NAVY-MARINE CORPS TRIAL JUDICIARY
WESTERN JUDICIAL CIRCUIT

U N I T E D S T A T E S	)	GENERAL COURT-MARTIAL
v.	)	GOVERNMENT RESPONSE TO DEFENSE MOTION FOR A CONTINUANCE
Douglas S. Wacker XXX XX 3913 Captain U.S. Marine Corps □	)	1 February 2011

1. Nature of Response

This response opposes the defense motion for a continuance of the trial from 24 February 2011 until 24 March 2011. The defense bears the burden as the moving party, per R.C.M. 905(c)(2).

2. Summary of Facts

The government incorporates the summaries of facts in its responses to the defense motions to dismiss due to alleged unlawful command influence and improper withdrawal and re-referral.

The defense has been provided approval by the Convening Authority for 10 hours of consultation with Dr. Norah Rudin, a forensic DNA consultant in Mountain View, California. The defense's request for Dr. Rudin initially included a request for a "retest by Dr. Rudin," without specifying precisely what evidence would be retesting or including an estimated cost of the retest. After several efforts by the government to clarify the defense request, the defense indicated that $12200 (equivalent to Dr. Rudin's minimum retainer of $2200 for eight hours of consulting plus five days of testimony) "sounds like the appropriate amount for Dr. Rudin for the time being." The same email forwarded an email from Dr. Rudin to defense counsel describing retesting as an "unlikely event" and stating that "honestly, I just don't foresee it." Dr. Rudin's

website also has a lengthy discussion about retesting (http://www.forensicdna.com/To_reanalyze_or_not.htm) which indicates that "depending on the results of the review, independent testing of any remaining sample may or may not be recommended," and that she typically only recommends retesting in certain circumstances. The convening authority's approval of Dr. Rudin as a consultant denied the further request for retesting but provided that the defense could submit a request for additional funding with specific justification.

3. **Discussion**

Applicable law

In considering a request for a continuance, the United States Supreme Court recognizes that not every restriction on counsel's opportunity to investigate or otherwise to prepare for trial violates a defendant's constitutional rights. *Morris v. Slappy*, 461 U.S. 1, 11 (1983). Indeed, the trial judge must consider the difficulties of assembling witnesses, lawyers, and jurors at the same place at the same time, and the Supreme Court emphasizes that this burden on the court counsels against continuances except for the most compelling of reasons. *Slappy*, 461 U.S. at 14. Finally, in the process of ensuring the prompt administration of criminal justice, the Supreme Court dictates that the trial judge may not ignore the concerns of the victims of a crime in deciding whether or not to delay a trial further. *Id*. at 14-15.

In military cases, the Court of Appeals for the Armed Forces ("CAAF") echoes the concerns of the Supreme Court when deciding whether to grant a continuance. In the military system, some of the factors to be considered by the military judge in deciding whether to grant a continuance are, inter alia, the timeliness of the request, availability of witness, length of the continuance, prejudice to the opposing party, whether the moving party has been granted prior

continuances, the good faith of the moving party and the use of reasonable diligence by the moving party in preparing for trial. *United States v. Miller*, 47 M.J. 352, 358 (C.A.A.F. 1997); *United States v. Weist*, 59 M.J. 276, 279 (C.A.A.F 2004).

Like military courts, when considering a request for continuance, federal district courts must also consider: 1) the length of the delay; 2) whether defense counsel is adequately prepared to try the case; 3) whether other continuances have been requested and granted previously; 4) balance the convenience or inconvenience to litigants, witnesses, opposing counsel and the court; 5) whether the requested delay is dilatory and contrived; and, 6) whether there are other unique factors present. *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir., 1971), cert. denied, 405 U.S. 922 (1972).

