

UNITED STATES MARINE CORPS  
WESTERN JUDICIAL CIRCUIT

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UNITED STATES	)	GENERAL COURT-MARTIAL
	)	
v.	)	DEFENSE MOTION FOR A
	)	CONTINUANCE
DOUGLAS WACKER	)	
CAPTAIN	)	31 January 2011
U.S. MARINE CORPS	)	

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1. Nature of Motion. Capt Wacker, by and through counsel, hereby moves for a continuance of the trial scheduled to commence on February 24, 2011 until March 24, 2011. This motion is made pursuant to Article 40 of the Uniform Code of Military Justice and R.C.M. 906(b)(1). A continuance is appropriate and necessary because 1) the defense requires additional time to engage the assistance of a DNA expert that this court has granted but that has not yet been retained or provided by the Government; 2) the defense has a good faith reason to believe that an ongoing USMC Inspector General investigation into the very issues raised by the Defense in its UCI and Improper Withdrawal and Re-Referral motions will disclose additional relevant evidence to Capt Wacker's defense that he will have a constitutional right to present in his own defense; 3) this court currently has before it two motions that raise issues that may require this court to order certain remedies that will require additional delay. *See United States v. Douglas*, 68 M.J. 349 (C.A.A.F. 2010)(Military Judge has discretion to order remedies to ameliorate UCI); 4) Even if the Defense' UCI and Improper Withdrawal motions are denied, potential changes to the evidentiary landscape of this case as a result of the

court's holding will require that the defense have additional time to reorganize and prepare its defense.

2. Statement of Facts. The defense incorporates by reference its facts as presented in UCI I filed in October 16, 2009, UCI II filed September 1, 2010, and its Improper Withdrawal and Re-referral Motion.

On November 3, 2010, this court granted the defense' request for a DNA expert. Despite efforts by both Trial and Defense Counsel, all efforts have thus far failed to retain a DNA expert. The defense sought the assistance of an expert to conduct its own DNA tests of the garments seized by the NCIS that allegedly contain the accused's DNA evidence and to secure the assistance of a DNA expert for the purpose of preparing to cross examine the Government's expert. Based on the experience of counsel, even an expedited DNA test will take 2-3 weeks to be completed. Once the results are obtained, the DNA expert will have to have time to study the data and provide a report. As of the date of the writing of this motion, there is a little over three weeks left before the trial is scheduled to commence, yet no expert has yet been retained.

On or about November of 2010, the Marine Corps Inspector General's office undertook an investigation to look into allegations of witness tampering, unlawful command influence and dereliction of duty charges by Col. Stephanie Smith. *See enclosure a.* The allegations arose from several other cases along with the allegations made by the defense in this case regarding UCI. Among the allegations leveled at Col. Smith is that she tampered with witnesses to essentially fix witnesses' testimony to secure government victories rather than obtain just outcomes. If the IG investigation

reveals evidence that Col Smith tampered with witnesses in this case –as the defense has alleged- such evidence would be relevant and necessary for the purpose of the motion but more importantly for examination during trial. Capt Wacker has a constitutional right to obtain and present such evidence.

This Court currently has before it two motions that raise allegations of UCI, and an improper referral. Both motions raise serious and substantial allegations of UCI that will certainly meet the defense' burden resulting of a shifting of the burden to the Government. If the Government is not able to meet its burden to show that the UCI has been ameliorated, the court may choose to fashion its own remedies consistent with *U.S. v. Douglas, Supra*. If the court orders remedies, it will then require another hearing to determine if the remedies achieved the desired outcome. Such actions will by necessity cause delay. Currently this trial is scheduled to begin immediately following the motions scheduled for February 22, 2011. Any delay after the motions will mean witnesses' and members' schedules will be disrupted; counsel will have to readjust schedules that normally quickly fill up and the court will be forced to adjust a docket that has very little open space.

3. Discussion. Article 40 of the U.C.M.J. states that the military judge should, upon a showing of good cause, grant a continuance to any party for as long and as often as is just. 10 U.S.C. §840. A continuance may be granted only by the military judge. R.C.M. 906(b)(1). The standard of review of a military judge's decision to deny a continuance is abuse of discretion. *United States v. Weisbeck*, 50 M.J. 461 (C.A.A.F. 1989). "There is an abuse of discretion where 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; it

does not imply an improper motive, willful purpose, or intentional wrong." *Id.* at 464 (C.A.A.F. 1999) citing *United States v. Miller*, 47 M.J. 352, 358 (1997)(internal quotations omitted). Among the factors considered to determine whether there is an abuse of discretion is timeliness of the request, availability of evidence or witnesses requested, length of continuance, prejudice to opponent, moving party receiving prior continuances, good faith of the moving party, use of reasonable diligence by the moving party, possible impact on the verdict and prior notice. *Id.*

