconciliation between father and son in 2007, the respective testimony of the accused's mother and father was not established by the defense as being appreciably different. The Defense did not address matters of relative credibility and demeanor between the attending witness (mother) and the requested witness (father). Further, the two witnesses would have virtually the same periods of observation of the accused, as well as testimony of a pertinent character trait. The weight of the additional aspect of the father's opinion as to the accused's rehabilitative potential, occurring over 3 years ago but potentially still shaping the opinion, does very little to distinguish the father's potential testimony over that of the mother. On the issue of whether any benefit would accrue to the accused to have the additional witness testify, none could be distilled from the Defense motion or argument. *U.S. v. Jouan*, 3 M.J. 136 (CMA 1977; *U.S. v. Williams*, 3 M.J. 239 (CMA 1977).

B. The Defense cites three cases in support of the request to produce the accused's father as a sentencing witness and to counter the Government position that the additional witness is cumulative with the witness already approved to provide live in-court testimony for the accused. These cases though do not present a similar issue as in this case, which is, the cumulative effect of two sentencing witnesses expected to testify as to substantially the same time period and as to the same uncontested opinion/character trait. For example, the U.S. Court of Military Appeals ruled that in a case in which the entire defense theory rested on the accused's credibility, denial of two witnesses supporting the accused's credibility whose observations and opinions accumulated during different periods of time was prejudicial error. *U.S. v. Williams*, 3 M.J. 239 (CMA 1977). The dicta contained within footnote 8 of the opinion, cited by the Defense during oral argument, addresses testimony from multiple witnesses on the merits on a matter in controversy. However, that fact pattern is not consistent with the present case, where the Defense seeks to offer near-identical testimony during sentencing of a factually uncontroverted opinion. This is not a case of a corroboration witness needed to assist the fact finder in determining how a course of event actually occurred.

C. The additional cases cited by the Defense during the motion hearing are equally apposite. *U.S. v. Harmon*, 40 M.J. 107 (C.M.A. 1994) involved a military judge refusing to allow the testimony of a fourth present and cumulative witness during a presentence proceeding, determined not to be error. *U.S. v. Black*, 42 M.J. 505 (A.C.C.A. 1995) involved limiting the number of witnesses to testify on a pertinent character trait of the accused on the merits of a hotly contested trial of a senior enlisted Army member. Such a limitation, permitting 3 of 6 witnesses requested, was determined not to be error. That case stands for the proposition that the number of witnesses that will be permitted to testify as to an accused's pertinent character trait, again, on the merits, is within the discretion of the military judge, and that once the military judge determines how many witnesses will be permitted, only the defense my properly decide which of the witnesses will be called. This is a very different situation than that

presented by the Defense motion in this case. This factor does not support production of the requested witness.

4. As this witness has been requested for the presentence hearing, there are viable alternatives to live in-person testimony that are available for this witness. This factor does not support the production of the requested witness. I determine that this alternative method of receiving the testimony of this witness under the particular facts of this case will not diminish the fairness of the proceedings. *United States v. Jones*, 20 M.J. 919, 930-931 (NMCMR 1985).

5. This witness has been proffered by the Defense to be available to testify during this case. This factor supports the production of the witness.

6. The requested witness is not in the armed forces and is not subject to military orders. However, this factor is not a relevant factor of the production analysis in so far as the witness has been proffered as being available to testify at trial and willing to participate.

7. This factor, whether the absence of the witness will adversely affect accomplishment of an important military mission, is not a relevant factor of the production analysis in so far as the witness is not a military member.

CONCLUSION AND ORDER

The Court finds that the Defense has not met its burden to demonstrate by a preponderance of the evidence that the in-court testimony of Mr. John Wylde would be sufficiently material, necessary, and non-cumulative to warrant production of this witness. The Court further finds that the Defense should have the opportunity to determine which of its two requested sentencing witnesses it would prefer to have produced live for trial in light of the additional justification provided for the production of Mr. Wylde after production of Mrs. Wylde had been approved by the Government.

SO ORDERED, this 12th day of October, 2010.

G. L. SIMMONS
LtCol, USMC
Military Judge

CERTIFICATE OF SERVICE

This ruling was served upon counsel electronically on 13 October, 2010.

G. L. SIMMONS