Rules 50 (a) & (b) of the Federal Rules of Criminal Procedure also require that the courts minimize undue delay and to further the prompt disposition of criminal cases, to the end of accelerating the disposition of criminal cases for effective law enforcement, fairness to accused persons, and efficient judicial administration. 18 U.S.C. § 3165(b). As such, the trial court should grant continuances only upon the findings that the ends of justice which will be served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. 18 U.S.C. § 3161(h)(8)(A).

"It is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). Although a court may not insist upon expeditiousness for its own sake, a defendant cannot also be allowed to insist upon unreasonable delay or inconvenience in the completion of his trial. *Giacalone v. Lucas*, 445 F.2d 1238 (6th Cir., 1971), cert. denied, 405 U.S. 922 (1972).

The defense has been granted a DNA expert and has sufficient time to prepare to address the DNA evidence at trial

The defense first argues that the defense is entitled to a continuance in order to obtain the assistance of a DNA expert. Of course, the situation has changed since the defense filed its motion in that the defense has been provided with funding for a DNA expert. The defense has more than enough time before trial to have Dr. Rudin review the data from USACIL and consult with the defense regarding trial strategy. The defense assertion that "based on the defense's consultations with experts on the matter, a likelihood exists that the defense will seek to have its own DNA tests conducted" conflicts with Dr. Rudin's own assessment regarding the likely necessity of a re-testing of the physical evidence. Although it is true that retests of forensic evidence do require some time (a fact raised by the trial counsel in an email to defense counsel on 10 November 2010), the defense has not, so far, presented any facts beyond mere speculation to suggest any reasonable likelihood that a second test of the forensic evidence in this case would yield a different result. In fact, Dr. Rudin herself notes that "unless an analysis is severely flawed, independent analysis would be unlikely to produce radically different results." Mere speculation is insufficient to establish either that a retest in this case is necessary to the defense or that the defense is entitled to a continuance.

The defense fails to provide any evidence, beyond mere speculation, that an Inspector General's investigation will produce any relevant evidence that the defense could not have found on its own.

Regarding the Inspector General's (IG) investigation, the defense does no more than make bare assertions that some evidence helpful to the defense may be produced by the investigation. The defense provides no evidence that the IG investigation is even related to the present case. The main connection between the IG investigation and the present case appears to be that another accused, represented by the same defense counsel (both military and civilian) in

this case, included some of the affidavits attached to the defense UCI motion in this case in his own Article 69, UCMJ appeal. However, there is no evidence beyond speculation that the IG complaint will produce any relevant evidence that the defense could not develop on their own.

In particular, because of the nature, timing, and location of the charged offenses, it is extraordinarily unlikely that any fact witnesses could have been influenced by any alleged UCI, even taking every allegation made by the defense as true. Therefore, if any possible UCI occurred on board MCRD San Diego, assuming everything alleged in the defense UCI motion to be true, it would have been directed at potential character witnesses. Because experienced defense counsel should be able to identify any witnesses who might have the requisite interaction with the accused to be potential military character witnesses, it should not take an IG investigation to figure out if there are any potential character witnesses who might have been influenced. The defense also completely fails to provide any explanation of what "changes to the evidentiary landscape" might come about as a result of the court's decision on the UCI motion that the defense could not have prepared for during the year that this case has been pending at 3D MAW, even disregarding the prior litigation.

<u>No delay will be necessary in this case in order to implement any remedies for alleged UCI because no witness has actually been chilled from testifying, and any remedies that might be required have already been implemented.</u>

The defense next argues that a continuance will be necessary because any alleged UCI will necessitate additional ameliorative steps prior to trial, based on *United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010). In *Douglas*, the original military judge found that a remedy for the UCI in that case was necessary only after specifically finding that three potential character witnesses had been adversely affected by the actions of a Master Sergeant in the accused's chain of command, and that all three witnesses feared adverse consequences if they testified or

submitted statements on the accused's behalf. *Id.* at 352. The military judge only determined that a detailed remedy was necessary after determining that witnesses had actually been chilled from testifying. *Id.* In this case, the government is confident that all three character witnesses identified by the defense as having been subject to alleged unlawful influence will testify that neither their opinion of the accused nor their willingness to testify was affected, and that all of these witnesses would be willing to testify on the accused's behalf without fear of repercussion. Under these circumstances, the type of remedy crafted in *Douglas* would serve no purpose.