*The defense is entitled to delay to obtain the assistance of a DNA expert.*

Capt Wacker has been granted the right to retain a DNA expert to assist in his defense. The right to a DNA expert is justified because the Government will present DNA testimony through its own expert. Accordingly, Capt Wacker is entitled to have an expert to assist his defense team on this issue. See *United States v. Warner*, 62 M.J. 114 (C.A.A.F. 2005). Trial and Defense counsel have cooperated to identify and retain an expert. As of the date of the writing of this motion, a DNA expert has not been retained. Based on the defense' consultations with experts on the matter, a likelihood exists that the defense will seek to have its own DNA tests conducted. As this court is aware, such tests normally take weeks even if expedited. Given that we are a mere three weeks away from trial, the defense will not be ready to present its case unless and until a defense DNA expert has reviewed the evidence, completes necessary tests that may be require and consults with the defense team on the appropriate strategy for the DNA evidence.

*Delay is appropriate until pending discovery of certain "Brady" material possessed by the Government.*

This case began in the Spring of 2007. The initial referred charges were withdrawn and re-preferred after the defense filed a UCI motion in the fall of 2009. In the fall of 2010, the Marine Corps IG initiated an investigation to look into allegations of witness tampering and Unlawful Command Influence by Col Stephanie Smith. Col Smith is the same officer that tampered with witnesses and unlawfully influenced the court-martial proceeding in this case. The defense has good faith to believe that the IG investigation will disclose additional evidence of witness tampering and unlawful command influence that the defense could not uncover on its own. In addition to being relevant to the UCI motion, such evidence would also be relevant to the defense in its case-in-chief to allow Capt Wacker an opportunity to effectively cross examine the witnesses against him. *See United State v. Owens*, 484 U.S. 554, 559 (U.S. 1988) (the confrontation clause guarantees an opportunity to effective cross examination); *See also United States v. Brady*, 373 U.S. 83 (1963) (failure to disclose evidence material to the accused's guilt violates the due process clause).

This case is rife with conduct by certain individuals that is at best ignorant of the due process and constitutional rights of the accused and at worst a systematic plan to win at any cost but that undermines the military justice system and raises serious doubts about its ability to provide just trials. This defense team raised these questions long before other accused members of the same command raised the same issues that eventually lead to the IG investigation. Accordingly, the defense has a good faith basis to believe that the investigation will uncover additional evidence that will be material to the accused's guilt and that the defense will be entitled to as a matter of right under *Brady*.

"Weisbeck" factors counsel in favor of approving the continuance.

In considering whether to grant a continuance, the court is counseled to consider several factors. *Weisbeck, Supra*. Those factors will be briefly analyzed here. This request is timely made. We remain three weeks away from trial. None of the logistical actions to bring in witnesses have begun. The Government will, therefore, suffer no prejudice from the granting of the continuance. On the contrary, a denial of this continuance now with a court ordered delay neared to the trial date to further investigate the UCI or to take steps to ameliorate the UCI, will result in substantial schedule disruptions for witnesses and members, will result in wasted funds paid for witnesses to travel and will make it more difficult to find time on the docket in the short term.

The delay is requested to obtain additional evidence and witnesses. Both, the witness requested, and the evidence desired, are currently unavailable but should become available in the near future.<sup>1</sup> This request is, therefore, made in good faith in anticipation of a currently unavailable witness and evidence becoming available. The defense and government have moved with due diligence to secure the presence of a DNA expert. Due to scheduling conflicts and unavailability of the possible experts, however, none have yet been retained. It is anticipated that with some additional effort a DNA expert will soon be retained.

The time of the requested delay is exactly a month. The length of the continuance is reasonable under the circumstances and does not prejudice the government. Moreover, this is the first substantial request for a continuance submitted by the defense. Finally, the reason for the requested delay does have a possible impact on the verdict. The

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<sup>1</sup> Civilian Defense Counsel has exchanged emails with LtCol Leon Francis, JAM SJA to CMC to inquire about the status of the IG investigation and was informed that it should be completed in a few weeks.

assistance of the expert and the anticipated results of the IG investigation are grounded in Capt Wacker's constitutional rights to effective assistance of counsel and his right to cross examination of witnesses against him under the confrontation clause.

Based on the forgoing, the defense respectfully requests that this motion be granted.

4. Evidence.

- a. Marine Corps Times Article, *A Colonel on the Hot Seat*, December 20, 2010.
- b. Defense Discovery Request dated 10 January 2011

5. Argument. Respectfully requested.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on January 31, 2011, I electronically filed the foregoing paper with the Military Judge and with the Government at the following: Capt Douglas Hatch at [douglas.hatch@usmc.mil](mailto:douglas.hatch@usmc.mil), and Capt Evan Day at [evan.s.day@usmc.mil](mailto:evan.s.day@usmc.mil).

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