To the extent that any remedy may have been called for at any point in response to either Col Smith's interaction with potential character witnesses or an unprofessional email sent by LtCol Bond, it has already been carried out. As soon as the SJA became aware of the email, he promptly contacted every potential character witness from the G-3 shop who received the email in order to inform them that they should discount the email, and that "BGen Bailey would expect that they act according to their consciences and testify freely if they believed it appropriate." Additionally, shortly after the email from LtCol Bond, both Col Smith and LtCol Bond were asked by both the prosecution on this case and by the SJA to refrain from discussing the accused's case with any potential witness. Finally, the accused was removed from Col Smith's command, as in *Douglas*. If there is any remedy for alleged unlawful command influence that is mandated by *Douglas* but has yet to be carried out, the defense does not indicate what it is.

Nevertheless, the government remains committed to ensuring that the accused in this case gets a fair trial. If there are any witnesses who have been unduly chilled from offering a character opinion on behalf of the accused, yet who the defense has failed to mention during the many months that this issue has been litigated, the government is willing to work with the defense in order to ensure that those witnesses are willing to testify at trial. If the court disagrees with the

government's analysis regarding the necessity of a *Douglas*-type remedy, there is no reason that the implementation of such a remedy would need to wait until the dates of the motions hearing immediately before trial.

<u>The defense request for a continuance should be denied because the defense fails to establish the necessity of further delay in a case that has already been pending for over a year.</u>

The defense asserts, without having consulted the government, that "none of the logistical actions to bring in witnesses have begun." Although no witness has begun travel, MCAS Miramar Military Justice and 3D MAW personnel have already invested substantial amounts of time in order to issue subpoenas and arrange witness travel based on the current dates. In addition, many of the witnesses who will testify in this case, including numerous witnesses who will travel, have already made work and personal arrangements around the expectation that they will testify on the currently scheduled trial dates. The government estimates that approximately 25-30 witnesses will testify (or be made available to testify) for either side during this trial. Most of those witnesses have already had to prepare their schedules for at least two previous trial dates, including the originally scheduled trial dates in early November 2010 and anticipated trial dates (based on an RCM 802 conference) in early February 2011.

Although this continuance may be the "first substantial request for a continuance submitted by the defense," the defense also requested approximately 70 days of excludable delay during the Article 32, UCMJ investigation, and requested that trial not take place for over five months after referral due to the civilian defense counsel's trial schedule. Additionally, when the originally scheduled trial dates in November 2010 became unavailable due to an anticipated trial in the case of *United States v. Wuterich*[1], this case was delayed for nearly four months. On top of

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[1] That trial date was subsequently continued after the defense in that case filed a petition for extraordinary relief with the Navy-Marine Corps Court of Criminal Appeals.

that, the defense has raised speedy trial issues in this case, although indirectly. Due to the length of time that all parties have had to prepare for this case, and the length of time that this case has been waiting to go to trial, no further delay should be granted by the court absent any serious showing of need that could potentially impact the outcome of the trial.

4. <u>Relief Requested</u>

The government requests that the court deny the motion.

5. <u>Evidence and Burden of Proof</u>

The government provides the following evidence:

Encl (1): Approval of defense expert consultant
Encl (2): Emails between trial and defense counsel regarding defense DNA experts
Encl (3): Printout of article from Dr. Rudin regarding retesting of forensic evidence.

The defense bears the burden of proof as the moving party.

6. <u>Oral Argument</u>

The government respectfully requests oral argument on this motion.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion was served on the court and defense counsel by electronic mail on 1 February 2011.

E. S. DAY
Captain, U.S. Marine Corps
Trial Counsel